REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(Functioning as LIMPOPO DIVISION, POLOKWANE)

CASE NO: 365/2014

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

9/5/2014
DATE

SIGNATURE

In the matter between:

COPPER SUNSET TRADING 220 (PTY) LTD **t/a Build It Lephalale** (under business rescue)	**Applicant**
and	
SPAR GROUP LIMITED **(Registration Number: 1967/01572/07)**	**First Respondent**
NORMANDIEN FARMS (PTY) LTD **(Registration Number: 2006/011224/07)**	**Second Respondent**

JUDGMENT

MAKGOBA J.

[1] This matter came before me on urgent basis on the 30 April 2014. Upon hearing argument by Counsel for the parties I made an order in the following terms and indicated that my reasons for judgment would follow in due course:

1. That the result of the votes by the First and Second Respondents in rejecting the revised business rescue plan at the meeting of Creditors held on 4 March 2014 is set aside on the ground that it was inappropriate.

2. That the revised business rescue plan attached as Annexure "H" to the Applicant's Founding Affidavit is declared to be properly adopted on condition that the Applicant and/or the Business Rescue Practitioner obtain the post commencement finance to the tune of R2 million (TWO MILLION RAND) within 30 Court days from date of this order.

3. In the event of the Applicant and/or the Business Rescue Practitioner's failure to acquire the aforesaid post commencement finance the Business Rescue Practitioner shall file a notice of the termination of the business rescue proceedings as envisaged in Section 153(5) of the Companies Act No 71 of 2008.

4. The costs of this application are reserved with the proviso that the judge seized with this matter shall be the judge to hear the argument on the issue of costs should the need arise.

[2] What follows is my judgment setting forth the reasons for the order which was handed down.

[3] The applicant company, which is under business rescue and which is represented in these proceedings by its appointed business rescue practitioner, Mr. Benno Jacques de Klerk applied on urgent basis for the following relief:

3.1 that the result of the votes by the first and second respondents in rejecting the revised business rescue plan at the meeting of Creditors held on 4 March 2014 be set aside on the grounds that it was inappropriate,

3.2 that the revised business rescue plan attached as Annexure "H" to the founding affidavit be declared to be properly adopted,

3.3 that the first and second respondents be ordered to pay the costs of the application on attorney and client scale, jointly and severally.

[4] The application is brought in terms of Section 153(1)(a)(ii) of the Companies Act No 71 of 2008 ("the Act") which provides as follows:

" *153.* **Failure to adopt business rescue plan**

(1)(a) If a business rescue plan has been rejected as contemplated in Section 152(3)(a) or (c)(ii) (bb) the practitioner may –

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan or

(ii) advise the meeting that the Company will apply to a Court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was in appropriate

(b) ....."

[5] For purposes of the present application Section 153(1)(a)(ii) must be read with Section 153(7) which provides as follows:

" (7) On an application contemplated in subsection (i)(a)(ii) or (1)(b)(i)(bb), a Court may order that the vote on a business rescue plan be set aside if the Court is satisfied that it is reasonable and just to do so, having regard to –

(a) The interests represented by the person or persons who voted against the proposed business rescue plan,

(b) The provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons, and

(c) A fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated".

[6] In essence Section 153 contemplates broadly that where the requisite votes approving a plan are not achieved, the appointed business rescue practitioner or failing him, one of the category of persons described in the Act as affected persons may, on fulfillment of certain conditions, invite the meeting to approve the preparation and publishing of a revised plan or apply to the Court to have the result of the vote of "voting interests" (class of creditors) or shareholders set aside as inappropriate.

[7] It is appropriate to mention that if no person takes any action contemplated above, the business rescue practitioner must promptly file a notice of the termination of the business rescue proceedings in accordance with Section 153(5) of the Act. In the present matter the business rescue practitioner ("Mr de Klerk") elected to go to Court under Section 153(1)(a)(ii).

[8] The Applicant trades under the "Build It" brand as a retailer in hardware, building materials and related products and has been trading as such in Lephalale, Limpopo Province since 2006. The Applicant employs 52 people and has two directors who are the only shareholders in the company. The Applicant benefited from the economic spin off especially brought about by the large scale construction of the Medupi Power Plant under construction at Lephalale.

Applicant alleges that its turnover grew from R27 million on 28 February 2009 to some R46 million on 28 February 2013 but due to large scale strikes at the Medupi Power Plant sales dropped dramatically. Notwithstanding the strikes the Applicant managed to generate sales of some R37 million for the financial year ending on 28 February 2014.

[9] The "Build It" brand is owned by the Spar Group (First Respondent). The Applicant is a member of the Build It – Guild of South Africa. Members of the Guild, such as the applicant, trade under the "Build –It" brand and derive benefits of the combined buying power of such membership in regard to the purchase of products from suppliers. Arising from the applicant's membership of the Guild, and the payment by Spar Group to suppliers on behalf of the applicant, the applicant became indebted to the Spar Group (First Respondent) but was unable to meet its payment obligations.

[10] The First Respondent is owed about R7.6 million making it the largest creditor of the applicant. The applicant's indebtedness to the First Respondent in the aforesaid amount is almost equivalent to the total assets of the applicant, and represents over 50% of the applicant's total liabilities.

The applicant is indebted to the Second Respondent in the sum of R412 756-04. There are other creditors owed by the applicant. Although they are not part of the present Court proceedings, some of them took part in the voting at the creditor's meeting held on 4 March 2014 and voted in favour of the adoption of the revised business rescue plan.

[11] The First Respondent instituted Court proceedings against the applicant to perfect its security under the notarial bonds registered over the applicant's movable assets. The Second Respondent had also instituted action against the applicant claiming the amount owed to it. The applicant has given notice to oppose and to defend both Court proceedings/ actions. In all the two instances Mr. de Klerk acts as an attorney of record for the applicant.

[12] While the perfection application was pending, Mr. Rodney Sanders ("Sanders") of Rens Business Consulting approached Spar Group to garner its support for a possible turnaround strategy for the applicant and to this end several meetings between Sanders and representatives of Spar Group took place.

The applicant alleges that the Spar Group representatives seemed to be impressed by the proposed turnaround strategy put forward by Sanders. Spar Group denies that a firm plan was proposed by Sanders

and that the discussions were in general terms and exploratory in nature.

[13] Sanders, de Klerk and applicant contend that an agreement was reached between Sanders and Spar Group that Spar Group would support the alleged turnaround plan while Spar Group denies that any such agreement was reached.

It is unnecessary for the Court to delve in detail into the issue of whether an agreement on the terms of a turnaround plan was reached, as the Court need not make any finding on this issue.

[14] While the negotiations between Sanders and Spar Group regarding a turnaround plan were still in progress, the applicant's directors resolved to place the applicant into business rescue. A resolution in terms of Section 129 of the Act was adopted on 26 November 2013.

[15] The business rescue proceedings then commenced and pursuant thereto:

15.1 Mr. de Klerk was appointed as a business rescue practitioner on 11 December 2013.

15.2 the first creditors meeting was held on 19 December 2013.

15.3 the proposed first business rescue plan was published on 23 January 2014.

15.4 the proposed first business rescue plan was rejected at the second creditors meeting of the 4 February 2014,

15.5 the revised business rescue plan was then published on 18 February 2014.

15.6 the third creditors meeting was held on 4 March 2014 at which the revised business rescue plan was introduced but was rejected, the First and Second Respondents voting against the adoption thereof.

[16] Following the rejection of the revised business rescue plan the present application was launched. The application is opposed by the First and Second Respondents.

[17] As stated earlier in this judgment this application was brought to Court on urgent basis. In making out a case for urgency Counsel for the Applicant submitted, correctly in my view, that the real urgency lies in the fact that the Applicant does not have the luxury of time on its side : every day that passes in anticipation for the plan to be approved, it becomes more difficult for the applicant to turn itself around.

[18] **In Koen v. Wedgewood Village Golf Estate 2012 (2) SA 378(WCC)** the following was said at 381 G-H :

"It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to

expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospects of effective rescue.

Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of the business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings however dubious might be their prospects of success in a given case materially affects the rights of third parties to ensure their rights against the subject company……"

[19] At the commencement of the hearing of this matter both the First and Second Respondents rightly conceded that the matter is urgent.

[20] The respondents raised two points *in limine:*

20.1 Firstly, that a jurisdictional requirement for the launching of the present application is that the practitioner must have advised the meeting at which the revised business plan was introduced and considered, that the applicant would apply to Court to set aside the result of the vote at such meeting on the grounds that it was inappropriate. Unless the practitioner advised the meeting to this effect, the practitioner was obliged in terms of Section 153(5) to promptly file a notice of termination of the business rescue proceedings. That De Klerk as a business rescue practitioner, did not act in accordance with Section 153(1)(a)(ii) at the meeting of creditors held on 4 March 2014, and

accordingly the present application falls to be dismissed on this basis alone.

20.2 Secondly, that De Klerk acted for the applicant in litigation with Spar Group (First Respondent) and Second Respondent prior to the commencement of business rescue proceedings. This precluded De Klerk from accepting appointment as the business rescue practitioner having regard to the provisions of Section 138 (1)(e) of the Act.

[21] I proceed to deal with the points *in limine* raised by the Respondents.

The deponent to the First Respondent's answering affidavit, Sean Bradshaw, in regard to the failure of Mr. de Klerk as the business practitioner to have advised the meeting held on 4 March 2014 that the applicant would apply to Court as contemplated in Section 153(1)(a)(ii), referred to the confirmatory affidavit of Mr. Julian Jones.

Mr. Julian Jones is the attorney who attended the said meeting on behalf of the First Respondent. The confirmatory affidavit of Mr. Jones merely confirms the allegation by Mr. Bradshaw that the practitioner failed to advise the meeting that an application would be made to Court.

Mr. Jones, an attorney who was present at the meeting does not divulge any facts but merely confirms the deponent's terse allegation.

It is common cause that the deponent, Mr. Bradshaw was not present at the meeting. Therefore no weight can be attached to the evidence in both affidavits.

[22] The Second Respondent's answering affidavit does not take the matter any further. The deponent of the affidavit confirms that the First and Second Respondents voted against the plan and merely put a bare denial that Mr.de Klerk advised the meeting that he was going to make an application to Court.

Mr. de Klerk's detailed explanation as to what took place at the meeting is acceptable, in particular that he duly advised the meeting that he would make an application to Court within five days from date of the rejection of the revised business plan.

[23] Section 138(1)(e) of the Act provides as follows:

"*1. Any person may be appointed as the business rescue practitioner of a company only if the person –*

(a) ----------

(b) ----------

(c) ----------

(d) ----------

(e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship"

[24] Nowhere in their answering affidavits do the First and Second Respondents allege or show the factual basis on which it can be said that Mr. de Klerk's integrity, impartiality or objectivity was compromised by the mere fact that he acted as attorney of record for the applicant prior to the commencement of the business rescue proceedings.

In any event the respondents never raised any objection to Mr. de Klerk's appointment at any of the three creditors meeting already held. They have acquiesced to his position as the duly appointed business rescue practitioner.

[25] I do not find any merit in the points *in limine* raised by the respondents. The two points *in limine* are accordingly dismissed.

[26] On the merits of this case the issue to be determined is whether the Applicant has made out a proper case that the Respondent's vote was inappropriate within the meaning of Section 153(1)(a)(ii) read with Section 153(7) of the Act.

[27] In the case of **DH Brothers Industries (Pty) Ltd v. Gribinitz NO and Others 2014 (1) SA 103 at 108 E – 109A** para [10] Gorven J said the following about Chapter 6 of the Act, dealing with Business Rescue:

> *"I respectfully agree that the Chapter as a whole reflects a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction, but only of viable companies, not of all companies placed under business rescue"*

[28] Section 7(k) of the Act reads that one of the purposes of the Act is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders."

The shareholders, creditors and employees and/or registered trade unions representing employees are stakeholders in terms of the Act.

[29] The aim of business rescue is to save a business, rather than destroy it. Business rescue is preferred to liquidation.

See: **Southern Palace Investments 265(Pty) Ltd v. Midnight Storm Investments 386 Ltd 2012(2) SA 423 (WCC)**

In **Koen v. Wedgewood Village Golf & Country Estate**, supra at par 14 it was said:

> *"It is clear that the legislature has recognised that liquidation of companies more frequently that not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods.*
>
> *It is obvious that it is in the public interest that the incidents of such adverse socioeconomic consequences should be avoided where reasonably possible.*

Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deletirious consequences of liquidation in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or securing a better return to creditors than would probably be achieved in an immediate liquidation"

[30] The purpose of the business plan need not be to save the company from liquidation and thus return the business to solvency. If the goal is just to ensure a better return for creditors than would be achieved in liquidation, such goal is a valid goal in terms of the Act.

In the present case it is common cause that in the event of liquidation of the Applicant only the First Respondent, as a secured creditor will get a dividend of R0,45 in a Rand and the rest of the concurrent creditors totaling about R8 million will get no dividend at all.

The question then arises as to whether a business rescue plan is not an option worth trying.

[31] In **Oakdene Square Properties v. Farm Bothasfontein (Kayalami) 2013 (4) SA 539 (SCA)** it was held that the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, there is no reason why the proclaimed opposition should be ignored. Unless, of course, the attitude can be said to be unreasonable or mala fide.

[32] Creditors should participate in good faith and objectively consider the merits and demerits of a proposed business plan.

(Unreported decision by Kollapen J in **Employees of Solar Spectrum Trading 83 (Pty) Ltd v. Afgri Operations Ltd 6418/2011 8 May 2012 (GNP) at par 37).**

[33] The Applicant contends that due to the fact that the business plan has not as yet been adopted, it is impossible for Applicant to at this stage obtain post commencement finance in terms of Section 135 of the Act. Creditors and potential suppliers are not prepared to provide stock on account or provide credit under these circumstances. In the absence of sufficient stock Applicant is not generating the required cash flow to pay back its creditors.

If the First Respondent is successful in perfecting its notarial bond, it will for all practical purposes be the only creditor that will derive any benefit from a liquidation.

[34] The business rescuer and his consultant, Mr. Sanders are both of the view that the Applicant can be turned around if post commencement finance to the tune of R2 million can be found.

One of the directors of the Applicant, Mr.Fourie has made an undertaking to raise a loan of R2 million against security in the form of a mortgage bond over his farm. His undertaking is set out in an affidavit which forms part of the papers in this case.

[35] Counsel for the Applicant made a submission that if post commencement finance is generated the business rescue plan will be viable. He further submitted that this Court can grant an order subject thereto that the business rescue will terminate if post commencement finance is not procured within one month. The proposition sounds reasonable.

[36] Not only the interests of the creditors should be considered in this case. Upon liquidation the Applicant's 52 employees will lose their jobs and it is common cause that it is safe to presume that most of the employees maintain extended families. In the light of the high unemployment rate, their salaries are probably their only source of livelihood.

It is worth it to embark upon the business rescue plan than resort to a more devastating process of liquidation of the company.

[37] The attitude to the First Respondent in gunning for liquidation is self serving and, with respect, unreasonable regard being had to the fact that it is the only creditor to probably gain at most R0,45 dividend.

Suffice it to state that the Second Respondent's vote against the adoption of the business plan is irrational.

It voted against the business plan notwithstanding the fact that in the absence of such a plan it will receive no dividend in liquidation.

[38] Consequently I make a finding that the conduct of the First and Second Respondents in rejecting the revised business rescue plan at the meeting of creditors held on 4 March 2014 was inappropriate.

[39] These are accordingly the reasons why I granted the order on 30 April 2014.

E.M.MAKGOBA
JUDGE OF THE HIGH COURT

HEARD ON	:	30 APRIL 2014

APPEARANCES:

For the Applicants	:	Adv. H.J.De Wet
Instructed by	:	Davel De Klerk Kgatla Inc
For 1st Respondent	:	Adv P.T. Rood SC
Instructed by	:	Cliffe Dekker Hofmeyr Inc c/o Naude & Britz
For 2nd Respondent	:	Adv C Hattingh
Instructed by	:	Vinnocombe & Associates