IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBERS: 30779/2014; and

32271/2014

1/7/2014

In the matter between:

W FERGUSON INVESTMENTS CC	FIRST APPLICANT
CAPITAL ACCEPTANCE (PTY) LTD	SECOND APPLICANT

and

FILAPRO (PTY) LTD (in business rescue)	FIRST RESPONDENT
THOMAS GEORGE NELL N.O	SECOND RESPONDENT
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	THIRD RESPONDENT

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

1/7/2014
DATE SIGNATURE

and

EX PARTE FILAPRO (PTY) LTD (in business rescue)

JUDGEMENT

TLHAPI J

[1] On 27 May 2014 the draft order in case 30779/2014 was made an order of court and the *ex parte* application under 32271/2014 was dismissed with costs. My reasons for granting these orders now follow.

[2] The above applications were brought on urgency. The applicants in the matter under 30779/2014 launched an application in terms of sections 130(1)(a) and 130(5)(c)(i) of the Companies Act, Act 71 of 2008 ('the Act") in which the following order was sought:

> "2. That the resolution to place first respondent under business rescue dated 12 March 2014 be set aside;
>
> 3. That the first respondent be placed in liquidation;
>
> 4. That the applicants be authorised to uplift the equipment forming the subject matter of the lease agreements entered into between the first respondent and the applicants respectively, as more fully set out in Annexure "A" hereto, from the possession of the first respondent and to keep same pending the appointment of a liquidator;

5. That the costs of the application be costs in the liquidation;"

The applicant under 32271/2014 seeks the following order:

"2. That the time period within which the Applicant has to publish its proposed Business Rescue Plans, in terms of Section 150 of the Companies Act, Act 71 of 2008, be and hereby is extended to 31 May 2014;

3. That the costs of this application shall be costs in the Business Rescue of the Applicant, unless any of the affected persons, or any other person (as defined in Section 128 of Act 71 of 2008) opposes this application in which event such affected person or persons shall pay the costs of this application."

The applicants sought leave to intervene as first and second intervening creditors in the above *ex parte* application and, that both applications be heard simultaneously. Furthermore, that the *ex parte* application be dismissed with costs. The applicant further contended that there was no prospect that it together with High Power Equipment Africa (Pty) Ltd ('HPE') and three of the first respondents major creditors would vote in favour of the adoption of the business rescue plan.

The Liquidation Application

[3] The first applicant entered into written agreements (annexures 'MF2, MF3 and MF4') with the first respondent where the first respondent sold to the first applicant certain equipment described in paragraphs 23.1 to 23.3 of the founding affidavit for the sums of R1 493 400.00, R4 423 200.00, R7 705 260.00 respectively. These agreements 'were conditional upon the first respondent entering into a lease agreement with the first applicant in respect of the goods' and copies of the agreements were annexed to the papers. There were further lease agreements (annexures 'MF5, MF6 and MF7') described in paragraphs 23.4 to 23.6 of the founding affidavit, in terms of which the first applicant leased equipment to the respondents.

The second applicant entered into written agreements with the first respondent wherein equipment was sold to the second applicant conditional upon the first respondent entering into a lease agreement with the second applicant, annexure 'MF17' and MF20. There were further lease agreements 'MF18, MF19, MF21, MF22, MF23'.

The first applicant averred that the agreements and purpose of sale by the first respondent to the applicants was to provide tangible security in the event of default by the first respondent of such lease agreement.

[4] The first applicant averred that as at 29 January 2014 the first respondent in terms of the certificates of indebtedness annexures 'MF8 to MF 10' was in arrears in the amount R243 982.12, R213 548.31 and R958 939.65 respectively. The agreements were cancelled on or about 13 February 2014 and the return of the equipment was claimed. The first respondent was currently indebted to the first applicant in the sum of R15 177 518.10. A meeting followed between Mr B Ferguson ('Ferguson') representing the first applicant and Mr V Lategan ('Lategan') for the first respondent in which the first applicant was advised that the first respondent had secured new contracts and in which an offer was made to settle the arrears in instalments of R500 000.00 commencing March 2014. A subsequent attempt by Lategan to vary the offer and subsequent proposals by Ferguson did not yield results.

With regard to the arrear rentals owed to the second applicant a letter of demand was communicated to the first respondent on 4 March 2014, 'MF24', currently the arrears amount to R3 846 698.53. Both applicants cancelled the agreements on 13 February and 12 March 2014 respectively.

[5] The first respondent was placed under business rescue by resolution of 12 March 2014 and the affected persons including the applicants were notified by email dated 20 March 2014 of such

resolution. The second respondent was appointed business rescue practitioner and he convened a meeting of creditors for 4 April 2004 in terms of sections 147(1) and 148(1) of the Act. At such meeting the second respondent reported:

1. 'that the business was in financial distress and that there were reasonable prospects of rescuing the entity', referring to a 'new contract the first respondent was in the process of securing;'

2. that 90 of the 110 employees had been retrenched and that as new contracts came into place the retrenched employees would be re-employed;

3. the time line was discussed in terms whereof a business plan had to be published by 30 April 2014 and the second respondent indicated that he could only publish a report once a new contract had been secured and that he would apply for extension of the time periods;

According to the applicants what was not minuted by the second respondent was that the first respondent was indebted to various creditors in total amount of about R45 million as reflected in the attendance register of the said meeting, annexure 'MF30'. The claim of unpaid taxes to the Receiver was recorded at R7 898 327.00.

[6] After this meeting the second respondent acknowledged the applicants cancellation of the agreements though he wished to investigate the validity thereof and it was agreed to have another meeting on 9 April 2014. It was at this meeting where the second respondent disputed the validity of the cancellations but granted consent to applicants to proceed with an application for the return of the equipment. The respondents would not hand same back voluntarily because the equipment could be necessary since they were in the process of securing a new contract. It was agreed to hold an inspection of the equipment to advise whether some of it could be released.

[7] At a site inspection it became apparent to the applicants that the first respondent was 'hopelessly insolvent', it having defaulted on its repayment obligations by August 2013 before the contract with its major client was cancelled. A report on the state of equipment revealed that it was in a terrible state and could not be used in such state; some machines were removed and swopped with engines from other machines, in breach of the agreements; one Power screen model 1000SR Cone Crushers needed repairs of about R470 000.00 and was handed over to ELB for repairs. Another machine which was still under lease was traded- in without the knowledge of the applicants to finance new equipment. The applicants contended that the trade-in transaction was proof of the respondent's factual insolvency. On the other hand the first respondent would need access to 'substantial post-commencement finance' to repair the equipment in disrepair for use. The respondent did

not have access to such finance and this was one of the reasons given by second respondent for refusing to return the equipment.

[8] The applicants contended that there was no reasonable basis for believing that the first respondent was financially distressed or that there were prospects in the rescue endeavour because as at the time when the resolution was taken to place respondent under business rescue, it was already insolvent. The applicants contended that the procuring of new contracts would not assist the rescue because of the huge amounts that were required to fix the equipment and because both applicants had cancelled the lease agreements. Furthermore, close to 90% of the workforce had been retrenched two weeks after commencement of business rescue proceedings.

[9] According to the time line for business rescue the second respondent appraised creditors of the time frames and of the impossibility of filing a business plan by the deadline 30 April 2014 and that same would be published once a new contract had been in place. The second respondent did indicate then that an extension would be applied for.

[10] The first respondent raised three points *in limine.* The first was that Ferguson did not have the necessary *locus standi* because he was not a member of the first applicant but that a trust was the sole member and, that no resolution authorising the institution of legal proceedings was present. The second was on the basis upon which the applicants

contended that the matter was urgent and the erroneous interpretation of section 130 (1) of the Act in approaching the court on urgency to set aside the business rescue proceedings. The third was that the applicants were not in a position to dispute the manner in which the second respondent went about the partial investigation into the standing of the first respondent. The applicants did not know the value of the contracts with Harmony Gold at Deelkraal Gold Plant, the profit of which was estimated at R41 000 000.00. The applicants wished to liquidate without having had benefit to the business rescue. In terms of section 130(5)(b) it was not just and equitable to allow business rescue to be set aside without having regard to the prospects of the business rescue. The court should exercise its residual discretion in favour of the first respondent.

[11] On 23 December 2010 the first respondent entered into a 'Site Works and Service Contract' ('the contract') for the screening and processing of waste rock with Sibanye Gold limited ('Sibanye') worth R317 640 000.00 million, (three one seven six four zero thousand) the approximate remaining worth thereof from March 2014 of December 2015 was about R111 174 000.00 million. During October/November 2013 Sibanye breached the contract and first respondent instituted proceedings in the South Gauteng High Court. This was followed by a cancellation of the contract for what the first respondent maintained were flimsy reasons. The first respondent's urgent application for an interdict against removal from the Sibanye mine was struck of the roll due to lack

of urgency. Although provision was made for disputes between them to go to arbitration the first respondent contended that it was not abandoning its litigation and was confident that for reasons mentioned, it would be successful in this litigation and be allowed to resume business on the Sibanye mine.

[12] On August 2013 the first respondent had concluded another waste rock processing contract with Deelkraal Gold Plant. The commencement was delayed due to Harmony Gold failing to obtain a clearance certificate timeously and because of a moratorium placed on induction on all contractors till 31 January 2014. Other factors of delay were that the site where the processing had to be done was in Gauteng and the induction conducted in Welkom in the Free State; and, because of below surface fires at Harmony during the early part of January 2014.

[13] The Deelkraal Project though not new only commenced to run on 2 May 2014. It was further averred that the first respondent was in the process of entering into a sub-contract relating to Harmony Gold by 31 May 2014 but due to the sensitive nature of the process more could not be disclosed. In the light of the above there were reasonable prospects of the first respondent being rescued and the business practitioner had to be given an opportunity to rescue the business. It was therefore contended that it was not just and equitable to set the business rescue aside or to liquidate the first respondent.

The subcontract with Harmony Gold came to fruition as appears from annexures 'P1' a e-mail from Harmony and 'P2' a purchase order in favour of E C Mining ('ECM') and both dated 6 May 2014. The deponent to the answering affidavit was also a director of ECM verbal agreement entered into with Gerda Lategan of the first respondent, that the latter would assist with the performance of the contract. The second respondent was to assist with reducing the contract to writing.

[14] The first respondent denied that it was unable to pay its debts. The affidavit of a director of the first respondent, Getruida Lategan ('MF27') clearly stated on 13 March 2014 that it was unlikely that the first respondent would be in a position to pay all its debts 'when they fell due for a period of the ensuing six months'. Despite this situation the fact that the Deelkraal Project was due to commence, the applicants on 9 April 2014 rejected with prejudice settlement proposal which would have enabled it to settle the arrears due to the applicants by December 2014. The first respondent had on 30 April 2014 received payment of R149 399.35 and the insurance on all the equipment and salaries of all existing employees had been paid.

[15] The first respondent contended that the sale agreements annexed to the founding papers were 'ghost transactions' entered into in order to circumvent the need to register notarial deeds of security over the movables, it was never intended that ownership would pass to the applicants. The lease agreements also did not accurately reflect the

intention of the parties. It was contended that the equipment described under paragraphs 23.1 to 23.3 of the founding papers belonged to the first respondent. This had the effect of drastically reducing the claim of the first applicant in that it would place the first respondent in possession of assets in excess of R15 000 000.00 making the business rescue process reasonably possible.

[16] The first respondent contended further that it was possible for the first applicant to mitigate its damages in respect of 'MF10' by reclaiming the VAT amount from SARS. Although the validity of the lease agreements was denied, the first applicant would be obliged in terms of the agreements to mitigate its damages, therefore the claim of R15 177 518.10 was over inflated. The offer to settle the arrears at the rate of R500 000.00 was not a firm offer and was made at a time where relationships between the first applicant and first respondent were cordial. The first applicant was willing to entertain reasonable payments to settle the arrears and there was never an attempt to vary the amount.

The first respondent contended that it had kept the first applicant informed about the problems encountered with Sibanye and why payment at the time of R1 100 000.00 remained outstanding which amount excluded the claim which the first respondent had against Sibanye, for cancellation of the contract between them. There were good prospects for success in the litigation with Sibanye which could result in the reinstatement of their agreement and together with the Deelkraal contract the first respondent would generate income to meet its

obligations with creditors. The first respondent contended that its liquidation would result in an additional ground by Sibanye for cancelling the contract.

[17] The first respondent contended that its relationship with the second applicant was along the same lines as conducted with the first applicant and the second applicant would still be required to mitigate its damages. It was denied that there was proper cancellation of the lease agreements because business rescue preceded the purported cancellation. Its liabilities were far less than contended because the creditors were allowed to give the approximate value of the amounts due by the first respondent in order to establish voting percentages at the meeting. The liability with SARS to the tune of R7 000 000.00 was denied.

[18] The value of indebtedness could only be investigated and verified by the second respondent and contained in the business plan. The first respondent further criticized the report on the status of the machinery by Mr Dickson as constituting hearsay and contrasted this reported with the one by Mr Ueckerman whose annexure 'J' painted a different picture, that save for the Powerscreen Warrior 2400, the machinery were all of a mining safety and operational standard.

[19] The first respondent contended that the applicants were not entitled to the return of the equipment duly listed because ownership by the applicants was vehemently denied.

Furthermore it came to the attention of the first respondent via the second respondent that HPE voted against the extension of the time period for publishing the plan after the lapse of time for voting and that four other creditors voted for the extension also after the lapse of voting time.

[20] The applicants contended in reply that defences raised in opposition contained untruths. The Deelkraal contract had not been signed as alleged on the 13 August 2013 by Randfontein Estates Limited and that Lategan's signature was only appended on 22 February 2014. In a supplementary affidavit of the 12 May 2014 Lategan, the general manager of the first respondent, explained that the contract was indeed signed by him on 13 August 2013 and that he forwarded his signed copy to Harmony Gold annexed as 'R' as evidenced by email to Harmony Gold of even date, annexure 'S'. The copy signed on 22 February 2014 was a mistake in that he believed that another copy was sought whereas Harmony Gold only requested the electronic copy of the 13 August 2013.

[21] It was further not clear how the profit to the first respondent was calculated at R41 000 000.00 because the first respondent was only granted a right to remove some material from the Deelkral site at no cost to the mine. The first respondent would have to source purchasers for the material. The applicants contended that the nature of the contract between the first respondent and ECM was in direct competition with the first respondent and that although the value of the sub-contract was put

at R478 800.00 the share to the first respondent before expenses are paid was valued at only R239 400.00.

[22] The applicants further contended that the conclusions by the second respondent that the first respondent was financially distressed was not accompanied by any proof or supported by his scrutiny of the financial status of the first respondent supported by all relevant documentation. This was evident from the second respondent's reliance only information obtained from Lategan as contained in the *ex parte* application.

According to the applicants the equipment was the only security in respect of the first respondent's indebtedness and that since the contracts had been cancelled they were entitled to take possession in order to avoid deterioration or the disposition of certain machinery as has already occurred.

[23] Another supplementary affidavit was filed on behalf of the first respondents on 15 May 2014, the purpose being to appraise on developments regarding the contracts revealed in the answering affidavit, which are capable of enabling the first respondent to trade itself out of distress in particular in reporting on the commencement of the Deelkraal contract. After the Risk Assessment report submitted on 24 April 2014, verbal approval by one Wessel Cronje of Harmony Gold on 28 April 2014 enabled the first respondent to commence with the operation on site, on 2 May 2014 although the Risk Management report

was only dated the 14 May 2014, this did not detract from the fact that operations commenced on the former date.

[24] There was a further contract to be entered into with MINTAILS GOLD (PTY) LTD ('Mintails') regarding the processing of the gold bearing material at the waste rock dump at Deelkraal. The conclusion of the contract had to be preceded by the conducting of tests to determine the gold recovery percentage from the waste rock dump and, later the determination of the recovery of gold per ton which on the leachibility stood at 2,6 grams per ton of which 1 gram would go to Mintails and 1,6 grams be retained by the first respondent. It was envisaged that 5000 tons would be processed per month, which would work out at 8000 grams being paid to the first respondent.

[25] The value to the first respondent would be calculated at the gold price per kilogram, the rate at the time going at approximately R420 000.00 per kilogram. The net profit to the first respondent would be over R3 000 000.00 per month. Mintails would be responsible for selling the gold and in turn paying the first respondent. The contract with Mintails was due to be finalized as soon as the optimum gold recovery percentage was determined and the first respondent expected this to occur not later than the 23 May 2014. This operation is depended upon the sub-contract entered into with ECM, it being the one possessed of a vendor number with Harmony Gold on the one hand and, the first respond providing its employees and machinery. ECM had to submit its own risk management report , labour plan and method statement by 14

May 2014. Although no contract had been finalized between ECM and the first respondent, the second respondent was confident that the above operations would assist in bringing the formulation and finalizing of the business plan by the 24 May 2014.

The *Ex Parte* Application

[26] The founding affidavit was deposed to by Mr Nel the business practitioner. The first business rescue meeting was held on 4 April 2014. Responses for the voting for the extension of the business rescue plan was received from a certain number of creditors mentioned in the affidavit. It became apparent to him, having regard to the value of creditors that the extension would not have been agreed upon. The extension was required in order to give time to put into place several contracts the applicant had secured even before the business rescue was entered into. These have already been mentioned and it was envisaged through these contracts that the applicant would be placed in the same financial position prior to cancellation of the Sibanye contract.

[27] Mr Nel averred that the applicants in the liquidation application were not *bona fide* in that their voting was done with a predetermined outcome and that their claims were inflated. It was contended that the business rescue plan would ensure payment to suppliers, current liability creditors and, payment to long term creditors of what was currently overdue. The securities would remain intact and the applicant would be in a position to conduct business 'on a solvent and liquid basis'.

Information on the sub-contracts which had not been finalized could not be divulged due to privilege, the success of the business plan rested hinged on the conclusion of such contracts.

[28] In as far as urgency was concerned I was of the view that the matter was urgent considering the circumstances under which the business rescue resolution was taken when the first respondent was placed under business rescue, the fact that the agreements had been cancelled, the deterioration of the equipment and the interests to the body of creditors. The respondents were consequently given sufficient time to respond to the application.

The point taken about the deponent to the application not having authority to bring the application is without merit on grounds argued for the applicants. The deponent was a trustee of the trust which was a member of the first applicant.

The Liquidation Application

[29] The Sale and Leaseback Agreements: It was argued for the applicants' that the transaction made commercial sense in that it was intended to provide security and for the respondents it was argued that the court had to first enquire whether the agreements displayed what was intended by the parties. In *Mariana Bosch and Another v The Commissioner SARS 2013 (5) SA 130 (WCC)* paragraphs 80-83, the fact that the agreements were signed simultaneously and were interdependent was an important consideration in determining their

validity. At paragraph 86 of Bosch supra, reference is made to Mackay v Fey NO and Another 2006 (3) SA 182 (SCA) at para 26 where Scott JA stated:

> *"Before a Court will hold a transaction to be simulated or dishonest in this sense it must therefore be satisfied that there is some unexpressed or tacit understanding between the parties to the agreement which has been deliberately concealed"*

In my view the respondents have failed to make out a case why they contended that the agreements were simulated. No confirmatory affidavit from Ms Lategan was availed. An important consideration in this application was that the applicants did not intend to take possession of the equipment but wanted it placed in the custody of the liquidators for the benefit of the body of creditors.

[30] Insolvency of the First Respondent and business rescue:

In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Comapny (Pty) Limited 2013 JDR 1019 (GSJ)* in examining the meaning of 'Financially distressed' Kgomo J stated:

> *".....it is clear that a business rescue plan cannot be invoked where a company is already insolvent..... This is one of the aspects differentiating business rescue from judicial management:*

Proceedings can be started six months in advance when the tell-tale signs are starting to appear. For instance a company that is trading profitably and is cash positive but does not have the wherewithal to repay a large debt which will become due and payable within the next six months would qualify to be classified as being financially distressed, thus being a candidate for business rescue."

In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA)* Brand JA stated:

"[23] The potential business rescue plan s128(1)(b)(iii) thus contemplates has two object goals: a primary goal, which is to facilitate the continued existence of the company in a state of solvency and a secondary goal which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation."

In Oakedene supra at paragraph [29] the prospect of the purpose of business rescue being achieved must be based on '*reasonable grounds', 'speculative suggestion was not enough'*. At paragraph [30] Brand JA agreed with Van de Merwe J in Prospec Investments v Pacific Coasts Investments 97 Ltd 2013 (1) SA 542 (FB) at paragraph [11]:

"I agree that vague averments and mere speculative suggestions will not suffice .....the applicant must place before the court a factual foundation for the exixtence of a reasonable prospect that the desired object can be achieved."

And at paragraph [15]

"In my judgement 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 it business, and the likely availability of the necessary cash resource to enable the company to meet its day-today expenditure, or concrete factual details of the source, nature and extend 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 proceeding"

The applicant set out grounds that the goals in 128 (1)(b) can reasonably be achieved.

1. The Sibanye Contract: The contract with the first respondent was breached during October November 2013 and later cancelled and followed by litigation between first respondent and Sibanye and when

this application was launched the contract had therefore not been revived. The Sibanye Contract constituted the main source of income for the first respondent.

2. The Deelkraal and Harmony Gold Contract: Although the first respondent contends that this contract was entered into in August 2013, there is no confirmation that Harmony Gold has concluded the envisaged agreement. Of importance is that when the first respondent resolved to be placed under business rescue this contract had not as yet come into fruition. Subsequent to the launch of this application the contract had still not become operative. As I see it, from the answering affidavit and from the additional supplementary affidavits the commencement is still largely speculative. The recovery of gold per ton on leachibility and the achievement of a profit of R41 000 000.00 was dependent upon the conclusion of contracts with Mintails which contract was dependant on the conclusion of a sub-contract with ECM. ECM had on its own not finalized its operations with Harmony Gold regarding its risk management report and labour plan. The other problems were that the applicants had cancelled their agreements with the first respondent.

[31] In my view the first respondent has failed to meet the yard stick set in Oakdene, hence the order as prayed for in the above case no. 30779/2014.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	15 MAY 2014
JUDGMENT RESERVED ON	:	15 MAY 2014
ATTORNEYS FOR THE APPLICANT	:	MARTIN VAN VUUREN c/o GEORGE NELL ATT
ATTORNEYS FOR RESPONDENTS	:	DRSM ATT c/o SAVAGE JOOSTE ADAMS ATTORNEYS