IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE No. 1301/2020P

NEDBANK LTD **Applicant**

v

PILISANANI TRADING ENTERPRISE 59 CC **First Respondent**

IMPERATIVE FINANCIAL SOLUTIONS (PTY) LTD **Second Respondent**

JUDGMENT

VAN ZYL, J.:-

[1] By notice of motion issued on 18 February 2020 the applicant commenced proceedings seeking the following relief:

> "*1. The resolution taken by the first respondent on 20 June 2019 to voluntarily begin business rescue proceedings in terms of Section 129 of the Companies Act, 71 of 2008, be, and is hereby, set aside;*
> *2. The appointment of the second respondent as a business rescue practitioner be, and is hereby, set aside;*
> *3. Costs of this application against the first and second respondents, jointly and severally, the one paying the other to be absolved;*
> *4. Further and/or alternative relief.*"

[2] The background to the dispute insofar as relevant is set out below. The first respondent is an agricultural concern conducting farming operations on Portion 41 (of 12) of the farm Umlaas No. 902 at Eston, KwaZulu-Natal. The Applicant was its banker. As such the first respondent

conducted with the applicant a current account with an overdraft facility, an instalment sale agreement, as well as a loan account secured by a mortgage bond.

[3] The second respondent is alleged to be a company, despite the fact that its letterhead which was freely used in the course of these proceedings does not reflect this. It appeared to be the alter ego of Mr Adrian Vengadesan, a business rescue practitioner. In the course of the affidavits the parties have made no distinction between Mr Vengadesan and the second respondent company and dealt with both interchangeably as the business rescue practitioner for the first respondent. For purposes of this judgment I do not propose to dwell upon this distinction.

[4] When the first respondent breached the repayment terms of its various accounts with the applicant, the applicant instituted legal action against it under case number 1007/2019P for recovery of the amounts due. This resulted in a meeting convened on 5 March 2019 where the first respondent's representatives explained that it was experiencing cash flow difficulties. At that time the first respondent was indebted to the applicant in respect of the various accounts as follows;

a. Its current account number 1106 794 621 for R316 442-35;
b. An instalment sale agreement number 146 9075/002 for R258 643-80; and
c. The Nedbond Facility loan account number 146 9075/0001 for R1 843 257-63.

[5] Various options and possible solutions were considered and debated, but in the end it was agreed that the applicant would keep further action in abeyance for a period of three months from 1 April to 30 June 2019 to enable the first respondent's representatives time to rationalize its position and either turn the farming business around, or to sell the farm to best

advantage. Consents to judgment were signed, both on behalf of the first respondent, as well as by its two sureties Mr Ibanathan Govender and Ms Indranie Govender.

[6] In terms of the understanding and during the moratorium the first respondent would pay what it could in respect of the various accounts. At that stage its instalment obligations had been R6 602-72 per month in respect of the instalment sale agreement and R26 987-04 per month in respect of the Nedbond loan account facility. There was no pre-existing repayment schedule for the overdraft account which had been called up and technically was repayable forthwith in full.

[7] According to the applicant and during the period from 1 April to 1 August 2019 the first defendant paid a total of R91 000-00 towards the Nedbond loan account facility, but nothing in respect of the other two accounts, nor had it made any arrangements to otherwise settle its indebtedness to the applicant.

[8] In the result the applicant applied for judgment by default against the first respondent and its two sureties, which was subsequently granted on 2 August 2019 for;

d. Payment of R298 327-98 with interest thereon from 19 November 2018 at 20,5% per annum calculated daily and capitalized monthly;
e. Payment of R1 736 745-63 with interest thereon from 19 November 2018 at 11% per annum, calculated daily and capitalized monthly;
f. Cancellation of the instalment sale agreement, return of the asset concerned, payment of R33 820-31 with interest thereon from 19 November 2018 at 12.05% per annum, calculated daily

and capitalized monthly, with leave to apply in due course for such damages as it may have suffered;

g. Costs of suit on the attorney and client scale.

[9] However, at the time unbeknown to the applicant, the first respondent had on 20 June 2019 resolved to begin voluntary business rescue proceedings in terms of s129(1) of the Companies Act 71 of 2008 (the Act), which resolution was filed with the Companies and Intellectual Property Commission (the Commission) on 28 June 2019 and from which date it became effective in terms of s129(2)(b) of the Act.

[10] The first intimation of these events reached the applicant on 30 July 2019 by way of an email and letter on the letterhead of the second respondent from a Mr Adrian Vengadesan who styled himself as the first respondent's business rescue practitioner. Therein the applicant was advised that the first respondent had entered into business rescue and attaching copies of the relevant resolution and lodgment with the Commission. In addition, applicant was advised of the first meeting of the creditors of the first respondent due to be held at the offices of the second respondent on 5 August 2019. In terms of s147(1) of the Act such notification should have been given within ten business days after the appointment of the business rescuer practitioner.

[11] The applicant's response was to consider the resolution by the first respondent as a nullity. In this regard it relied upon the provisions of s129(3) and (4) of the Act which required that a company entering voluntary business rescue was required to inform all affected persons of the fact of the resolution and its effective date, here being 28 June 2019 when it was lodged with the Commission, as well as the identity of the business rescue practitioner appointed, within five business days. The applicant correctly considered itself an affected person and because the notifications only

reached it on 30 July 2019, it regarded such as being out of time. By reason of the provisions of s129(5) it concluded that the resolution was thereby rendered a nullity which could not be resuscitated.

[12] In the light of the attitude it had adopted, the applicant accordingly declined to attend the proposed first meeting of the first respondent's creditors. Notice of the alleged second meeting of creditors together with a draft business rescue plan was given by email dated 26 August 2019 to the applicant. In order to protect its interests the applicant's attorney Ms P J Combrinck related in her supporting affidavit how she conveyed to the second respondent's Mr Vengedesan that short notice of the second meeting for 30 August 2019 had been given and it was then agreed that the meeting would instead take place on 2 September 2019.

[13] On the latter date Ms Combrinck related how she attended at the offices of the second respondent, but was then informed that the other creditors had in fact attended on 31 August 2019. In the result she claimed to have held an informal meeting with Mr Vengadesan during which she pointed out certain anomalies in the draft business rescue plan circulated and was given some amended pages, copies of which were attached as annexure FA.20 to the applicant's founding affidavit.

[14] Ms Combrinck also said that she pointed out to Mr Vengadesan that the applicant was not aware that there had been formal publication of the resolution in terms of s129(3)(a) of the Act. In her affidavit she recorded that proof of such publication had in fact since then also not been forthcoming. She concluded her affidavit with recording that since 6 September 2019 there had been no further communications from or with Mr Vengadesan and by implication also not with the second respondent.

[15] In opposing the application the respondents primarily relied upon the answering affidavit of Mr Vengadesan who stated that he was a director of the second respondent. In order to address the allegation of the nullity of the first respondent's resolution by reason of not timeously adhering to the statutory time limits, it was alleged that on 6 August 2019 Mr Vengadesan had made application to the Commission in terms of s129(3) and (4) of the Act for the extension of time, which application was granted by way of a letter dated 14 August 2019 and a copy of which was attached marked AV2.

[16] The operative portion of the letter issued by the Commission under the hand of Adv Rory Voller in his capacity as Commissioner and although dated 14 August 2019, was signed by him on 15 August 2019, reads as follows:

> "*It was decided that an extension of time limits will be considered and granted in deserving circumstances as prescribed under Regulation 166(1) and (2) of the Companies Regulations published on 26 April 2011, in which a senior officer may generally extend a time limit set by the Act to accommodate administrative capacity and in the interest of efficiency and equality of access.*
>
> *Extension of the requirements of section 129(3) and (4) is herewith granted to PILISANI TRADING ENTERPRISE 59 CC from 28 June 2019 until the 5 August 2019 to allow sufficient time for the Business Rescue Practitioner to comply with the required sections of the Act.*"

[17] In the light thereof Mr Vengadesan claimed that any alleged non-compliance with the provisions of s129 of the Act and Regulations 166(1) and (2) had been cured. Insofar as Mr Vengadesan sought to rely upon

annexure AV6 to contend that an earlier notification was in fact sent to the applicant on 8 July 2019, such reliance is misplaced. Annexure AV6 is a copy of an email addressed in the name of Mr Vengadesan to one Janisha Govender requesting her to send out "*the attached letter*" under her letterhead to all creditors of the first respondent. Since there is no letter attached to the file copy of the email and there is no affidavit from the person Janisha Govender as part of the court papers, the claim remains unverified and unsupported.

[18] In para 26 of the answering affidavit the general allegation was made that an affected person was barred in terms of s130 from making application to set aside a business rescue resolution in terms of s129 unless the application is made prior to the adoption of the business rescue plan. However, no specific allegation was made of how, when, where and on what terms the creditors of the first respondent had approved and adopted the proposed business rescue plan.

[19] Section 130 provides as follows:

"*130 Objections to company resolution*

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-

(a) setting aside the resolution, on the grounds that-

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 129;

(b) setting aside the appointment of the practitioner, on the grounds that the practitioner-

(i) does not satisfy the requirements of section 138;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

(c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons."

[20] If the second meeting of the first respondent's creditors had duly adopted the business rescue plan as proposed by the business rescue practitioner on 30 August 2019 and since the notice of motion in the present application was only issued on 18 February 2020, the application was *prima facie* brought out of time. The issue of debate was whether it had been established that the proposed business rescue plan was ever adopted by the creditors of the first respondent.

[21] Ms Ploos van Amstel, who appeared for the second respondent submitted that this was established on the papers and drew attention to the statement by Mr Vengadesan in para 25 of the answering affidavit that there was no need to terminate the business rescue proceedings because the general body of the first respondent's creditors had adopted the business rescue plan and in support referred to the "*proof of the vote of creditors*" annexed to his affidavit and marked "AV7".

[22] In this regard it is interesting to note that the remark by Mr Vengadesan was made in passing in response to a repeated assertion on behalf of the applicant (at para 10.5 of the founding affidavit) that the failure to have timeously complied with the requirements of the Act, read with s129(5), rendered the first respondent's resolution a nullity. By way of contrast in para 13.4 of the founding affidavit of Ms Moodley, the unequivocal allegation was made that the business rescue plan had never been adopted, in response to which Mr Vengadesan in para 34 of the

answering affidavit merely responded with a general denial and a claim that "*all necessary steps were taken pursuant to compliance with business rescue proceedings and in compliance with the Act*".

[23] Mr Hoar, who appeared for the applicant, pointed out that annexure AV7 comprised a series of printed forms where in manuscript the names of purported creditors and the amounts claimed to be owing to them had been entered. There forms were undated, unsigned and the amounts claimed to be owing were all rounded off to the closest R50 000-00. This suggested that the claims were mere approximations and had not been verified and there was no indication whether the claimants were secured or concurrent creditors. In any event, there was no indication from annexure AV7 itself when the business rescue plan had been adopted.

[24] In his answering affidavit Mr Vengadesan dealt primarily with the allegations contained in the founding affidavit of Ms Salochini Moodley and not separately with the supporting founding affidavit of the applicant's attorney Ms P C Combrinck. In response to the averment in para 11.10 of Ms Moodley's affidavit incorporating by reference the affidavit of Ms Combrinck, Mr Vengadesan's reply in para 32 of his answering affidavit was to deny the alleged nullity of the business rescue proceedings and to admit the remainder, including the affidavit of Ms Combrinck.

[25] Ms Combrinck, in her affidavit dealt *inter alia* with the meeting scheduled for 30 August 2019 and pointed out that the notice of the meeting given on 26 August 2019 was short notice. In this regard she was correct because s151(2) requires at least five business days' notice. As a result, she said that she had been in contact with Mr Vengadesan, had pointed out to him the short notice and that they had agreed that the meeting would instead take place on 2 September 2019. However, when she arrived on 2 September 2019 she was informed that the "*other parties notified of the*

meeting" had in fact attended on 31 August 2019, so that the meeting between Ms Combrink and Mr Vengadesan then proceeded on an informal basis.

[26] Ms Combrink also recorded that she reminded Mr Vengadesan that proof of publication of the first respondent's resolution was still outstanding and that it has never been forthcoming. More importantly she said that she pointed out certain anomalies in the draft business rescue plan, as a result of which he furnished her with certain amended pages which were attached as annexure FA.20 to the founding affidavit of Ms Moodley. Since then there had been no further communication from Mr Vengadesan. This was echoed in Ms Moodley's founding affidavit at para 12, which was also not disputed.

[27] At the outset the question arising is when the business rescue plan was adopted by the first respondent's creditors. Since short notice had been given for 30 August 2019, no valid decision could have been taken on that date. In terms of the agreement asserted by Ms Combrinck the meeting should then have taken place on 2 September 2019, but on that date she was advised that certain unnamed creditors had attended on 31 August 2019. However, she was not informed that any formal creditors' meeting had taken place on that date, nor what decisions if any had been taken. This begs the question as to when, if at all, the proposed business rescue plan was considered and adopted.

[28] To add to the uncertainty was the production by Mr Vengadesan, upon being queried about inconsistencies and errors in the draft plan, of replacement documentation which, if they were to be substituted for the then existing plan, would have required creditors' approval, of which there was no suggestion.

[29] Mr Hoar also pointed out that there were no minutes or other indication of a formal meeting having taken place. In addition, counsel drew attention to the provisions of s152(2) which required the support at a formal meeting of more than 75% of the creditors voting interests and the support of at least 50% of independent creditors' voting interests. Counsel submitted that a voting interest is defined in s128(1)(j) read with s145(4) to (6) which determine the voting interests of creditors and that annexure AV7 does not reflect the status or voting interests of those creditors there reflected, nor the attendance and voting results of those present at any valid meeting.

[30] In addition counsel drew attention to the allegation made in the founding affidavit of Ms Moodley that all payments made to the applicant since the date of the resolution were made, not by either of the respondents, but by an individual "*J. Govender*" or "*Janisha Govender*". A series of payment vouchers were annexed marked "FA19" in support of this contention. Applicant drew attention to the fact that she was the daughter of the active member of the first respondent.

[31] In response thereto Mr Vengadesan in para 34 of the answering affidavit merely contented himself with a general denial. However, since it was undisputed that the applicant had no further contact with the second respondent or Mr Vengadesan after 6 September 2019, had any payments been made by either of the respondents in terms of an approved business rescue plan, one would have expected him to have said so.

[32] The issue of whether the applicant was disqualified in terms of s130(1) was raised by the respondents and in accordance with the general principle that he who asserts must prove (*Pillay v Krishna* 1946 AD 946 at 951; *Tooth and Another v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N) at 134 – 135) the *onus* rests in my view upon the respondents. It was for them to establish on a preponderance of probabilities that the proposed business

rescue plan for the first respondent had been adopted prior to the applicant issuing its notice of motion herein, thereby disqualifying the applicant from instituting the present proceedings thereafter. In my judgment they have failed to do so.

[33] However, even if the duty to establish that the creditors of the first respondent had duly adopted the proposed business rescue plan had rested upon the applicant then, in my view and in the light of the circumstances dealt with above, the applicant would have established upon a balance of probabilities that it had not been adopted in terms of s152 of the Act. The applicant was therefore not disqualified in terms of s130(1) from moving for an order setting aside the resolution.

[34] It remains to consider whether the applicant has established the grounds upon which it seeks to set aside the resolution. The applicant contended that it was entitled to have the resolution set aside because there had been a failure to satisfy the procedural requirements set out in s129, as well as there being no reasonable prospect of rescuing the company, both within the contemplation of s130(1)(a)(ii) and (iii).

[35] The respondents had effectively conceded that there had been a failure to comply with the procedural requirements of s129, but contended that the Commissioner, by virtue of his letter of 15 August 2019 and referred to in para 16 above and had condoned the late compliance with the requirements of s129(3) and (4), so that the irregularity had been cured and could not thereafter be relied upon by the applicant.

[36] In this regard Ms Ploos van Amstel, who appeared for the respondents submitted that the Commissioner was both empowered to and did extend

the time limits to accommodate the respondents as provided for in s129 of the Act and Regulation 166 of the Companies Regulations, 2011.

[37] Regulation 166 reads as follows:-

"*166. Extension and condonation of time limits.—*

(1) The senior officer of a regulatory agency may generally extend any particular time limit set out in the Act or these regulations for filing any document with that agency, to the extent necessary or desirable having regard to the public demand for access to the agency's services, the administrative capacity of the agency to meet that demand, and the interests of efficiency and equality of access.

(2) On good cause shown, the recording officer of a regulatory agency may condone late performance of an act in respect of which the Act or these regulations prescribe a time limit, other than a time limit that is binding on the regulatory agency itself."

[38] With regard to the failure to comply with the requirements of s129 counsel for the applicant submitted that in his letter of 15 August 2019 the Commissioner only intended to extend the period contemplated in s129(4)(a) relevant to the filing of the notice of the appointment of the business rescue practitioner with the Commission. That, so the submission ran, was because the Commissioner's powers were limited in terms of Regulation 166 to extending time limits for the filing of any documents with the Commission only. Accordingly, so it was submitted, the remaining failures were not condoned and amounted to failures to observe the provisions of s129(3) and 129(4)(b).

[39] I do not agree with this submission. That approach may be in keeping with Regulation 166(1) but Regulation 166(2) clearly provides a much wider discretion because the Commissioner may condone late performance of any

act in respect of which the Act, or the Regulations, prescribe any time limit, other than a time limit that is binding on the Commission itself. That, in my view, is what the Commissioner had in mind in his letter of 15 August 2019 and in so doing he was authorised to exercise his discretion. In addition, s129(3) of the Act also endows the Commissioner with a discretion to allow a company a longer period to comply with its provisions.

[40] The initial approach of the applicant's attorney, given the failure to observe the statutory time limits, that such failure rendered the resolution a nullity in terms of s129(5), thus *ipso facto* bringing the business rescue proceedings to an end, is undermined by the condonation granted by the Commissioner. In *Panamo Properties (Pty) Ltd v Nel NNO* 2015 (5) SA 63 (SCA), Wallis, JA explained in para's 28 and 29 that s132(2)*(a)*(i) of the Act provides for business rescue proceedings only to end when the court sets aside the resolution that commenced those proceedings. Accordingly, and even if the resolution had lapsed and become a nullity in terms of s129(5)*(a)*, the business rescue proceedings set in motion by that resolution had not terminated until the court set the resolution aside. Where a resolution lapsed and became a nullity it may be set aside under s130(1)*(a)*(iii), but the court still needs to be approached for the resolution to be formally set aside, thereby only then terminating the business rescue proceedings.

[41] The court further held that in considering the setting aside of a resolution on any of the grounds contained in s130(1)(a), the court in addition needs to be satisfied that, in the light of all the facts, it was just and equitable to set aside the resolution and thereby terminate the business rescue proceedings (at par 32).

[42] It follows that, by reason of this approach, the lapsing contemplated in s129(5)(a) is provisional in nature and only becomes effective once the court, being so satisfied, makes an order in terms of s132(2)(a)(i) setting

aside the resolution. That also makes it clear why, where non-compliance with s129(3) or (4) resulted in a lapsing of the resolution in terms of s129(5)(a), the Commissioner is nevertheless empowered to condone late performance, thus effectively reviving the business rescue process.

[43] It follows that I agree with counsel for the respondents that their failure to comply with the provisions of s129(3) and (4) had been condoned in the Commissioner's letter of 15 August 2019 and that in the light thereof it would not be just and equitable, by reason thereof alone, to set aside the resolution and terminate the business rescue proceedings.

[44] There remains, however, the applicant's reliance upon the provisions of s130(1)(a)(ii), namely that there is no reasonable prospect of rescuing the first respondent. I have earlier set out a number of factors relevant to the consideration of this aspect. Not only does it appear that the business rescue plan was not formally adopted by the creditors of the first respondent, but there was no indication that the second respondent had given effect to the proposed business rescue plan at all. Such payments as the applicant received all came from an individual, not associated with the second respondent, but instead with the active member of the first respondent.

[45] It was also undisputed that the applicant had no further contact with the second respondent or Mr Vengadesan after 6 September 2019, nor have the latter given any indication of how, since that time and until the matter was heard on 29 May 2021, a period in excess of twenty months, the business rescue had progressed, or what the prospects were of actually rescuing the first respondent.

[46] In this regard it is relevant that the proposed business rescue plan envisaged that creditors and more particularly the applicant, would have been paid in full by 30 July 2020, which as regards the applicant was not the position. In the schedule of claimed payments put up as annexure AV3 in the answering affidavit of Mr Vengadesan it was alleged that payments made to the applicant during the eighteen month period from March 2019 to 6 August 2020 totaled only R460 577-37, a far cry from settling the full indebtedness.

[47] By way of comparison, the first respondent's instalment obligations had been R6 602-72 per month in respect of the instalment sale agreement and R26 987-04 per month in respect of the Nedbond loan account facility. Without making allowance for the repayment the debt in respect of the overdraft account, these came R33 589-76 per month which, over the same eighteen month period totaled R604 615-68. Effectively the first respondent's debt to the applicant therefore increased during this period.

[48] It follows that even if the business rescue plan had been adopted and implemented, the financial position of the first respondent has markedly deteriorated during the period of its alleged currency and it does not appear that there is any reasonable prospect of the first respondent being rescued and avoiding ultimate liquidation.

[49] In the circumstances any further delay brought about by the resolution would undoubtedly be prejudicial to the applicant and indeed also to such other creditors as the first respondent may have. The submission by counsel for the applicant that the business rescue exercise in this instance was a calculated delaying tactic is not without merit.

[50] In all the circumstances I have come to the conclusion that the applicant has established, with the requisite degree of certainty grounds for the setting aside of the resolution in terms of s130(1)(a)(ii) on the basis that there is no reasonable prospect of the first respondent being rescued. I have in addition concluded in the light of all the evidential material placed before the court and in compliance with the requirements of s130(5)(a)(ii) that it would be just and equitable to set aside the resolution, thus finally bringing to an end the protracted attempt at voluntary business rescue.

[51] Neither counsel made any particular submissions with regard to the costs of the application. Counsel for the respondents submitted that the application should be dismissed, with costs and counsel for the applicant asked for costs as per para 3 of the notice of motion against the respondents jointly and severally. In the circumstances I see no reason to depart from the usual approach that costs should follow the result. Insofar as the second respondent has associated itself with the justification for the alleged exercise in business rescue, I am also of the view that an order for liability for costs payable jointly and severally is justified in all the circumstances of the matter.

[52] In the result I make an order substantially in the form sought by the applicant in its notice of motion, namely:

a. The resolution taken by the first respondent in terms of s129 of the Companies Act 71 of 2008 on 20 June 2019 to voluntarily begin business rescue proceedings is hereby set aside in terms of s130(5)(a) of the Act.

b. For the sake of clarity it is declared that in terms of s132(2)(a)(i) of the Act the order contained in para 1 hereof also brings to an end such business rescue proceedings.

c. In the result the appointment of the second respondent as the business rescue practitioner for the first respondent is set aside.

d. The costs of the application, including any reserved costs, shall be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

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VAN ZYL, J.

APPEARANCES:

For the Applicant:	Adv S Hoar Instructed by De Villiers Evants & Petit Applicant's Attorneys (Ref: PJ Combrinck/oj/02N012094) c/o Austen Smith Inc PIETERMARITZBURG (Ref: Mr C Smythe) Tel: 033 392 0500
For the Respondents:	Adv (Ms) Z Ploos van Amstel Instructed by Messrs Zayeed Paruk Inc DURBAN (Ref: Mr Paruk/01.1002.001) Email: zayeed@zpaa.co.za Tel: 031 301 3398/9 c/o Document Exchange PIETERMARITZBURG DOCEX 5, DURBAN
Judgment reserved:	26 May 2021.

Judgment delivered: 18 June 2021