

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case nos. 952/11 and 23929/11

In the matter between:

MARTIN MELT VAN NIEKERK

Applicant

and

**SERISO 321 CC
FIRSTRAND BANK LTD**

Respondent
First Intervening Party

JUDGMENT DELIVERED ON 20 MARCH 2012

GANGEN, AJ:

[1] This is an application (under case no 23929/11) in terms of Section 131(1) of the Companies Act 71 of 2008 ("the Act") that Respondent be placed under supervision and that business rescue proceedings commence. In the event of the application failing, I am asked to make an order confirming the *rule nisi* issued under case no 952/11 for the liquidation proceedings to continue.

[2] Respondent is a close corporation and owner of immovable property in Knysna which has an interest in a bed and breakfast business which operates from the said immovable property. The Bed and Breakfast business (run by Applicant and his wife) was set up approximately

three years ago and pays Respondent a monthly rental which is used to finance the Mortgage Bond registered over the property.

- [3] Respondent fell into financial distress due to the fact that it stood surety for the debts of a close corporation, Emithini Hardwood CC ("Hardwood") which conducted business in the building and import industries. A final order of winding up of Hardwood was issued on 5 July 2011. Hardwood was indebted to the Firststrand Bank in the sum of R873146.11 and interest at 15% per annum from 1 December 2011 to date of payment.
- [4] Firststrand Bank called upon Respondent to make payment of the debt in terms of the provisions of two surety agreements. Respondent is unable to make payment of the debt of Hardwood from its normal revenue and has as a result fallen into financial distress.
- [5] As a consequence of Respondent's failure to pay the debt in terms of the suretyship, Firststrand Bank launched liquidation proceedings and the Honourable Judge Zondi granted a provisional liquidation order against Respondent on 31 October 2011 under Case no 952/2011.
- [6] On the return date of the rule *nisi*, the application to subject Respondent to business rescue proceedings was brought and, in terms of section 131(6) of the Act, suspended the liquidation proceedings
- [7] Applicant submits that if Respondent is placed under supervision and the business rescue proceedings commence, and a business plan is

implemented in order to rescue the affairs of Respondent, all the creditors of Respondent would be fully paid in due course, and Respondent would be granted the opportunity to proceed with its business.

- [8] Firststrand Bank is intervening on the basis that it is Respondent's main creditor, with a claim of R3 375 743,71 being R2 502 597,60 in respect of the mortgage bond and R873 146,11 in terms of the suretyship.
- [9] Firststrand Bank submits that Respondent is financially distressed and it is not just and equitable for financial reasons to commence business rescue proceedings and that there is no reasonable prospect for Respondent to be rescued as envisaged in section 131(4) of the Act. It is further submitted that Applicant has failed to place before this Honourable Court, "a workable business rescue plan", which has a reasonable prospect of success.
- [10] Business rescue proceedings is a new concept in South Africa brought about by the Companies Act 71 of 2008, which came into operation on 1 May 2011.
- [11] Section 128(1)(b) of the Act defines 'business rescue' as follows-
- 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for —
- (i) the temporary supervision of the company, and of the management of its affairs, business and property;

- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

[12] Section 131(4) of the Act states that –

‘After considering an application in terms of subsection (1), the court may —

- (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that —
 - (i) the company is financially distressed;
 - (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
 - (iii) it is otherwise just and equitable to do so for financial reasons,
 and there is a reasonable prospect for rescuing the company; or
- (b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.’

[13] It is common cause that Applicant is financially distressed as defined in section 128(1)(f) of the Act. It is clear from Section 131(4) that the person making the application for business rescue in terms of Section 131(1) of the 2008 Companies Act must satisfy the Court that there is reasonable prospect for rescuing the company.

- [14] The Applicant in this regard submits that there are two possible options available, namely to enable the business rescue practitioner an opportunity to either sell the property to a third party at a market related price thereby rendering it possible for Respondent to pay all its creditors or alternatively, to obtain additional finance to ensure that the debt that arose out of the surety agreements is paid and to so allow Respondent to continue trading.
- [15] In this regard Applicant submits that his attorney of record has negotiated a sale of the property and the Bed & Breakfast business for R12 million, although the sale is dependent upon the purchaser's application for residency which application is being attended to by his attorney of record. This is confirmed by the Applicant's attorneys of record.
- [16] The Applicant further submits that the nominated business rescue practitioner has already commenced negotiations with two other banks to obtain a loan to enable it to pay Firststrand Bank who is the only creditor who is putting pressure on the Respondent. The Bed & Breakfast business will pay the Respondent R40 000,00 rental monthly instead of the current amount of R30 000,00 which increase would be sufficient to service the new loan. Applicant has placed financial information before the Court indicating that the Bed & Breakfast is in a position to pay the increased amount.

- [17] Applicant further submits that in the event of the sale transaction proceeding, all the creditors will be paid in full. The creditors totalling R5 285 743.71 are as follows—

Applicant: (approximately)	R 590 000.00
Firststrand Bank:(Home Loan):	R2 502 597.60
Firststrand Bank:(Hardwood Sureties):	R 873 146.11
Mr Paster: (legal costs)	R 220 000.00
Hardwood (in liquidation)	R1 100 000.00

- [18] It is submitted by Applicant that Respondent has a counterclaim exceeding the R1100 000 owing to Hardwood and that the amount due to Paster was to be paid from the income earned by the Respondent over the next few months from income earned by the Respondent from the Bed & Breakfast business. Accordingly it is only Firststrand Bank that has placed pressure on the Respondent for payment in terms of the suretyship. It appears that payments are being made to Firststrand in respect of the Mortgage Bond.

- [19] Firststrand Bank submits that in respect of the sale of the immovable property, no firm offer is placed before Court and that no detail is given regarding the terms of the agreement. Firststrand Bank contends further that if there was a potential purchaser for the immovable property of Respondent, Applicant could assist the liquidator of Respondent, to conclude such agreement, and Respondent could be taken out of liquidation, if needs be. It is also the submission of Firststrand Bank that if the immovable property is sold, there is no need for Respondent to

be placed under business rescue in any event and the liquidation proceedings should proceed.

[20] Section 7(k) of the Act reads that the purpose 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.'

[21] In the case of *Koen & another v Wedgewood Village Golf & Others* WCC Case no 24850/11, Binns-Ward J remarked -

'The requirements for a supervision order for business rescue purposes are materially different from those which pertained to judicial management. It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.'

[22] These remarks are relevant in this case having regard to the importance of growing the tourism industry in South Africa's economy as the liquidation will have the result that the Bed and Breakfast business will no longer be able to operate. The Bed & Breakfast business is an upmarket five star establishment and mainly attracts international guests.

[23] It is clear that the legislature introduced this procedure in order to provide an alternative to liquidation that is preferable to liquidation.

[24] Whilst it is submitted by Firstrand Bank that the process for judicial management is relevant, I do not agree. This was dealt with specifically by Eloff, AJ in the unreported Judgment of *Southern Palace Investments 265(Pty)Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & another intervening)* WCC Case no 15155/2011 (25 November 2011).

[25] As Rogers, AJ pointed out in *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd* 2011 (5) SA 600 (WCC),

'The business rescue provisions in the 2008 reflect a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction (and see s7(k) of the Act).'

[26] Accordingly, although it is Firstrand Bank's submission that the application for business rescue proceedings is an abuse of process, I am of the view that this is the type of matter for which business rescue proceedings were intended.

[27] In weighing up the interests of creditors, the Applicant and the Respondent, one has to consider the potential prejudice to stakeholders if the application to commence business rescue proceedings is granted.

[28] Section 147(1) of the Act states that –

"Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of creditors, at which –

(a) the practitioner – (i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company”...

[29] It accordingly seems to me that Firststrand Bank being the only creditor putting pressure on the Respondent will not be prejudiced because of the time-frames referred to in the Act and also because Firststrand Bank has security for the debts.

[30] While the sale of the property may mean that the Bed & Breakfast will have to cease operating, there is a reasonable prospect that the amount due to Firststrand Bank in terms of the suretyship will be raised in which event the business will be able to continue to operate.

[31] There is a reasonable prospect that the body of creditors as a whole stands to gain should the Respondent be placed under supervision to allow the rescue practitioner an opportunity to either sell Respondent's immovable property to obtain a better dividend for all the creditors or to obtain the necessary finance to allow Respondent to obtain a further bond to pay the debt due in terms of the suretyship and to continue trading as a solvent entity.

[32] It is also common cause on the papers that the property is worth at least R5.5m while the outstanding bond is currently R2 502 597.60.

[33] I am satisfied that there is a reasonable prospect that the business rescue practitioner will be able to raise a further bond to pay Firststrand Bank the amount due in terms of the surety agreements to enable the

Bed & Breakfast to continue operating and generating an income for the Respondent or to sell the property at a market related price thereby being in a position to pay all creditors in full.

- [34] Firstrand Bank also made submission that it wanted to nominate the business rescue practitioner. Section 131(5) states that if the Court makes an order placing the company under supervision and commencing business rescue proceedings,-

“the Court may make a further Order appointing as interim practitioner a person who satisfies the requirements of Section 138, and who has been nominated by the affected party who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in terms of Section 147.”

- [35] Firstrand Bank would accordingly be entitled to raise any concerns regarding the interim practitioner at the first meeting, there being nothing to suggest that the practitioner nominated does not meet the requirements of Section 138.

- [36] It is accordingly ordered that-

1. The Respondent is placed under supervision and that business rescue proceedings commence as envisaged in terms of the Companies Act 71 of 2008 ("the Act").
2. Mr Graham Stavridis is appointed as interim business rescue practitioner in terms of Section 131(5) of the 2008 Companies Act.
3. The First Intervening Party is to pay the costs of this Application.

4. The liquidation proceedings under case number 952/2011 are suspended in terms of Section 131(6) pending the outcome of the business rescue proceedings.

A handwritten signature in black ink, appearing to be 'AJ Gangen', is written over a horizontal line.

GANGEN, AJ