REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED: YES
.....	22/07/2021
SIGNATURE	DATE

CASENO: 2138/2021

In the matter between:

PETRUS ZEELIE N.O.	Applicant
and	
MJEJANE FARM MANAGEMENT (PTY) LTD	First Respondent
CHRISTOFFEL ANTONIE ROUX	Second Respondent
PIETER JAKOBUS VAN OOSTHUIZEN	Third Respondent
TSHEPO CHARLES RAMPATLA	Fourth Respondent

THEODOR WILHELM VAN DEN HEEVER	Fifth Respondent
GRANT CHITTENDEN N.O.	Sixth Respondent
KEYSHA 187 INVESTMENTS (PTY) LTD	Seventh Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Eighth Respondent

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JUDGMENT

MASHILE J:

INTRODUCTION

[1] This is an urgent application that traces its origins to a resolution of the First Respondent ("MFM") adopted on 29 May 2021 placing It in business rescue. The resolution was subsequently submitted and filed with the Eighth Respondent ("the Commission") on 31 May 2021. Believing that the resolution was in contravention of Section 129 of the Companies Act, 71 of 2008 ("the 2008 Companies Act"), the Applicant launched this urgent application seeking final relief in the following terms:

"1. ...

2. That the resolution taken by the Second and Third Respondents to place he First Respondent in business rescue in terms of Section 129(1) of the Companies Act 38 of 2008 be set aside in terms of Section 130(1)(a) of the Companies Act 38 of 2008;

3. That, pursuant to an order granted in terms of prayer 2 *supra*, it be declared that the business rescue of the First Respondent has ended in terms of Section 132(2)(a)(i) of the Companies Act 38 of 2008;

4. That, pursuant to an order granted in terms of prayer 2 *supra*, it be declared that the First Respondent is in voluntary winding-up under the supervision of the Fourth and Fifth Respondents with effect from 12 April 2021;

5. That the Eighth Respondent be ordered to change the status of the First Respondent within its records from "Business Rescue" to "In Liquidation";

6. That the Second and Third Respondents be ordered to pay the costs of this application on a scale as between attorney and client, jointly and severally with any other party opposing;

7. ..."

FACTUAL MATRIX

[2] On 12 April, the Seventh Respondent ("Keysha"), a shareholder of MFM, approved a resolution placing the latter in voluntary liquidation. The resolution took effect on 15 April 2021. Following the coming into effect of the voluntary liquidation of MFM, the Fourth and Fifth Respondents ("Rampatla and Van Den Heaver") respectively, were appointed as liquidators. On 3 May 2021 and ostensibly unhappy with the voluntary winding-up, the Applicant initiated compulsory liquidation proceedings against MFM in this Court ["the compulsory liquidation application"]. On 6 May 2021, the aforesaid application, which is still pending, was served upon MFM.

[3] On 7 May 2021, the Second Respondent ("Roux") challenged the voluntary placement of MFM in liquidation. The challenge was through a legal entity for which he is the sole director and the entity is a creditor of MFM. Following a successful intervention as a creditor of MFM, the Applicant opposed the application by Roux. On 28 May 2021, the North Gauteng Division per Davis J, granted an order reversing the voluntary liquidation status of MFM.

[4] Purporting to be Acting in terms of the provisions of Section 129(1) of the 2008 Companies Act, on 29 May 2021, Roux and Van Oosthuizen as directors of Keysha, a shareholder in MFM, took a resolution placing MFM in business rescue. On 31 May 2021, the resolution was submitted to the Commission following which the Sixth Respondent ("Chittenden") became the appointed business rescue practitioner for MFM.

[5] On 31 May 2021, the Applicant launched an application for leave to appeal the order of Davis J setting aside the resolution placing MFM in voluntary liquidation. Davis J dismissed the application for leave to appeal on 1 June 2021. During the hearing hereof Counsel for the Applicant stated that the Applicant has petitioned the Supreme Court of Appeal and that outcome was still pending. I was urged to ignore this evidence as it lacked supporting material.

[6] At a properly constituted meeting of 3 June 2021, the Board of Directors of Keysha endorsed the decision of 12 April 2021 to place MFM in voluntary winding-up. On 7 June 2021, the Applicant became aware of the resolution to place MFM in business rescue. In response to receipt of news of the placement of MFM on business rescue, the Applicant launched these urgent proceedings on 10 June 2021 seeking relief as described above.

ISSUES

[7] The first issue for determination is whether or not the application was urgent. This becomes of interest to this Court because firstly, the Applicant was granted permission to remove the application from the urgent roll of the 29th of June 2021 and to re-enroll it at his convenience. Secondly, by majority vote the creditors of MFM have decided to grant indulgence for the meeting to decide on the business rescue plan to 31 August 2021. The second issue for determination is the validity of the business rescue resolution of 29 May 2021 especially having regard to the allegation that at the time when it was taken the compulsory liquidation application was extant.

ASSERTIONS OF THE APPLICANT ON URGENCY

[8] When the application first served before this Court on 29 June 2021, the Applicant had by then acquired knowledge that the directors of Keysha had adopted a resolution for the placement of MFM in business rescue. News of the placement of MFM came to his attention on 7 June 2021 and three days thereafter he launched this urgent application. In terms of Section 150(5) read with Section 151 of the 2008 Companies Act a meeting of creditors ought to be held within 35 days to vote on the business plan prepared by Chittenden.

[9] Thus, by the time the matter came before this Court the Applicant thought that a meeting for the adoption of the business rescue plan was to be held on 5 July 2021. Labouring under this impression, it was evident to him that he would not obtain substantial redress in due course if he elected to bring this application under the normal motion court proceedings. See, *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* **(11/33767) [2011] ZAGPJHC 196 (23 September 2011)**. This soon changed when Counsel for Roux and Van Oosthuizen advised that Chittenden would not do so as he was not in possession of documents that would assist him to prepare the business rescue plan. The documents were still in the possession of Rampatla and Van Den Heever.

[10] It became clear that the meeting to vote on the business rescue plan would not proceed on 5 July 2021 and that as such, Chittenden would seek a postponement from the creditors. This fact coupled with the Applicant's omission to serve the application on the employees of MFM persuaded this Court to allow the Applicant to remove the application from the roll but held him liable for the costs of the postponement. So, clearly on the facts stated above the application was urgent as the Applicant had limited time within which to bring the matter before court. Had it not been for lack of service upon the employees, I would have allowed the application to proceed as an urgent matter.

[11] The Applicant subsequently attended to the outstanding issues and enrolled the application on the urgent roll of the 13th of July 2021. He argued that he will still not obtain substantial redress were he to enrol this application in the ordinary motion court. The meeting of the creditors of MFM having been postponed to the 31st of August 2021 and the first available opposed motion date being the 26th of October 2021, it is inexorable to conclude that he will not obtain substantial redress in due course because by the time he is heard on the 26th of October 2021 the meeting would have been held possibly validating the business rescue plan thereby rendering the outcome of the application vain.

ASSERTIONS OF ROUX AND VAN OOSTHUIZEN ON URGENCY

[12] On the application being urgent on the first time it came to court, 29 June 2021, Roux and Van Oosthuizen asserted that the Applicant had confessed that he had known MFM to have been financially struggling as early as the latter part of 2020. The claim that the application was urgent some ten to eleven months later was rather staggering. Similarly, Roux and Oosthuizen persist with their argument of lack of urgency even with the date of 13 July 2021 notwithstanding their acceptance that the first available opposed motion court date is on 26 October

2021 and that as a result the horses would have bolted when the date of opposed motion court finally arrives on 26 October 2021.

EVALUATION

[13] I am somewhat at loss why Roux and Van Oosthuizen stretch as far as the latter part of 2020 to determine whether or not the application that served before this Court on 29 June 2021 was urgent. Insofar as I am concerned that period is neither here nor there. The clock on urgency started ticking on 7 June 2021, the moment the Applicant acquired knowledge of the fact of the adoption of the resolution placing MFM on business rescue and the date on which the meeting of creditors were likely to vote on the business plan. Having regard to the time within which the Applicant launched this application, 10 June 2021, and the date of the meeting of the creditors, it can hardly be said that the urgency was self-created. Accordingly, the application was urgent when it served before this Court on 29 June 2021.

[14] Turning to the question of urgency for the date of 13 July 2021. Once it is established that the first available date for opposed motion court is the 26th of October 2021 and that the meeting of the creditors to vote on the business plan is set for 31 August 2021, it is unproductive to argue that this application should wait until 26 October 2021. That said, it is probably necessary to state that the urgency is not as usual as any other urgent matter but it should nonetheless be considered as such because of the peculiar circumstances around it. For what it is worth, perhaps I should spell it out that the Applicant will not receive substantial redress in due course.

ASSERTIONS OF THE APPLICANT ON THE VALIDITY OF THE RESOLUTION

[15] The Applicant's approach in this regard is that the resolution to place MFM in business rescue adopted in terms of Section 129(1) of the 2008 Companies Act

by Roux and Van Oosthuizen on 29 May 2021 is invalid because of the provisions of Section 129(2)(a) of the same Act, which I will cite in full and discuss later below. Briefly, the section prohibits the adoption of a resolution placing a company in business rescue in circumstances where liquidation proceedings have been initiated. When the resolution was adopted by Roux and Van Oosthuizen on 29 May 2021 the Applicant had on 6 May 2021 already initiated proceedings to liquidate MFM. Accordingly, concluded the Applicant, the resolution that ushered in business rescue on 31 May 2021 is unlawful and ought to be set aside.

ASSERTIONS OF ROUX AND VAN OOSTHUIZEN ON THE VALIDITY OF RESOLUTION

[16] It was argued on behalf of Roux and Van Oosthuizen that the liquidation proceedings initiated by the Applicant on 6 May 2021 were conversion liquidation proceedings brought in terms of the old Companies Act, 61 of 1973. Inherent in Davis J's order of 28 May 2021 setting aside the voluntary status of MFM that was brought about by the resolution of 12 April 2021 was the incapacitation of the conversion application.

[17] This meant somehow that the compulsory liquidation application pending before this Court could not go ahead and that the Applicant will have to start the process all over again. Roux and Van Oosthuizen's justification for this was that the voluntary liquidation and the compulsory liquidation were intricately linked such that one cannot set aside the first one without any consequences on the second. Surprisingly, Roux and Van Oosthuizen conceded that the order of Davis J could not have set aside the compulsory liquidation application pending before this Court.

[18] Roux and Van Oosthuizen were elaborate in showing that submission of the resolution on 31 May 2021 to the Commission meant filing as defined in the 2008 Companies Act. Here the argument was that by the time the Applicant noted his appeal the business rescue had taken effect already. The Applicant had mentioned during argument in court that he has appealed the order of Davis J dismissing his appeal. This could not be taken into consideration as relevant documents that would serve as supporting material was not before court.

LEGAL FRAMEWORK

RELEVANT LEGISLATIVE PROVISIONS

[19] The parties have made numerous references to various statutory provisions. As a result, it could be useful to cite a few of those and perhaps look at case authority to determine what other courts have made of those provisions. The starting point should be Section 130(1)(a) of the 2008 Companies Act which is the Section under which this application has been brought. It provides that:

"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 requirement

set out in section 129".

[20] Section 129(1) allows the adoption of a resolution to place a company in business rescue where a Board of that company believes that reasonable grounds listed in Section 129(1)(a) or (b) exist. Section 129(2)(a), on the other hand, prohibits a Board from doing so where liquidation proceedings have been initiated. The two scenarios are cited below in the sequence discussed in this paragraph.

"129. Company resolution to begin business rescue proceedings. —

(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.

(2) A resolution contemplated in subsection (1)—

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed."

[21] Section 150(5) provides that:

"(5) The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by—

(a) the court, on application by the company; or

(b) the holders of a majority of the creditors' voting interests."

[22] Section 151 is headed: Meeting to determine future of company. Subsection (1) thereof provides that: "Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan."

[23] To the extent that controversy exists on the validity of the resolution adopted in terms of Section 129(1), the meaning of 'initiate' as mentioned in Section 129(2) may require clarification regardless of the common cause stance of the parties on what the meaning of the word is as used in the Section. Clarity on the meaning of the word is vital because depending on the meaning attributed to it, business rescue proceedings will prevail over liquidation proceedings or the latter will over the former. To put this to rest, in Tjeka Training Matters (Pty) ltd v KPPM Construction (Pty) Ltd and Others 2019 (6) SA 185 (GJ) the court, dealing with compulsory liquidation application and after considering a number of decisions, had the following to say about the word:

"[22] Accordingly, in my view:

22.1 The liquidation proceedings contemplated in section 129(2) of the 2008 Act must be served on the company, not merely issued to nnnnnn meet the requirements of the section."

The court reached the above after concluding that for a liquidation application to trump over a resolution placing a company in business rescue liquidation proceedings must have been initiated which means that such application must have been served.

EVALUATION

[24] The central question concerning this matter is the validity of the resolution to place MFM in business rescue. Roux and Van Oosthuizen leaned heavily on the conversion application for the liquidation of MFM by the Applicant and the supposed inextricable relationship between the voluntary and the compulsory liquidation applications. The intricacy of the relationship between the two applications, together dubbed, 'conversion application' is contrived and imaginary.

[25] The above became palpable upon Roux and Van Oosthuizen admitting that the order of Davis J could not have affected the validity of the compulsory liquidation proceedings currently pending before this Court. The pertinent part of Davis J's order reads *"The voluntary liquidation of Mjejane Farm Management (Pty) Ltd and all winding up proceedings in respect thereof, initiated by a resolution dated 12 April 2021 and registered at 15 April 2021, are hereby set aside."*

[26] Their admission is right because the order of Davis J is clear that it does not seek to legislate on matters that fall outside of the jurisdiction of the North Gauteng Division. That leaves the compulsory liquidation application pending before this Court intact. That tramples over the notion that the two liquidation applications, the voluntary and compulsory, are intricately connected such that the setting aside of the voluntary liquidation would necessarily affect the compulsory somehow.

[27] If it is acknowledged, as Roux and Van Oosthuizen do, that the effect of Davis J's order reversed the voluntary status of MFM such as to render it void, it must also be recognised that the only surviving liquidation application is the compulsory one pending before this Court. The disentanglement of what has been referred to as a conversion application leaves the compulsory liquidation application that was initiated by service of the founding papers on MFM on 6 May 2021 extant. It is thus manifest that the compulsory liquidation application preceded the resolution placing MFM in business rescue on 29 May 2021.

[28] The resolution was as such, taken in contravention of Section 129(2)(a) to which I have referred *supra*. The compulsory liquidation application in this case must prevail over the business rescue. In view of the provisions of Section 129(2)(a) of the 2008 Companies Act, a court was never expected to weigh up which of the two would be more appropriate in a particular set of circumstances. The conclusion of this Court means that it is gratuitous to deal with all matters that occurred post the 29th of May 2021.

[29] Among these, was the question of what came first between the leave to appeal and the filing of the resolution placing MFM in business rescue and whether or not the Applicant has appealed the order of Davis J that he dismissed on 1 June 2021. Additionally, it is also superfluous to traverse the questions that arise in terms of Section 130(1)(a)(i) and (ii) because I have already found that MFM has failed to adhere to the procedural requirements of Section 129.

[30] A further and necessary corollary of Davis J's order, which has been accepted by both parties to this dispute, is the reversal of the voluntary status of MFM. It ought to be a matter of course that Prayer 4 of the Notice of Motion seeking this Court to declare that MFM is in voluntary liquidation cannot be granted. The true situation now is that MFM is not in any form of liquidation but proceedings to have it declared insolvent are pending before this Court.

COSTS

[31] Finally, I turn to the issue of costs. I note that the Applicant has asked for costs on the scale as between attorney and client. I do not think there can be any justification for such costs, certainly not on the basis levied by the Applicant. I believe that Roux and Van Oosthuizen were not necessarily mindful of the unlawfulness of the business rescue resolution that they adopted on 29 May 2021.

As such, the appropriate scale in these circumstances should be the normal party and party.

CONCLUSION

[32] Given the above background, the application in terms of Section 130(1)(a) of the 2008 Companies Act succeeds and I make the following order:

1. The Applicant's non-compliance with the Uniform Rules relating to forms, time periods and service is condoned and the matter is heard as one of urgency in terms of Uniform Rule 6(12);

2. The resolution taken by Roux and Van Oosthuizen to place the First Respondent in business rescue in terms of Section 129(1) of the Companies Act, 71 of 2008 is set aside in terms of Section 130(1)(a) of the Companies Act 71 of 2008;

3. Pursuant to the order granted in terms of prayer 2 *supra*, it is declared that the business rescue of MFM has ended in terms of Section 132(2)(a)(i) of the Companies Act 71 of 2008;

4. The Commission is directed to remove or cancel the business rescue status of MFM from its records such that it accords with prayer 3 *supra;*

5. Roux and Van Oosthuizen are directed to pay the costs of this application, jointly and severally.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 22 July 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv G Egan**
Instructed by:	**Du Toit Smuts & Partners**
Counsel for the Second & Third Respondents:	**Adv Van Der Merwe SC**
Instructed by:	**Weavind & Weavind**
Date of Hearing:	**13 July 2021**
Date of Judgment:	**22 July 2021**