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

Case no: 21236/2021
REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:NO
REVISED:NO
DATE:14/05/2021

In the matter between: -

DEKKER NAUDE	First Applicant
JOHANNES JACOBUS NEL	Second Applicant
and	
SERVIGRAPH 42 CLOSE CORPORATION	First Respondent
WAYNE ROBERT CLARK N.O	Second Respondent
RAYNOLD SELLO MKHONDO N.O	Third Respondent
(Cited in their capacities as business rescue practitioners)	
THE MASTER OF THE HIGH COURT, PRETORIA	Fourth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fifth Respondent
FIRSTRAND BANK LIMITED	Affected Party
(Registration Number: […])	

JUDGEMENT

NE NKOSI AJ

1. This is an urgent application heard on 12 May 2021. The applicants seek an order in the following terms:

   1.1 That the matter be treated, enrolled and heard as one of urgency and that for the purposes thereof condonation is granted for the non-compliances with the normal Rules of Court with regard to service, forms, processes and time-periods as contemplated in Rule 6(12)(a);

   1.2 Declaring that the notice of termination of business rescue proceedings in respect of Servigraph 42 CC (the First Respondent) in terms of Section 141 of the Companies Act, 71 of 2008 filed by Raynold Sello Mkhondo N.O. (the Second Respondent) on the 16th of April 2021 be invalid, null and void *ab initio* and set aside;

   1.3 That the status *quo omnio* be and hereby is restored consequent upon the order in prayer 2 hereof and that Servigraph 42 CC(t h e First Respondent) is returned to supervision and declared to be in business rescue; and

   1.4 Costs of this application be costs in the business rescue except in the event of opposition, in which event costs will be sought against such opposing party on a scale as between attorney and client.[1]

2. The application is opposed by FirstRand Bank limited ("The Affected Party"). The Third Respondent filed an explanatory affidavit in which he indicated that he neither supports nor opposes the application. There is no

3. Mr. Smith, Counsel for the affected Party, informed the Court that he does not take an issue with the first order sought by the applicants. The remainder of the orders prayed for remain in dispute. The Court is also satisfied that the applicant has met the requirements of the provisions of

[1] Caseline 003 - 3

Rule 6(12).

4. It is common cause that the First Applicant ("Mr . Naude") and the Second Applicant ("Mr. Nel") are members ("the members") of the First Respondent and placed it in voluntary business rescue in terms of section 129 of the Companies Act No. 71 of 2008 ("the act") on 8 May 2020.

5. The Second Respondent ("Mr. Clark") and the third respondent ("Mr. Mkhondo") were appointed as joint business rescue practitioners ("the practitioners") at the instances of the members.

6. On the 16th of April 2021, a notice of termination of the business rescue proceedings was filed with the Fifth Respondent. Effectively the first respondent was released from business rescue.

7. The members are aggrieved by this notice of termination of business rescue and have approached this Court on an urgent basis to have it declared invalid, *void ab initio* and set aside. They contended that the practitioners did not act jointly and that, in fact, Mr. Mkhondo acted alone.

8. In terms of section 132 (2) of the Act, business rescue proceedings end when:

(a) .....

(i) ….

(ii) ….

(b) The practitioner has filed with the commission a notice of the termination of business rescue proceedings, or

(c) ....

(i)...
(ii)...

9. Subsequent to the rejection of the business rescue plan, the practitioners invited the applicants to consider, their options in terms of section 153(1) of the Act. The applicants advised the practitioners that they intended to bring an application to set aside the results of the vote but no application was launched.

10. The practitioners resolved to place the applicants in terms to launch an application to set aside the FNB dissenting vote which in effect lead to the rejection of the business plan. The applicants were afforded an opportunity to do so before 15 April 2021, failing which the business rescue would be terminated. The application to challenge the dissenting vote of the Affected Party was drafted but never issued in Court. The applicants herein were meant to be applicants in that aborted application.

11. On 9 April 2021, Mr. Mkhondo sent a letter to the second applicant and a copy to Mr. Clark. The letter reads:

"Please kindly note the following:

1. *The right to apply to court to set aside the vote of FNB as being inappropriate was reserved at the meeting on 11 December 2020. It has now been almost 4 months, without any feedback to that effect;*

2. *Section 153(5) of the Companies Act provides that if no person takes any action as contemplated in subsection (1) the BRP should promptly file a notice of termination;*

3. *Given that there was a subsequent offer entertained between Highveld and FNB, the BRP's put the termination in abeyance to accommodate this negotiation. This however, did not stand in the way of Servigraph*

or any other affected person filing to court to set aside FNB's vote;

4. *The Creditors, an in particular FNB, have indicated that they cannot entertain any further delay; and*

5. *Therefore, the request to extend the deadline beyond the 15 April cannot be entertained*

Best regards
Sella Mkhondo"[2]

12. The aforementioned letter supports the fact that:

12.1 Mr.Mkhondo did not act alone on the issue of the termination of the business rescue and the said letter was sent to Mr.Clark;

12.2 paragraph 3 of the letter confirms that both practitioners were contemplating terminating the business rescue; and

12.3 the business rescue was terminated on 16 April 2021, after the deadline of the 15 April 2021 had expired and Mr. Clark must have been aware of the termination.

13. The notice terminating the business rescue is consistent with common cause facts and the sequence of events leading to the decision to file a notice of termination. The Fifth Respondent received the notice of termination of business rescue on the 16th April 2021, which was filed in terms of section 153 (5) and not regulation 125 as argued by the applicants, and acknowledged receipt on 19 April 2021.[3]

[2] 008 - 20 on Caselines
[3] 008 - 15 Caselines

14. Any doubt whether Mr. Mkhondo acted alone is put to rest by the letter dated 15 April 2021 from Mr. Elliot who represented both practitioners. The letter is directed to Mr. Lombard who represents FNB. The letter clearly states that the practitioners intend to file the statutory notice of termination during the course of tomorrow, meaning on 16 April 2021.[4]

15. In the circumstances, prayer 2 of the notice of motion ought to be dismissed. Prayer 3 depends on the success of prayer 2 and therefore should also be dismissed.

16. The applicants filed a replying affidavit consisting of 55 pages and largely raising new issues which were not dealt with in the founding affidavit. In *Mostert vs Firstrand Bank t/a RMB Private Bank* [5] the Court stated the following at paragraph 13:

> *"It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit... In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the* court; (ii) whether the determination of the new matter will prejudice *the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs."*

17. If I were to allow the replying affidavit to stand, it would mean the respondent would be prejudiced unless afforded an opportunity to answer

[4] 006 - 86 Caselines
[5] (198/2017) [2018] ZASCA 54 (11 April 2018

to the new allegations raised in the replying affidavit. That kind of approach defeats the object of an urgent court and should be discouraged. In the circumstances of this case, I do not find any exceptional circumstances warranting that I should allow the new allegations in the replying affidavit to stand.

18. In *Michelin Tyre CO South Africa (PTY) Ltd vs Adriaan Coetzee & Another*[6] *, the Court noted the following at paragraph 7*:

"It is trite in motion proceedings, an applicant must stand or fall by the founding affidavit and the facts alleged in it. In particular, an applicant is not permitted, save in exceptional circumstances, to make or supplement by way of reply. In Bayat v Hansa 1955 (3(SA 547 (N), the rule was expressed in the following terms:

An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavit filed with the notice of motion, whether he is moving ex parte or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits."

19. In the circumstances I therefore make the following order:

1. The application is dis missed with cost including costs of two Counsels.

[6] Case No: J129 2/ 16 Labour Court, 7 July 2016 unreported.

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NE NKOSI, AJ
Acting judge of the
High Court

Date of hearing:	12 May2021
Date of Judgement:	14 May2021
For the applicant:	SJ Van Rensburg SC C E Thompson
Instructed by:	Martin Van Vuuren Attorneys , Northcliff
For the Affected Party:	J E Smit
Instructed by:	Edward Nathan Jonnenberg Inc, Sandton