/SG

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 16/5/2012

CASE NO: 6418/2011
18624/2011
66226/2011
66226A/11.

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

8/5/2012 .....
DATE SIGNATURE

In the matter between:

THE EMPLOYEES OF SOLAR SPECTRUM TRADING 83 (PTY) LIMITED	APPLICANT
And	
AFGRI OPERATIONS LIMITED	1ST RESPONDENT
SOLAR SPECTRUM TRADING 83 (PTY) LTD	2ND RESPONDENT

In Re:

AFGRI OPERATIONS LIMITED	APPLICANT
And	
SOLAR SPECTRUM TRADING 83 (PTY) LTD	RESPONDENT

JUDGMENT

KOLLAPEN, J

[1] In this application the applicants, who are employees of the second respondent seek an order for the commencement of business rescue proceedings and for the appointment of a business rescue practitioner in respect of the business of the second respondent as provided for in terms of the Companies Act No 71 of 2008 (the Act).

[2] Ms Thobile Cynthia Maseko who is a packing house supervisor in the employ of the second respondent deposed to the founding affidavit on her own behalf as well as on behalf of some 76 employees of the second respondent, both permanent and temporary, all of whom work and live on the farm of the second respondent located at portions 34 and 73 of the farm Malelane 1389JU.

[3] The first respondent is Afgri Operations (Pty) Limited a secured creditor of the second respondent. It has brought a conditional application for the liquidation of the first respondent which application was subject to the discharge of the provisional judicial management order issued by this court on 8 February 2011.

[4] On 8 February 2011 this court issued an order placing the first respondent under provisional judicial management in terms of section 428(1) of the Companies Act 61 of 1973 (the old Act). Juanito Damons

was appointed as provisional judicial manager with the return date being 7 March 2011.

[5] During March 2011 the first respondent brought an application to intervene in the judicial management proceedings. It sought to have the provisional judicial management order discharged and sought an order for the liquidation of the second respondent.

[6] The rule in the provisional management proceedings was extended on various occasions and the matter came before court on the opposed roll on 21 November 2011.

[7] On 18 November 2011 the applicants lodged the current application and on 23 November 2011 it was agreed between the parties and ordered by the court that all three applications (the judicial management, liquidation and business rescue) be heard together on the opposed roll of 26 March 2011.

[8]

8.1 There was no appearance for the second respondent in the judicial management application and apart from a provisional report of the provisional judicial manager dated 23 May 2011 no other reports from the provisional judicial manager were filed.

After the hearing of the matter, the second respondent filed a notice withdrawing it's opposition to the discharge of the provisional judicial management order and tendered the first respondent's costs.

In the circumstances the discharge of the provisional judicial management order with costs would be the appropriate order to make.

8.2 With regard to the conditional liquidation application, section 131(6) of the Act provides that "if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –

(a) The court has adjudicated upon the application; or

(b) The business rescue proceedings end, if the court makes the order applied for.

The reference to subsection (1) is a reference to business rescue proceedings and the effect of section 131(6) was to suspend the liquidation proceedings until the court adjudicated on the business rescue application.

The business rescue proceedings

[9] The new Companies Act (the Act) in introducing the provisions relevant to business rescue proceedings has demonstrated a shift from creditors' interest to an attempt to balance a wider range of often competing interests. See the judgment of CLAASSEN J in the matter between *Oakdene Square Properties (Pty) Ltd and Others v Farm Botha's Fontein (Kyalami) (Pty) Ltd and Others* an unreported judgment of the South Gauteng High Court of 17 February 2012.

Section 7(k) of the Act captures the essence of business rescue provisions as follows:

> "To provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all relevant stakeholders;"

Section 128 of the Act defines business rescue as follows:

> "(b) '**business rescue**' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

The stakeholders whose interest require a careful balancing would include creditors, shareholders and employees and while the scheme of the Act still contemplates the bringing of liquidation proceedings where this is warranted, business rescue would be preferred to

liquidation where a proper case for business rescue has been made out.

Business rescue is a relatively new concept and was described by MAKGOBA J in *Swart v Beagles Run Investments 25* 2011 5 SA 422 (GNP) as a novelty brought about by the new Companies Act. There are various judgments that have dealt with its application and in some of those there appear to be an attempt to compare it to the regime of judicial management. There are in my view both philosophical and substantive differences between the regime of judicial management and the concept of business rescue. CLAASSEN J in *Oakdene supra* remarks that South Africa has had a traditional liquidation system with a liquidation culture. It is this culture that the Act seeks to reverse, recognising the broadly accepted failure of the concept of the judicial management.

[10] ELOFF AJ in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* case number 15155/2011 (WCC) makes the observation in comparing the recovery requirement in relation to judicial management and business rescue that the requirement in respect of judicial management is a "reasonable probability" while in respect of business rescue it is a "reasonable prospect" indicating in his view that "the use of different language in this later provision indicates that something less is required and that the recovery should be a reasonable possibility".

He also alluded to the different mindset that should distinguish the approach to judicial management as opposed to the approach to business rescue. In judicial management the creditor was entitled to a liquidation order and a judicial management order would only be granted in exceptional circumstances. With business rescue it was the preferred option to liquidation.

[11] The broader range of interests that the Act recognises and seeks to balance as well as the eminently reasonable proposition that it is infinitely better to rescue a business than to liquidate it must mean that in applying the provisions of the business rescue provisions of the Act courts are enjoined to give substantive effect to the object of the Act in this regard.

[12] Of course one must be careful in the balancing exercise to give proper weight and consideration to the various competing interests and to guard against the use of business rescue proceedings in situations where it is clearly not warranted. In *Anthonie Welman v Marcelle Props 193 CC and Others* case number 33958/2011 (GSP) TSOKA J cautioned in this regard as follows:

> "In my view business rescue proceedings are not for the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations which, given time, will be

rescued and become solvent. To grant the present application, in these circumstances, would be to subvert the purposes of the Act and disregard the interest of other stakeholders."

[13] Section 131(4) of the Act which deals with the powers of the court in business rescue proceedings provide that:

> "(4) After considering an application in terms of subsection (1), the court may –
>
> (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that –
>
> (i) the company is financially distressed;
>
> (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company."

[14] With regard to these requirements the parties appear to be in agreement that the second respondent is financially distressed as contemplated in section 128 of the Act. What is in dispute is whether there is a reasonable prospect for rescuing the company.

[15] The words "reasonable prospect" in the context of section 131(4) were considered by the court in *Southern Palace supra*. The court beyond indicating that the cause of the demise or failure of the company's business as well as the proposed remedy would have to be adequately addressed, also provided some indicators which in its view would constitute concrete and objectively ascertainable details going beyond mere speculation and these would include:

(a) The likely cost of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

(b) The likely availability of the necessary cash resource in order to enable the ailing company to meet its day to day expenditure, once its trading operations commence or resumed. If a company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

(c) The availability of any other necessary resource, such as raw materials and human capital;

(d) The reasons why it is suggested that the proposed business plan will have reasonable prospect of success.

[16] In Henochsberg on the Companies Act (service issue 1 December 2011) the learned authors described these as stringent requirements and caution that if the level of proof was set as high as this in order to obtain a compulsory business rescue order "this will probably sound the death knell for business rescue in South Africa and lead to the procedure becoming as ineffective as its predecessor, judicial management".

[17] I do not necessarily understand the factors listed in *Southern Palace supra* with regard to satisfying the requirement of reasonable prospects to be applicable in each case, given the caveat expressed

by ELOFF AJ that every case must be considered on its own merits. In this regard while a court must be ultimately satisfied that reasonable prospects do exist in the balancing exercise it must have regard to what information the affected party who brings the application is able to present given its own position vis-à-vis the company.

[18] Clearly a shareholder is likely to possess greater details of a company's financial position and its financial performance then an employee. On the other hand employees, in particular long standing employees, would have peculiar information of a company's performance being as it were at the centre and at the heart and soul of its operations. Their knowledge of the company's history, the highs and lows of its performance, the problems and the solutions identified and their own role in any possible business rescue would be just as relevant. Without suggesting that different tests should be applied in establishing whether the threshold of reasonable prospects has been met, if the Act is to be implemented in a manner that does not disadvantage an employee as an affected party, then regard must be had both in assessing whether there are reasonable prospects and in exercising of the balance of competing rights to the different positions of the parties in relation to the company.

[19] In addition it should not in every case be expected of an applicant in business rescue proceedings to produce a business rescue plan. The responsibility for developing a business rescue plan is that of the

business rescue practitioner if one is so appointed and the Act clearly contemplates this happening only after an application for business rescue proceedings has been granted. To suggest as the first respondent has done, that such a plan should be a prerequisite in meeting the requirements of reasonable prospects, would not only be unduly onerous to an affected person who is an applicant in business rescue proceedings but would have the effect of importing a requirement that the legislature did not envisage regard being had to the architecture of the Act as a whole.

Has the applicant established the existence of reasonable prospects for the rescuing of the company?

[20] The first respondent in opposing the relief sought has suggested that the history of the first respondent's business going back to September 2009, has been a demonstration of the ongoing inability of the first respondent to turn the business around successfully and there is no reasonable prospect in its view of the business being rescued.

[21] It points out that despite the first respondent being placed under provisional judicial management in February 2011, the position of the first respondent did not improve as was contemplated when the first respondent applied to have itself placed under judicial management and that if the regime of judicial management did not yield the desired

result then it was unlikely that any business rescue intervention would yield a different result. In pointing to the failure of judicial management it points out that it has received no payment on its debt since the first respondent was placed under provisional judicial management, that there was no meeting of creditors convened since the provisional judicial management order was granted and that the provisional judicial manager failed to provide any information regarding the business of the first respondent and its financial affairs after 14 July 2011.

[22] The applicants on the other hand sketch out the various stages of the business operations of the first respondent from September 2009 and concede that from September 2009 until June 2011 there were various problems in the farming methodology used as well as in the management of operations that resulted in the business functioning below optimal levels.

[23] The applicants identify the individual problems experienced and indicate the corrective measures that have since been taken. These relate *inter alia* to adequate irrigation, proper crop choice, proper fertilisation and importantly effective management of production.

[24] With regard to the latter aspect they contend that the replacement of the former manager of the farm Mr Kritzinger with the present manager Mr Henry Makunya in about June 2011 has already begun to yield

positive results and in particular for the period 1 July 2011 to 14 November 2011 demonstrates the farm's and the first respondent's growing profitability as it was able to show a positive income of approximately R50 000.00 for that period. It was also able in this period of its operations to be in a position to pay approximately R150 000.00 worth of debt incurred during the preceding period of 1 March 2011 to 1 July 2011.

[25] The first respondent in its opposing affidavit and relying on a report of the provisional judicial manager dated 20 July 2011 as well as a profit and loss account for the period of 1 July 2011 to 14 November 2011 provide an analysis of the business activities for the period 1 March 2011 to June 2011 and thereafter for the period 1 July 2011 to 14 November 2011 from which the following emerges.

	1 March 2011 to June 2011	1 July 2011 to 14 November 2011
Income	R944 780.00	R1 484 001.00
Expenditure	R1 247 597.00	R1 434 961.00
Loss/profit	(R302 817.00)	R49 039.00

[26] From the above it would appear that for the period 1 July 2011 to 14 July 2011 the income of the farm increased by more than half a million rands while expenditure increased by some R190 000.00 and if one considers that R150 000.00 of the expenditure for the period July to November 2011 was in respect of the earlier period of March to June 2011, then it would appear that the period July 2011 onward that

coincided with the appointment of Mr Makanya provides concrete evidence of an improvement in the operations of the first respondent.

[27] In addition the applicants rely on an affidavit by Phillip Van Rooyen an agricultural programme manager who has visited the farm on several occasions at the request of the second respondent. He states that:

27.1 The farm is effectively managed and improved under the supervision and care of Mr Makanya.

27.2 The farm can be profitably operated subject to –

27.2.1 certain yields being met as well as the farm purchasing from other growers.

27.2.2 that there is satisfactory financial and production management as well as effective cost management.

27.3 That the farm has undergone a successful Global GAP audit and that such a certification has placed the second respondent in a position where it can penetrate retail markets at the higher end and achieve better prices for its crops.

[28] The applicant also relies on an affidavit by Francois Boshoff, a farmer and supplier of fertilizer to the first respondent and a creditor of the first respondent who visits the farm regularly. He also expresses a positive outlook for the farm and confirms that the appointment of Mr Makunya has resulted in a significant improvement in the production at the farm.

[29] During March 2011 the first respondent's attorneys instructed an expert to investigate the business operations on the farm and while the expert Mr AA Malan identified certain problems with the crop and projected production figures many of which are dealt with in the applicant's founding affidavit in this application as being problems identified and interventions effected, Malan in the same report concludes as follows:

> "My berekeninge toon dat die produksie eenheid wel sy verpligtinge vir die volgende twee jaar sal nakom mits die tonnemaat soos begroot realiseer ... die algemene gehalte van die gelewerde produkte is goed. My oorweë mening is dat bestuur die grootste bepalende faktor in die sukses van hierdie besigheid gaan wees."

[30] Certainly Malan's prognosis is hardly as negative as the first respondent makes it out to be. He identifies the most important challenge as management and hardly draws the conclusion that the

farm is destined to fail. In addition Malan's visit and inspection occurred during the tenure of Mr Kritzinger. The position with regard to production and income has improved since July 2011 which may serve to prove that Malan's reasonably positive prognosis was not misplaced.

[31] From the aforegoing it does appear that the past year has been characterised by mixed fortunes as it were with the farm doing considerably better since July 2011 under the management of Mr Makunya. While he may have been responsible for improved production there may well be a need for other aspects of the overall operation to be examined in particular those referred to by Van Rooyen.

[32] The failure of judicial management in my view cannot stand as an insurmountable obstacle to the relief the applicant seeks. The regime of judicial management and in fact the role of the judicial manager has not been clearly canvassed in the judicial management proceedings and one gets the distinct impression that certainly the first respondent experienced considerable difficulty in obtaining regular and accurate reports from the judicial manager. The role of a business rescue practitioner is considerably different; certainly much more "hands on" as it were and he/she is required to interact in a substantial manner with creditors, employees and other parties.

[33] In my view, one is not dealing with a business that is terminally ill or chronically ill but one that is ailing considerably and where the appointment of a business rescue practitioner may well build on the success of the past few months in developing a holistic plan that would cover the operational, financial, management and strategic aspects of the business towards its rescue.

[34] In the nature of applications such as these it should be noted that the concept of a "prospect" is hardly something that is certain. By its very nature a prospect is future looking and dependent upon a number of variables and includes a level of risk to the extent that the future is hardly capable of accurate prediction. What is required is not certainty but a determination on the facts and on the evidence presented that the future prospects of rescuing the business appear to be reasonable.

[35] In addition in the exercise of balancing competing interests the following warrant consideration:

(a) The applicants have been working and living on the farm for periods of long duration; the permanent employees from two years to eleven years. The large majority of them have dependents. They appear committed to using their skills to contribute to the rescue of business.

(b) Liquidation will likely result in the employees losing their employment and their accommodation on the farm which in turn will impact negatively on their dependants.

(c) The then provisional judicial manager valued the farm and improvements at R4.6 million and concluded that there was sufficient security to meet the claim of the first respondent.

(d) The proposed business rescue practitioner, Dr G Holtzhausen is described as a turnaround practitioner. He has a PhD from the University of Pretoria, his dissertation being "modelling turnarounds strategies using verifier determinants from early warning sign theory". He has experience in the banking and agricultural sector having been Nedbank's agricultural expert at Bank Seta. The Companies and Intellectual Property Commission has confirmed he is licensed by the commission as a business rescue practitioner and is classified as "a senior business rescue practitioner".

(e) The Act provides a narrow timeframe with full participation by creditors and employees in the business rescue proceedings ensuring that their rights and interests are properly considered.

[36] In this regard it was contended on behalf of the first respondent that given the history of the affairs of the second respondent there is no probability that the first respondent will accept any business rescue plan and given its dominant position as creditor it was unlikely that the requirements for the preliminary approval of a business rescue plan as set out in section 152(2) (approval of 75% of creditors voting interest and 50% of independent creditors' voting interest) would be met rendering the relief being sought somewhat academic and of limited duration.

[37] Whatever the position of the first respondent may be and while its cynicism may be justified at some level I would imagine that at the very least there would be an obligation on it to participate in good faith and to consider on its own merits or demerits any business plan proposed. I cannot imagine that it can be contended that it is a foregone conclusion that it will vote against the business plan even before one has been developed.

[38] In the circumstances and for the reasons given I am of the view that there are reasonable prospects for the successful rescue of the business of the second respondent and that the applicant has made out a case for the relief it seeks.

Costs

[39] The ordinary rule is that costs should follow the result and such a rule would have the result that I should direct the first respondent to pay the applicant's costs. There may be a basis for a departure from the ordinary rule in this case. The applicant while it was justified in launching the application and has on the papers before me made out a proper case for the relief it seeks was not met by opposition that was unreasonable or unjustified. Given the first respondent's experience of what can only be determined as a difficult relationship with the second respondent going back some years now the first respondent may have felt justified in opposing the application given in particular the unsatisfactory results of the process of judicial management. That being the case it would in my view be inequitable to direct the first respondent to pay the cost of the applicant in this matter and in my view a just and equitable award with regard to costs would be to direct that each party bear its own costs. I intend to make such an order.

[40] I accordingly make the following order: –

40.1 The Provisional Judicial Management Order is discharged and the second respondent is ordered to pay the costs of the first respondent in respect of that application.

40.2 The application for the liquidation of the second respondent is suspended in terms of section 131(6) of the Companies Act 71 of 2008.

40.3 The second respondent is placed under supervision and that business rescue proceedings should commence as envisaged in terms of the Companies Act 71 of 2008.

40.4 Dr Gerhard Hoitzhausen be appointed as business rescue practitioner to conduct the business of the second respondent with all powers and duties entrusted to him in terms of the Act.

40.5 The applicant gives notice of this order in the following manner:

40.5.1 by notifying creditors of the second respondent of this order within five days of this order having been granted by way of electronic mail;

40.5.2 by notifying shareholders of the second respondent within five days of this order having been granted by way of electronic mail to such shareholders whose electronic mail addresses are known to the applicant;

40.5.3 by serving a copy of the order on the second respondent at its registered address within five days of this order having been granted;

40.5.4 by notifying employees of the second respondent by way of attaching this order to the second respondent's notice board alternatively at a visible place at the second respondent's place of business situated on the farm being portions 34 and 73 of the farm Malelane;

40.5.5 by publication of this order in one publication of the Star newspaper within five days of this order having been granted.

40.6 It is ordered that the applicant and the first respondent bear their own costs in relation to this application.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

6418/2011-18624/2011-66226/2011/sg

Heard on:	Tuesday, 27 March 2012
For the Applicant:	Adv Z Schoeman
Instructed by:	Messrs John Joseph Finaly Cameron
For the Respondents:	Adv J G Bergenthuin S.C.
Instructed by:	Messrs Van Zyl Le Roux Inc
Date of Judgment:	