

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 13 November 2014


SIGNATURE

**CASE NUMBERS: 64378/2013
64380/2013
64381/2013**

In the matter between:

13/11/2014

THE REGISTRAR OF BANKS

Applicant

And

GERRITJE DAFEL

1st Respondent

KAMPSTONE FINANCIAL SERVICES CC

2nd Respondent

MOFFIT PROPERTIES (PTY) LTD

3rd Respondent

JUDGMENT

MATOJANE, J

Introduction

[1] The applicant, the Registrar of Banks ("Registrar"), moved for a provisional order of sequestration against Ms Gerritje Dafel and for the liquidation of Kampstone Financial Services CC ("Kampstone") and Moffit Properties (Pty) Limited ("Moffit Properties"). (Collectively referred to as the "Dafel entities"). That the Master be directed, subject to section 370 of the Old Companies Act, to appoint the person nominated by the applicant as liquidator as provided in section 84(1A)(d) of the Banks Act. Applicant relies primarily upon legislative provisions and upon a solvency report as foundation for the applications. The three applications are opposed.

[2] On 2 December 2013 the court struck the applications off the roll with costs for lack of urgency. The respondents have not yet taxed their bills of cost and have not yet recovered their taxed costs.

[3] Kampstone and Moffit Properties have filed counter-applications for business rescue. The Registrar of Banks has opposed the applications contending that the two entities do not have the necessary *locus standi* to apply for their business rescue. Gerritje Dafel in her capacity as a sole member of Kampstone, and her husband, Danie Dafel in his capacity as sole shareholder of Moffit Properties, gave notice of their intention to apply at the hearing of this application for leave to intervene.

The parties

[4] The applicant is the Registrar of Banks ("Registrar"), appointed in terms of the provisions of section 4 read with section 3 of the Banks Act.¹

[5] Ms Dafel is a FAIS accredited financial advisor. She is the sole member of Kampstone and assists her clients with the investment of their money through Kampstone. Kampstone is registered as a financial services provider with the Financial Services Board and is in the business of selling insurance. Gerritje Dafel is married out of community of property to Danie Dafel. Danie Dafel is the sole director and shareholder of Moffit Properties. Moffit Properties own properties in the central business district of Heidelberg.

[6] Although the applications were moved separately, the legal and factual issues raised in the matters are identical. I have therefore prepared a single judgment dealing with these issues.

Application for postponement

[7] Six court days before the hearing of the present applications, the Dafel entities brought an application for the Manager, who has been duly appointed in terms of section 84(1) of the Banks Act to conduct and manage the affairs of the Dafel entities, to be ordered to make payment of legal fees and disbursements of the Dafel entities from the bank account of Kampstone that the Manager has

¹ Act No 94 of 1990

under her control and for the matter to be stayed until then. That the Manager be ordered to make payment of the deposit for the further conduct of the matter in the amount of R90 000.00. Counsel for the Dafel entities informed the court that he was due to lack of funds not instructed to argue the main application. He informed the court that his mandate would be terminated if unsuccessful in the application for postponement. I dismissed the application for postponement and counsel excused himself. I gave no reasons at the time and will do so below.

[8] Counsel informed the court that Gerritje Dafel brings this application in her capacity as a sole director of Kampstone and Danie Dafel as a director of Moffit Properties. Counsel further informed the court that a committee of investors, who have voted in favour of a business rescue plan, has mandated Mr and Ms Dafel to bring an application for business rescue and they need funds to pay legal fees.

[9] Counsel for the applicant opposed the application vigorously. He argued firstly that the Dafel entities are entitled to reimbursement in respect of certain of their costs for the unsuccessful urgent application upon taxation; accordingly costs to be paid by the Registrar are irrelevant to the stay on the present proceedings. Secondly, the Manager has control of investors' monies deposited into Kampstone's bank account, there is no explanation why the costs for the business rescue applications for Kampstone and Moffit Properties, more particularly the costs of Mr Dafel who is not a respondent, should be paid from the investors' money. He argued, thirdly, that the Dafel entities have

contravened Registrar's directives, which is not only unlawful but also constitute a criminal conduct,. I agree with the arguments advanced by counsel for the Registrar.

[10] In deciding whether to grant the application or not, I must consider the reason for the postponement applied for, the prejudice to the parties if it is granted or refused and whether a cost order can cure the prejudice that a party may suffer through the granting of a postponement. The more detailed principles governing the grant and refusal of postponement have recently been summarized by the Constitutional Court in ***National Police Service Union and Others v Minister of Safety and Security and Others*** [2000] ZACC 15; 2000 (4) SA 1110 (CC) at 1112C - F as follows:

“The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including

(but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.”

[11] In this case, Gerritje Dafel and the Dafel entities have been found to be conducting the business of a bank and taking deposits from the general public, while not registered as a bank. Gerritje Dafel and the Dafel entities themselves are satisfied that the business of the bank was carried on as they never took on review, in terms of section 9 of the Bank Act, the Direction to repay the deposits received. A postponement will mean that the Dafel entities' criminal conduct would proceed unchecked as Gerritje Dafel has illustrated, as will be shown below, her intent to proceed soliciting investments from the public.

[12] The reason for demanding funds for legal fees is that the Registrar froze the bank accounts of the Dafel entities on 10 July 2013 and since then the Dafel entities have not had access to the money in the Kampstone account. Prior to the urgent applications, the Dafel entities requested funding for litigation from the Manager. An amount of R200 000.00 was made available. Attorneys Savage Jooste and Adams representing the Dafel entities contends that the R200 000.00 was insufficient to cover their complete fees and disbursements. They collectively claim a balance of R351 719.74, which includes the accounts in respect of Gerritje Dafel and Moffit Properties.

[13] In their statement of account, Savage Jooste and Adams charges exorbitant and unjustified amounts to the prejudice of investors. For example 1.5 hours at R1 930.00 per hour is claimed in respect of the serving and filing of the notices of intention to oppose, whereas on an attorney and client scale, R71.00 is a recommended fee in respect of each service and filing.

[14] I agree with the Manager's argument that the R200 000.00 she has already paid is in excess of Kampstone's *pro rata* entitlements and she is accordingly justified in refusing to make additional payments to the other Dafel entities. It must be mentioned that the Dafel entities would have been reimbursed in respect of certain of their wasted costs had they not indefinitely postponed the taxation of their bills of cost pursuant for a costs order granted in their favour.

[15] It is significant that while the Dafel entities claim the costs in respect of all the Dafel entities from the Manager, the Manager holds funds in respect of Kampstone only. Such funds, which must be repaid to investors cannot, in my view, be used to pay the legal fees of Gerritje Dafel and Moffit Properties. Most importantly, the Manager has established that rental income from properties owned by Gerritje Dafel and Moffit Properties are illegally diverted to SHS Properties, a rental agency of Gerritje Dafel's daughter. Part of this rental income, which should have been paid into the respective accounts of Gerritje Dafel and Moffit Properties which are under the Manager's control, have been applied to pay the personal expenses of Gerritje Dafel and Danie Dafel in

contravention of the directive issued by the Registrar. During the period 1 August 2013 to 31 March 2014 a net rental income of R122 459.79, which should have been paid to Moffit Properties, was paid to SHS Properties.

[16] From the founding affidavit, the Dafel entities state that applicant informed them already on 9 December 2013 that their request for funding was denied. They waited for a week before the hearing to bring the application for a postponement. There is no explanation for the delay in bringing the application for postponement timeously.

[17] Taking into account the above factors, in particular, the fact that a postponement will merely extend the unlawful investment practices of the Dafel entities and delay the investors' right to enforce their rights, I am of the view that it will not be in the interests of justice to grant the application for postponement

Factual background

[18] The South African Reserve Bank was advised through a confidential report during September 2009 that the business entity Kampstone and its sole member, Ms Dafel, may be conducting a business of a bank in contravention of the Banks Act, No 94 of 1990 ("the Banks Act"). It was alleged, *inter alia*, that

18.1 Ms Dafel issued letters to the general public soliciting investments;

18.2 Kampstone received funds as a result of these investment solicitations and such funds were then transferred to Ms Dafel's personal bank account, which she used for private purposes;

18.3 The business practices of Kampstone and Ms Dafel are tantamount to deposit taking in contravention of the Financial Advisory and Intermediary Services Act No 37 of 2002.

[19] On 12 February 2010 the Applicant advised Kampstone and Ms Dafel of the allegations and their suspicion that the Dafel entities may be conducting the business of a bank in contravention of the provisions of the Banks Act and/ or Mutual Banks Act 1993.²

[20] The South African Reserve Bank, acting in terms of section 82(1) of the Banks Act, directed Kampstone and Ms Dafel to furnish information to the South African Reserve Bank. The Dafel entities failed to respond to two section 82(1) directives, which were issued on 12 February 2010 and 2 July 2010 respectively. This is a contravention of section 82(1) of the Banks Act and a criminal offence in terms of section 82(3) of the Banks Act.

[21] On 15 October 2010 the South African Reserve Bank appointed temporary inspectors in terms of section 11(3), read with section 12 of the South African Reserve Act, to conduct an inspection into the financial affairs of the

² (Act No. 124 of 1994).

Dafel entities to establish whether "the business of the bank" was being conducted in contravention of the provisions of the Banks Act and/or the Mutual Banks Act.

[22] The inspection revealed that Gerritje Dafel obtained investments from friends and clients to fund the development of properties of Moffit Properties. The investments were channeled through Kampstone's bank account, in which account personal loans to Gerritje Dafel were also paid. Rental income from properties owned by Moffit was diverted to SHS Properties, a rental agency of Ms Dafel's daughter. Gerritje Dafel's living costs are also paid from the Kampstone account. Commission earned on insurance transactions by Ms Dafel and/or Kampstone were paid into the Kampstone account. Some investments were channeled through the bank account of Thunderstruck Invest 123 (Pty) Ltd.

[23] The Registrar was satisfied that Ms Dafel had obtained money by conducting the business of a bank without being registered as a bank in terms of section 17 of the Banks Act, or without being authorised in terms of the provisions of section 18(A)(1) of the Banks Act to carry on the business of a bank.

[24] On 30 January 2012 a meeting was held between the Registrar, the temporary inspectors, Gerritje Dafel, Danie Dafel and their attorney from Savage Jooste and Adams. The inspection report as well as Dafel entities' response

thereto was discussed. Gerritje Dafel and the Dafel entities undertook, *inter alia*, to cease taking further deposits as defined in the Banks Act from members of the public and furnish the South African Reserve Bank within 30 to 60 days with a plan to protect investors and to prevent contraventions of the Banks Act.

[25] Gerritje Dafel continued with her illegal deposit taking activities despite her undertaking to the contrary. She subsequently obtained a total amount of R974 875.00 from 8 investors, 6 of whom were new investors and 2 of whom were current investors who increased their investments. Gerritje Dafel further admitted to the Manager that she subsequently obtained further loans from 7 individuals during the period 4 May 2012 to 25 April 2013. The total amount of these further loans is R744 875.00. She disclosed to the Manager that she had two additional Money Market Investment Accounts at Standard Bank as well as an offshore bank account into which commission payments are made. This information was withheld from the Manager notwithstanding specific request to disclose all bank accounts as well as income received. The temporary investors obtained affidavits from 5 investors confirming that Gerritje Dafel informed them that she could not repay the money on demand, and if they wished to exit the scheme and be refunded the money it will result in her insolvency.

[26] On the 27 May 2013 the Registrar issued a Directive ("the Directive") in terms of section 83(1) read with section 84 of the Banks Act against Gerritje Dafel, and any related entities to repay all monies obtained from investors in so far as such money has not yet been paid. The Registrar also appointed Estelle

Naude as Manager in terms of section 84(1) read with section 83(1) of the Banks Act to manage and control the repayment of the monies obtained by Kampstone and/or Gerritje Dafel in compliance with the Directive issued. The Dafel entities accepted the Directive, as they did not take it on review.

[27] According to the Manager as at 27 August 2013, the total capital amount obtained from investors amounts to R11 198 561.87. The estimated accrued interest thereon amounts to R1 839 724.57. The total estimated capital plus accrued interest amounts to R13 029 286.44. The total difference between the total investments due to investors and the total investment value disclosed by Gerritje Dafel amounts to R582 089.05.

The business of the Dafel entities

[28] On 8 October 2013 the Manager filed a Solvency Report concluding that the Dafel entities are factually and commercially insolvent. The Report confirmed, *inter alia*, that Gerritje Dafel as the principal perpetrator of the scheme, and her husband, in order to diversify their retirement investment, decided to develop and refurbish properties owned by Moffit Properties in a syndicated property investment scheme.

[29] Gerritje Dafel obtained money from 45 investors in terms of loan agreements with Moffit Properties, herself and Kampstone, which loans were initially repayable after a period of 5 (five) years. In one instance interest of 20%

was payable on the investment, and in other instances interest at a rate of 15% per annum. The deposits were applied into the development of properties registered in the name of Moffit. Kampstone and Gerritje Dafel stood surety for repayment of the loans. Apart from the investments, personal loans were also made to Gerritje Dafel. Kampstone's bank account was utilised for deposits, although funds flowed freely from Gerritje Dafel, Moffit, Kampstone, investors and creditors.

[30] The Dafel entities dispute the correctness of the Solvency Report that the entities conducted the business of a bank. The entities contend that the inspection report is a mere opinion of the author thereof to which the court is not bound. The difficulty with this argument is that the Dafel entities could have taken the Registrar's Directives on review in terms of the Promotion of Administrative Justice Act 3 of 2000. In my view, the entities have accepted the findings of the inspection report and the Directives that followed stands.

Statutory framework

[31] Section 12 of the South African Reserve Bank Act³ stipulates that the Registrar of Banks (or a Deputy Registrar) has to cause the affairs of a person to be inspected. It reads:

³ Act, 1989 (Act No. 90 of 1989)

"12. INSPECTION OF AFFAIRS OF PERSON, PARTNERSHIP, CLOSE CORPORATION, COMPANY OR OTHER JURISTIC PERSON NOT REGISTERED AS BANK OR MUTUAL BANK

(1) If the Governor or a Deputy Governor has reason to suspect that any person, partnership, close corporation, company or other juristic person who or which is not registered in terms of the Banks Act, 1990 (Act 94 of 1990), as a bank or in terms of the Mutual Banks Act, 1993 (Act 124 of 1993), as a mutual bank, is carrying on the business of a bank or a mutual bank, he or she may direct the Registrar of Banks referred to in section 4 of the Banks Act, 1990, to cause the affairs or any part of the affairs of such person, partnership, close corporation, company or other juristic person to be inspected by an inspector appointed under section 11 (1), in order to establish whether or not the business of a bank or mutual bank, as the case may be, is being carried on by that person, partnership, close corporation, company or other juristic person."

[32] The business conducted by Gerritje Dafel and the Dafel entities qualifies as a business of the bank as defined. "The business of a Bank" is defined as follows :

- “(a) The acceptance of deposits from the general public (including persons in the employ of a person so accepting deposits) as a regular feature of the business in question;
- (b) The soliciting of or advertising for deposits;
- (c) The utilising of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated in paragraph (a) –
 - (i) for the granting by any person, acting as lender in such person's own name or through the medium of a Trust or a nominee, of loans to other persons;
 - (ii) for investment by any person, acting as investor in such person's own name or through the medium of a Trust or a nominee; or
 - (iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by such person in his or her own name or through the medium of a Trust or a nominee;
- (d) The obtaining, as a regular feature of the business in question, of money through the sale of an asset, to any other person other than

a Bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the assets so sold or any assets; or

- (e) Any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the Gazette declared to be the business of a Bank."

[33] "Deposit", is defined in Section 1 as follows :

"An amount of money paid by one person to another person subject to an agreement in terms of which –

- (a) An equal amount or any part thereof will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and

- (b) No interest will be payable on the amount so paid or interest will be payable thereon at specified intervals or otherwise ..."

[34] Section 83 stipulates that any person presumed to carry the business of a bank, who fails to repay the money so obtained, shall be deemed not to be

able to pay the debts owed by such a person or to have committed an act of insolvency. It reads:

“83 REPAYMENT OF MONEY UNLAWFULLY OBTAINED –

(1) If as a result of an inspection conducted under Section 12 of the South African Reserve Bank Act, 1989 (Act No 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a Bank without being registered as a Bank or without being authorised, in terms of the provisions of Section 18A(1), to carry on the business of a Bank, the Registrar may in writing direct that person to repay, subject to the provisions of Section 84 and in accordance with such requirements and within such period as may be specified in the direction, all monies so obtained by that person insofar as money has not yet been repaid, including any interest or any other amounts owing by that person in respect of such money.

(2) ...

(3) Any person who refuses or fails to comply with the direction under sub-section (1) –

(a) shall be guilty of an offence;

(b) shall for the purposes of any law relating to the winding-up of juristic persons or to the sequestration of insolvent estates, be deemed not to be able to pay the debts owed by such person or to have committed an act of insolvency, as the case may be, and the Registrar shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the winding-up of such a juristic person or for the sequestration of the estate of such a person, as the case may be, to any Court having jurisdiction."

[35] Section 8(4) of the Act regulates the management and control of the repayment of the monies unlawfully obtained. It stipulates:

"8.4 MANAGEMENT AND CONTROL OF REPAYMENT OF MONEY UNLAWFULLY OBTAINED:

- (1) Simultaneously with the issuing of a direction under Section 83(1), or as soon thereafter as may be practicable, the Registrar shall by a letter of appointment signed by him or her appoint a person (hereinafter in this Section referred to as the manager) to manage and control the repayment of money in compliance with the direction by the person subject thereto.

1A(a) The manager shall as soon as may be practicable

report to the Registrar whether or not the person subject to the relevant direction is, in the manager's opinion, solvent, and if the manager finds that the person subject to the direction is insolvent, the manager shall comment on whether such person is technically or legally insolvent.

(b) ...

(c) If the report referred to in paragraph (a) concludes that the person subject to the directive is insolvent, the Registrar may, notwithstanding anything contrary contained in any law relating to liquidation or insolvency apply to a competent Court for the winding-up in terms of the Companies Act or the sequestration in terms of the Insolvency Act, 936 (Act No 24 of 1936), as the case may be, of the person subject to the directive, and the Registrar shall have the right to oppose any such application made by any other person.

(d) The Master shall, subject to Section 370 of the Companies Act, appoint the person nominated by the Registrar as liquidator or trustee;

(e) ...

- (f) If the Registrar has issued an instruction in terms of Section 84(6) and a provisional liquidator or provisional trustee of the person subject to the directive is subsequently duly appointed, the Registrar shall be regarded as a creditor of the person subject to the directive and the Registrar shall have the same rights of a creditor in terms of the law relating to liquidation and insolvency.
- (2) The Registrar shall serve a copy of the letter of appointment referred to in sub-section (1) upon the person subject to the relevant directive, and such person shall, with effect from the date of the letter of appointment, be prohibited from disposing of or otherwise dealing with such of the assets of such person as are specified in the letter of appointment, except with the written permission of the manager.
- (3) ...
- (4) ...
- (5) ...
- (6) The manager shall in respect of the services rendered by him or her in terms of this Section and the responsible

inspector or inspectors shall in respect of an inspection referred to in Section 83(1) conducted under Section 12 of the South African Reserve Bank Act, 1989 (Act No 90 of 1989), be paid such remuneration by the Registrar as the Registrar may determine, and the Registrar may recover an amount equal to the remuneration so paid from the person subject to the direction or the inspection, as the case may be."

Insolvency

[36] On the facts before the court, and according to the Solvency Report, Gerritje Dafel is insolvent. Her liabilities far exceed her assets. The total value she put on her assets is R1 350 000.00 and the total known liabilities of Dafel entities to which she stood surety is R17 288 285.00. Gerritje Dafel and Kampstone cannot honour their interest obligations to known creditors as well as their other expenses. It is clear that Gerritje Dafel has committed, *inter alia*, the following acts of insolvency:

- 35.1 In terms of section 83(3)(b) of the Banks Act, she is deemed to have committed an act of insolvency by her refusal and failure to comply with a Directive issued by the Registrar.

35.2 Section 8(g) of the Insolvency Act⁴, giving notice that she is unable to pay her debts;

35.3 Section 8 (c) of the Insolvency Act a disposition of assets with the effect of prejudicing or preferring one creditor above the other. Gerritje Dafei was negotiating the alienation of certain of the immovable property.

Liquidations

[37] It is trite that commercial insolvency justifies the liquidation of a company. In order for a solvent company to be wound-up in terms of section 81 of the new Act⁵, it must be commercially solvent. If it is commercially insolvent it may be wound-up in accordance with chapter 14 of the old Act, as is provided for in sub-item 9(i) of Schedule 5 of the new Act. A court's powers to grant a winding-up order is derived from and defined in section 344 of the Act which, *inter alia*, provides in section 344 (f) that a company may be wound up if it is unable to pay its debts as described in section 345 of the Act. Section 345 in turn, under the rubric, "When company deemed unable to pay its debts", provides in subsection (1)(c) that a company is deemed to be unable to pay its debts where it is proved to the satisfaction of the court that a company is unable to pay its debts. The applicant has to establish a *prima facie* case which is done when, on a consideration of all the affidavits filed, such a *prima facie* case has

⁴ Act No 24 of 1936

⁵ Act No 71 of 2008

been established on a balance of probabilities. The deeming provisions concerning the inability to pay its debts, contained in section 345 of the old Act and section 83(3)(b) of the Banks Act clearly establish that Moffit and Kampstone are unable to pay their debts.

[38] In the repayment plan dated 30 August 2013 the Dafel entities concedes that Moffit and Kampstone are presently insolvent, their financial advisor states that "the primary problem is that the money had been invested into fixed property which remains illiquid and the development is not yet completed in its entirety requiring approximately another Five Million Rands to complete". This justifies the winding-up of Moffit and Kampstone in terms of section 344(f), read with section 345, of the old Act.

Business rescue

[39] The Dafel entities have filed a counter-application to place Moffit under supervision and for business rescue proceedings to commence and these applications are opposed. Section 7(k) states 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". Consequently, business rescue proceedings should result in better return for creditors and other stakeholders than would result from immediate liquidation.

[40] The mere institution of business rescue proceedings results in a temporary moratorium on the rights of third parties to enforce their rights against the subject company. In the present case, business rescue proceedings will extend the unlawful deposit taking activities of Gerritje Dafei whilst preventing investors from enforcing their rights against the Dafei entities, albeit temporarily.

[41] In terms of the Act, a court may make an order placing a company under supervision and commencing business rescue proceedings if the court is satisfied that the company is financially distressed and that there is a reasonable prospect for rescuing the company, or it may dismiss the application together with any further necessary and appropriate orders, including an order placing the company under liquidation.⁶

[42] In order to enable a court to exercise its discretion, a draft rescue plan that has objectively ascertainable support that there is a reasonable prospect of rescuing the company concerned must be provided at the time of application. In **Absa Bank Limited v Newcity Group (Pty) Ltd and Another Related Matter**⁷ the court cautioned that close scrutiny of the factual platform presented and the *rationale* mounted on that platform is required in order to decide if the threshold standard has been met. The court stated that this assessment must be made on solid information presented to the court, not upon conjecture.

⁶ Section 129(1) and Section 131(4)(a)(i) and (iii)

⁷ [2013] 3 All SA 146

[43] That Moffit is financially distressed is common cause as is evidenced by the consideration of business rescue. According to the repayment plan submitted for consideration by the Dafel entities, the only viable medium term measure to repay the deposits of long term investors would be to attract further investment of R5 million to complete the property development, which will take a period of 12 to 18 months. The first difficulty with this suggested repayment plan is that business rescue proceedings cannot obviously apply to companies conducting unlawful business. The repayment of interest and investments of earlier investors will be made from later investments in a typical ponzi scheme, and secondly, in terms of section 132(3) of the New Companies Act, the business rescue proceedings should terminate within a period of three months unless the period is extended by the court on application. Moffit requires three months merely to consider and compile a business rescue plan.

[44] On the facts before the court, it is my view that there are no reasonable prospect of Moffit, given time, being rescued and becoming solvent. The application for business rescue of Moffit is accordingly dismissed.

Benefits to creditors

[45] As pointed out in the Solvency Report, it is not possible to distinguish between loans made to, the money utilised by and the interest paid to investors by Gerritje Dafel, Kampstone and Moffit because the flow of funds between the entities are interwoven. It will be to the advantage of creditors if an enquiry into

the financial affairs of the Dafel entities is conducted as there is a prospect of undisclosed assets being brought to light.

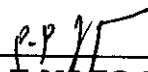
Order

[46] In the exercise of my discretion I therefore issue the following order:

- (1) That the estate of Gerritje Dafel is hereby placed under an order of provisional sequestration in the hands of the Master of the High court;
- (2) That Moffit Properties (Pty) Ltd be and is hereby placed under provisional winding-up order in the hands of the Master of this Court;
- (3) That Kampstone Financial Services CC (Pty) be and is hereby placed under provisional winding-up order in the hands of the Master of this Court;
- (4) That the Master is directed to appoint the person nominated by the Registrar of Banks as trustee as provided for in section 84(1A)(b) of the Banks Act, 1990 (Act 94 of 1990);
- (5) That a *rule nisi* do issue calling upon all the respondents to show cause, if any, to this Court on ^{27 February 2015}~~December 2014~~ why a final order of sequestration should not be granted against the Gerritje's estate

and the respondent entities should not be placed under final winding-up order in the hands of the Master of this Court;

- (6) That a copy of this order be served personally upon Gerritje Dafel;
- (7) That a copy of the *rule nisi* be published once in the *Star* newspaper; and
- (8) That a copy of the *rule nisi* be served on the Commissioner of South African Revenue Services, Heidelberg and,
- (9) by the sheriff on the Dafel entities at their registered address.



K E MATOJANE
JUDGE OF THE HIGH COURT