



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

Case No: 6885/2014
Date's heard: 26 March 2014 and
11 April 2014
Date judgment deliver: 13 May 2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS
	JUDGES: YES/NO
(3)	REVISED
13.5.2014	
DATE	SIGNATURE

In the matter between:

OPTIFEEDS (PTY) LTD

Applicant

and

BUSINESS DEPOT 2 CC t/a GS POULTRY
JEAN-PIERRE JORDAAN N.O.
THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION

First Respondent
Second Respondent

Third Respondent

and

GEORGE RAYMOND SPEROPOULOS
ROCK FARM (PTY) LTD
IMPICHICKS (PTY) LTD

First Intervening/ Affected Party
Second Intervening/ Affected Party
Third Intervening/ Affected Party

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This matter initially came before me in the urgent court. Save for the prayer pertaining to urgency, the applicant prays for the following relief:

- "2. *That it be declared that the business rescue proceedings of the First Respondent and the resolution by means of which it resolved to embark upon business rescue proceedings have lapsed and that the proceedings are a nullity and of no force and effect;*
3. *In the alternative to prayer 2 above, that the resolution by means of which the First Respondent embarked upon business rescue proceedings, and the business rescue proceedings, be set aside and rescinded;*
4. *That the necessary leave be granted to the Applicant to bring this application as contemplated in Section 133(1)(b) of the Companies Act;*
5. *That the First Respondent be liquidated finally, alternatively that an order for the provisional winding-up of the First Respondent be granted, with suitable directions regarding service of the rule nisi and publication thereof;*
6. *That the costs of this application be paid by the Second Respondent in his personal capacity should he oppose the application;*
7. *That as far as the winding-up is concerned, that costs of this application*

would be costs in the winding-up;"

- [2] The first and second respondents oppose the application. Prior to the hearing of the urgent application, George Raymond Speropoulos (" Mr Speropoulos") brought an application for leave to intervene in the main application. Mr Speropoulos further claims the following relief:

- "3. In the event of the Court finding that the business rescue has lapsed, that an order be granted placing the First Respondent under supervision and commencing business rescue proceedings in terms of section 131 of the Companies Act, Act no. 71 of 2008;*
- 4. That the costs of this application be costs in the business rescue of the First Respondent;"*

- [3] During the hearing of the urgent application, it appeared that each affected person, as envisaged in section 130(3)(b) of the Companies Act, No. 71 of 2008 ("the Act"), did not receive the requisite notice of the application.

- [4] The matter was postponed to enable the applicant to give notice of the application to all affected persons.

- [5] Prior to the further hearing of the matter, two affected persons, to wit Rock Farm (Pty) Ltd and Impichicks (Pty) Ltd launched applications for leave to intervene in the main application. Both affected parties claimed the following further relief:

- "2. That the liquidation application be dismissed with costs;*

3. *In the alternative and insofar it might be necessary that the counter application to place the First Respondent in business rescue proceedings be upheld;*

4. *Costs of suit"*

[6] At the inception of the further hearing of the matter, I granted the three intervening parties leave to intervene.

PARTIES

[7] The first respondent is involved in the poultry industry. The applicant and the second and third intervening parties are creditors of the first respondent, whereas Speropoulos is the sole member of the first respondent. The second respondent was cited in his capacity as the appointed business rescue practitioner of the first respondent.

IS THE FIRST RESPONDENT IN BUSINESS RESCUE ?

[8] The first bone of contention between the parties is the exact date on which the first respondent was placed in business rescue.

[9] The applicant received a letter from Theron, Jordaan & Smit Attorneys on 18 December 2013, in terms of which it was advised as follows:

"Our client has initiated voluntary Business Rescue Proceedings in terms of

Section 129 of the Companies Act, 71 of 2008. We will publish a notice of resolution and its effective date in the prescribed manner to every affected person in terms of Section 129(3)."

- [10] During January 2014, the applicant received certain documents pertaining to the business rescue of the first respondent. The prescribed CoR123.1 document, being the Notice of Beginning of Business Rescue Proceedings, contains the following information:
- i) the first respondent adopted a resolution to commence business rescue proceedings on 12 December 2013;
 - ii) in terms of section 132(1)(a) of the Act, business rescue proceedings commenced on 18 December 2013, being the date on which the resolution was filed with the Commission;
 - iii) the document bears a stamp of the third respondent dated 10 January 2014.
- [11] The CoR123.2 document, being the Notice of Appointment of Business Rescue Practitioner, confirmed that the first respondent commenced business rescue proceedings on 18 December 2013. In terms of the document, the second respondent was appointed as business rescue practitioner on 13 January 2014.
- [12] Prior to dealing with the respondents' version, it is apposite to have regard to the relevant provisions of the Act.
- [13] Section 129(2)(b) provides that a resolution in terms of which a company resolve to voluntarily begin business rescue proceedings, will have no force and effect until it has been filed.

- [14] In terms of section 129(3), a company that has adopted and filed a resolution, must, within 5 days, publish a notice of the resolution and its effective date in the prescribed manner to every affected person and appoint a business rescue practitioner.
- [15] Should a company fail to comply with the provisions of section 129(3), the resolution to begin business rescue proceedings, in terms of section 129(5), lapses and is a nullity.
- [16] In the premises and on the facts averred by the applicant, the first respondent has failed to comply with the provisions of section 129(3)(b), in that the second respondent was only appointed on 13 January 2014, more than 5 days after the resolution was filed.
- [17] The second respondent, however, contended that the first respondent was not successful in filing the resolution during December 2013 with the third respondent. According to the second respondent the resolution could, due to the holiday period, only be filed on 10 January 2014. Consequently, the effective date of the commencement of the business rescue proceedings was 10 January 2014 and he was accordingly appointed within the time period stipulated in section 129(3).
- [18] In contrast to the version of the second respondent, the second intervening party filed an affidavit by Mr Jan Andries van Aswegen, the legal representative appointed by the first respondent.

- [19] According to Mr van Aswegen, the resolution and appointment of the second respondent was filed on 18 December 2013. The filing was done via electronic transmission.
- [20] Mr van der Merwe, counsel for the applicant, draw my attention to Annexure 3, Table CR 3 - Methods and Times for Delivery of Documents, which annexure was published in terms of regulation 7 of the regulations promulgated in terms of the Act.
- [21] According to Annexure 3, a document may be delivered to the third respondent by *"transmitting the document as a separate file attached to an electronic mail message addressed to the Commission"*. According to the documents attached to Mr. van Aswegen's affidavit, this is exactly what the first respondent did on 18 December 2014.
- [23] Annexure 3 provides that the date and time of delivery of a document transmitted in this manner is *"on the date and at the time recorded by the Commission's system, unless, within 1 business day after that date, the Commission advises the sender that the file is unreadable"*.
- [24] Section 129(3)(a), however, refers to the *"filing"* of a resolution whereas annexure 3 provides for the *"delivery"* of a document. The definition of *"file"* in section 1 of the Act reads as follows: *"when used as a verb, means to deliver a document to the Commission in the manner and form, if any, prescribed for that document"*
- [25] In the premises, the manner of delivery of a document stipulated in Annexure 3,

includes the filing of a resolution with the third respondent as contemplated in section 129(3)(a).

- [26] Although no evidence was tendered in respect of the date and time recorded by the Commission's computer system, it is clear that the Commission, by affixing its official stamp on form CoR 123.1, confirmed that the information contained therein is correct and accords with its records. This is the only inference to be drawn from the official stamp affixed by the third respondent to the Notice of Beginning of Business Rescue Proceedings. In the premises, the business rescue proceedings in respect of the first respondent commenced on 18 December 2013.
- [27] The version of Mr van Aswegen pertaining to the appointment of the second respondent on 18 December 2013, is, however, not confirmed by the third respondent's records. The notice of appointment of the second respondent clearly states that the second respondent was appointed on 13 January 2014. The third respondent's official stamp also bears the date of 13 January 2014. This is evidently more than 5 days after the filing of the resolution to commence business proceedings.
- [28] Consequently, the first respondent did not comply with the provisions of section 129(3)(b) and in terms of section 129(5)(a) the resolution has lapsed and is a nullity.
- [29] The applicant is, therefore, entitled to an order in terms of prayer 2 of its notice of motion.

APPLICATION TO PLACE FIRST RESPONDENT IN BUSINESS RESCUE

[30] As a result of the finding that the first respondent is not in business rescue, the application by Mr Speropoulos to place the first respondent under supervision and commencing business rescue proceedings as contemplated in section 131 of the Act, which application is supported by the second and third intervening affected parties, needs to be considered.

Background

[31] A short overview of the background facts pertaining to the application by Mr Speropoulos is apposite at this stage. The first respondent, as alluded to earlier, is in the poultry industry and grow day old chickens to an age when it is appropriate to slaughter the chickens.

[32] The applicant (previously known as Noordwes Voere (Pty) Ltd) concluded an agreement with Mr Speropoulos on 30 August 2005 in terms of which the applicant would provide chicken feed to the first respondent.

[33] The first respondent had to pay for the chicken feed within a stipulated time period. The first respondent fell in arrears with its payment obligations to the applicant and was indebted to applicant in the amount of R 35 399 146, 06 on 21 January 2014.

[17] In an endeavour to procure payment of the debt, meetings were held between Mr Speropoulos and representatives of the applicant during November and

December 2013.

- [18] During one of the meetings, Mr Speropoulos intimated that the Sate might purchase the business of the first respondent for an amount of approximately R 60 million. No firm proof of the purported sale was available and the applicant requested Mr Speropoulos to urgently supply information pertaining to the first respondent's financial affairs.
- [19] The information was not forth coming and when threats of debt collection steps, which might include an application for winding-up, was made, the applicant received the email of 18 December 2013 informing it of the first respondent's decision to initiate business rescue proceedings.
- [20] At the first creditors meeting, it became apparent that the first respondent was indebted to various creditors in an amount of at least R 65 million.
- [20] The applicant alleges that it became apparent at the creditors meeting, that all the suppliers of either chickens or feed supplements, were no longer prepared to supply products to first respondent on credit. All purchases of these items will be on a cash only basis.
- [21] The applicant further states that the first respondent will not be able to trade itself out its financial difficulties without a huge capital injection.
- [22] In defending the viability of the business rescue of the first respondent, the second respondent states that the first respondent had been in business since 2003. According to the second respondent, the first respondent's financial

distress is caused by, *inter alia*, the elevation in feed costs, diesel costs, wages, illnesses of livestock, quality of feed and day old chickens.

- [22] The second respondent added that the problems faced by the first respondent are not unique, in that the poultry industry throughout the entire country suffered huge losses during 2012 and 2013 as a result of high input costs with increased maize, soya and sunflower prices as well as souring electricity and diesel costs.
- [23] Various other factors resulting in the first respondent's financial distress are also alluded to in the second respondent's answering affidavit.
- [24] The second respondent is of the view that the first respondent's prospects to be rescued is premised squarely on the first respondent being sold as a going concern against the potential value of the entity.
- [25] A valuation of the market value of the first respondent's business had been obtained, which valuation indicates that the market value of the first respondent's business and assets is R 45 471 574, 15.
- [26] The second respondent refers to an "*offer*" from Government to purchase the business of the first respondent for R 40 million. The offer is subject to conditions, which conditions the second respondent alleges, the first respondent has already met. No firm offer was, however, attached to the second respondent's affidavit.
- [27] The second respondent further elaborated on the urgent steps he had taken to keep the business of the first respondent afloat until a final offer from Government has been received. As a result of his efforts, the business of the first

respondent continues, according to the second respondent, to run on a day-to-day basis.

- [28] In order to boost the allegation that Government is on the verge of making an offer to purchase the business of the first respondent, Mr Speropoulos attached a letter from the Department of Rural Development and Land Reform to his replying affidavit. The letter is dated 27 June 2013 and the contents thereof did not support either Mr Speropoulos' or the second respondent's version of an imminent final offer. The letter reads as follows:

" ACKNOWLEDGEMENT OF AN OFFER TO SELL

The Department of Rural Development and Land Reform hereby acknowledges your offer to sell to the Department. Two valuers have been appointed and the first valuer has already conducted the valuation, however we are awaiting the second valuation to finalise the offer.

The Department is currently considering your offer and will be notified of any developments in due course."

- [29] Prior to the hearing of the urgent application and on 28 February 2014, the second respondent at the second creditors meeting put the business rescue plan to the vote. The applicant alleges that itself and an overwhelming number of creditors voted against the business rescue plan.

- [30] The plan was rejected. The second respondent informed the meeting that there was an offer from one of the first respondent's creditors to purchase the voting rights, with the exclusion of ABSA Bank, of all the dissenting creditors.

[31] The offer was made by a Close Corporation of which Mr Speropoulos is the sole member. The plan was amended and with the voting rights of the dissenting creditors to the disposal of the Close Corporation, accepted.

[32] Prior to the second hearing of the application and on 9 April 2014, the Department of Rural Development and Land Reform, addressed a letter, containing an offer to purchase the business of the first respondent, to Mr Speropoulos.

[33] The offer is for R 33 million and subject to:

- i) approval by the National Land Allocation and Recapitalisation Control Committee; and
- ii) the conducting of a due diligence.

[34] Against the aforesaid backdrop, the legal principles applicable to the relief claimed by Mr Speropoulos needs to be examined.

Reasonable prospect

[35] Once an application to place a company under supervision and commencing business rescue has been considered, section 131(4) of the Act provides for two scenarios. The section reads as follows:

"131(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 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; or*
- (b) *dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation."*

[36] It is common cause on the papers that the first respondent is financially distressed. The question to be answered is therefore, whether the first respondent has a reasonable prospect of being rescued.

[37] In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 SCA, Brand JA at 551 I - 552 A and after remarking that the term "*reasonable prospect*" is a lesser requirement than the previous "*reasonable probability*" test, described the term as follows:

"On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect - with emphasis on 'reasonable'- which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is

not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers."

- [38] Brand JA at 552 C - F of the judgment, cited with approval the following extracts from the judgment of Van der Merwe J in *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB):

"I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high." [para 11]

and

"in my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability and unjustifiably limits the availability of business rescue proceedings." [para 15]

- [39] Applying the aforesaid principles to the facts herein, it appears that the recent offer received from the State, provides at least a reasonable ground for the prospect that the first respondent can be rescued.
- [40] Although the applicant has certain other problems with the rescue plan that was tabled by the second respondent, its biggest concern was the absence of a firm offer from the State.
- [41] The fact that the second respondent's interim measures have ensured that the first respondent remains a going concern, was not denied by the applicant. The applicant, however, states that the costs involved in the on-going business operations of the first respondent is prejudicial to its creditors.
- [42] I am not called upon to decide at this stage whether the first respondent will be successfully rescued. As appears from the principles *supra*, the only test at this stage is whether there is a reasonable prospect of the first respondent being rescued.
- [43] On the available information, I am so satisfied.

APPOINTMENT OF INTERIM BUSINESS RESCUE PRACTITIONER

- [44] Section 131(5) stipulates that a court may appoint an interim business rescue practitioner, if such person satisfies the requirements of section 138.

- [45] The second respondent evidently satisfies the requirements of section 138. This much appears from the Notice of Appointment of Business Rescue Practitioner, referred to earlier in this judgment.
- [46] The second respondent must, furthermore, have been nominated by the affected person who brought the application in terms of section 131(1). Mr Speropoulos, in his capacity as sole shareholder of the first respondent, nominated the second respondent as business rescue practitioner in the previous attempt at business rescue proceedings.
- [47] I am of the view that, having regard to the second respondent's knowledge of and involvement in the affairs of the business of the first respondent thus far, it will be appropriate to appoint him as interim business rescue practitioner. The appointment is subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

COSTS

- [48] The applicant succeeded in obtaining the relief claimed in prayer 2 of its notice of motion and in the normal course should be entitled to costs. The applicant, however, requested that the costs of the application in respect of prayer 2 be paid by the second respondent in his personal capacity. The second respondent was cited and opposed the application in his official capacity as business rescue practitioner and no grounds exist to burden him with the costs of the application in his personal capacity.

[49] The second and third intervening / affected parties only became part of the proceedings on 11 April 2014. The relief claimed by the applicant was opposed by them and the applicant requests that they be ordered, jointly and severally, to pay the costs of the appearance on 11 April 2014.

[50] Mr Speropoulus requested that the costs of the application to place the first respondent under supervision and commencing business rescue proceedings, be costs in the business rescue of the first respondent. I am of the view that it is the correct order in the circumstances.

ORDER

1. It is declared that the business rescue proceedings of the first respondent and the resolution by means of which it resolved to embark upon business rescue proceedings have lapsed and that the proceedings are a nullity and of no force and effect.
2. The second and third intervening / affected parties are ordered, jointly and severally, to pay the costs of the applicant relating to the appearance on 11 April 2014.
3. The first respondent is placed under supervision and herewith, commences with business rescue proceedings.
4. The second respondent is appointed as interim business rescue practitioner of the first respondent, which appointment is subject to ratification by the holders of

a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147 of the Companies Act, 71 of 2008.

5. The costs of the first intervening / affected party's application dated 12 February 2014 is costs in the business rescue of the first respondent.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE NORTH GAUTENG HIGH COURT, PRETORIA

Applicants attorneys: Van Rooyen Tlhape
Wessels Attorneys p/a Tim
du Toit Attorneys
Mnr Moolman Wessels

Applicant counsel: Adv M.P van der Merwe

Respondents attorneys for 1st intervening party:
Theron, Jordaan & Smit Attorneys

Respondent counsel: Adv Badernhorst SC
Adv J Kloppe

2nd and 3rd Intervening party: Adv C Harms

Attorneys for the 2nd and 3rd intervening party:
Grundling McCabe Attorneys