Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 3300/2015

In the matter between:

YATZEE INVESTMENTS CC (UNDER BUSINESS RESCUE)	Applicant
and	
CAPX FINANCE (PTY) LTD	First Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	Second Respondent
COMBINED MORTGAGE NOMINEES (PTY) LTD	Third Respondent
KOORTS, HEINRICH	Fourth Respondent
KOTZEE, NANETTE	Fifth Respondent
BENJAMIN, ILZE	Sixth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Seventh Respondent

Court: Justice J Cloete

Heard: 12 August 2015

Delivered: 26 August 2015

JUDGMENT

CLOETE J:

Introduction

[1] The applicant was purportedly placed in voluntary business rescue by the seventh respondent (*'CIPC'*) pursuant to an application by its sole member, the fourth respondent (*'Koorts'*) at the end of November 2014. Mr Matheus Johannes Schlechter was appointed the applicant's business rescue practitioner (*'BRP'*) on 1 December 2014. He applies for an order extending the date for publication of a business rescue plan prepared by him which, he contends, is worthy of consideration by the first to third respondents (the applicant's creditors) and in particular the third respondent (*'CMN'*) which is the applicant's major creditor and which, it is common cause, is the only creditor which has any prospect of recovering monies due to it by the applicant.

[2] CMN, supported by the first and second respondents, opposes the relief sought by the BRP and has filed a counter-application for the applicant to be placed in provisional liquidation. CMN advances two attacks. The first is that the resolution

filed with the CIPC in support of the application for voluntary business rescue is a nullity. The second is two pronged, namely that there is no reasonable basis to believe that the applicant is financially distressed, and that there is no reasonable prospect of the applicant being rescued.

Background

[3] The applicant's main business is that of an estate agency. Its only asset of any value is an immovable property situated at 146 Oostewaal Street, Langebaan, which is a commercial property (*'the property'*) and which it initially acquired with loan(s) from CMN on 24 August 2008.

[4] The applicant is indebted to CMN in the sum of at least R10 million (according to a certificate of balance provided by CMN, the amount owing at 31 March 2015 was R11 180 323.07 together with further interest at 9.25% per annum calculated from 1 April 2015 until date of payment). The applicant's indebtedness is secured by way of participation mortgage bond no. B19190/2008 registered over the property in the amount of R10 million plus an additional sum of R2 million. CMN is the applicant's only secured creditor. Koorts bound himself as surety and co-principal debtor with the applicant to CMN for the limited amount of R8 496 000 excluding interest and costs.

[5] The applicant defaulted on its payment obligations and the last payment made to CMN was R10 000 on 1 April 2011. Koorts has never made any payments.

[6] The applicant first successfully applied for voluntary business rescue on 23 July 2012. Mr Jean-Pierre Jordaan (*'Jordaan'*) was appointed as business rescue practitioner by the CIPC on 31 July 2012. Just under two months later Jordaan terminated the business rescue proceedings on the basis that there was no longer a reasonable prospect of rescuing the applicant as contemplated in s 141(2)(a)(i) of the Companies Act 71 of 2008 (*'the Act'*). He informed the applicant's creditors that he would apply for the applicant's liquidation in terms of s 141(2)(a)(ii) of the Act, and duly launched the liquidation application on 17 October 2012 for hearing on 26 November 2012.

[7] The applicant opposed that liquidation application, as did Koorts in his personal capacity as an intervening creditor. After various postponements and for reasons which are unclear, Jordaan eventually withdrew the application for liquidation on 31 May 2013.

[8] On 8 November 2013 CMN instituted action against the applicant and Koorts to recover the sums owing to it. Both entered an appearance to defend and CMN applied for summary judgment. Koorts approached CMN's attorney to discuss the possible settlement of the matter. Various postponements followed over a period of five months while attempts were made to settle. These negotiations finally broke down. For various reasons more postponements followed and CMN instructed its attorneys to move for summary judgment on 1 December 2014. At the eleventh hour Koorts again applied for the applicant to be placed in voluntary

business rescue by the CIPC. Documents purportedly evidencing its business rescue status were handed by Koorts to CMN's attorney on 1 December 2014.

[9] This resulted in the application for summary judgment against the applicant being postponed *sine die* (in terms of s 133(1) of the Act). Summary judgment was however granted against Koorts and he has not made any attempt to satisfy that judgment.

Steps taken since BRP appointed

[10] The first meeting of creditors was held on 15 December 2014. According to the minutes of that meeting the BRP informed the creditors that:

10.1 The applicant was experiencing *'certain financial and operational difficulties'* and he had been appointed *'to assist the current management'* to address these;

10.2 He could not express a view on the applicant's financial position at the time because *'the financial statements are still to be finalised'*;

10.3 Based however on the information provided by the applicant's *'members'* and taking into account rentals paid by long-term tenants of the property, he was satisfied that there was a reasonable prospect of rescuing the

applicant *'if ABSA* [i.e. CMN] *was willing to negotiate the restructuring of the bond, which would allow for payment to ABSA and other creditors'.*

[11] It will thus immediately be apparent that even at that early stage the BRP was alive to the fact that any potential rescue was conditional upon CMN agreeing to the restructuring of the bond.

[12] At the same meeting the BRP secured a postponement for publication of the plan until 30 January 2015 (it would otherwise had to have been published within 25 business days of his appointment in terms of s 150(5) of the Act). On 29 January 2015 the BRP requested another extension until 6 March 2015 which the creditors refused. He then launched the application for an extension on 24 February 2015.

[13] The reasons advanced by the BRP were that:

13.1 In order to properly investigate the applicant's affairs he required properly drafted management accounts and financial statements *'correctly and accurately setting out the true financial position'*;

13.2 The applicant's auditors had been instructed accordingly but because the applicant's financial information *'was in such a shambles'* this was proving to be a lengthy process; and

13.3 CMN had not submitted a claim form *'in the manner and form requested'* (nothing turns on this for the reasons which follow).

[14] The BRP proceeded to set out what he considered to be the material facts which could render the proposed business plan viable. In essence he relied on a valuation of the property carried out by a quantity surveyor of R10 602 780.63 which he confirmed was disputed by all of the applicant's creditors. He explained that he was awaiting a valuation *'of an independent valuator'*. It is unclear why the BRP did not regard the one provided by the quantity surveyor to be independent.

[15] He also referred to the rental income received or to be received from various tenants in a total sum of R73 683.16 per month as well as residential rental commissions apparently received by the applicant of an average of R12 404 per month. The BRP stated that according to Koorts the applicant was expecting commission from various sales of immovable property but that *'due to time constraints the member* [i.e. Koorts] *could not provide me with a precise schedule of the list of transactions'* (although the BRP deposed to this affidavit on 20 February 2015, almost three months after Koorts had applied for voluntary business rescue on the applicant's behalf). The BRP made mention that Koorts was involved in negotiations with a *'possible investor with a view to the possible sale of the property'* but declined to divulge details due to what he referred to as

'the sensitive stage of the negotiations, and for fear of possible third party interference'. The BRP submitted that:

> *'54. Having regard to the total income that stands to be generated, it is clear that the business is capable of being rescued, should I as practitioner negotiate repayment terms with the Third Respondent* [i.e. CMN] *in terms of the bond payments'*

[16] Again, therefore, the BRP accepted that the success of any plan was conditional upon CMN agreeing to altered repayment terms.

[17] The BRP subsequently prepared a plan dated 6 March 2015 which is annexed to CMN's answering affidavit. The following portions thereof are relevant:

17.1 The property had been independently valued at a market value of R6.9 million and a forced sale value of R4.83 million;

17.2 In the event of a forced sale CMN would likely receive a dividend of 39 cents in the rand and on a sale in the normal course a dividend of 62 cents in the rand;

17.3 The only option other than sale of the property was to apply the revised rental income of an estimated R60 000 per month to payments to CMN on a monthly basis towards settlement of the applicant's indebtedness and to cede the rental income to CMN for this purpose; and

17.4 Despite the financial hardship experienced by the applicant due to the general economic decline in South Africa since 2008 and its former contractual obligations towards its licensor, Seeff Properties:

> *'2.8 The Company has however over the last 3 years made great strides in improving its cash flow problem, by taking various measures to minimise its monthly overheads, and by steadily settling its creditors over the last 3 years, to the point where the Company now only has a possible responsibility towards the three parties listed in the business rescue plan.'*

[18] Despite his earlier reliance on the necessity of obtaining audited financial statements, the BRP stated as follows at paragraph 3.2 of the plan:

> *'3.2 According to the Member, accountant and the auditors of the Company, the signed financial statements for the financial years ending on 28 February 2013 and 2014 respectively, as well as the management accounts for the period 1 March 2014 to 31 January 2015 will be available during the course of the coming week. These documents will be forwarded to all relevant parties as soon as same comes to hand.'*

[19] Although the business rescue plan is dated 6 March 2015, when the matter served before me the financial statements had not yet been provided to CMN. Insofar as forecast trading for the next three years is concerned, the BRP expressed the following view:

> *'5.1 The forecast for the following 3 years is irrelevant at this point in time.'*

[20] In subsequent affidavits the BRP:

20.1 Disclosed that the applicant's average monthly expenses amount to R60 861.21 including Koorts' drawings or salary of R20 000 per month, which effectively wipes out its rental income;

20.2 Supplied the applicant's schedule of anticipated commission on sales of immovable property totalling the sum of R115 670.18 excluding VAT over an eight month period (the last sale having taken place in March 2015) and thus, on an optimistic scenario, an average during that eight month period of R14 458.77 per month with no sales at all for the past five months; and

20.3 Disclosed the existence of two offers made by the same prospective purchaser ('*offeror*') to buy the property (including the existing leases) by private treaty, the first for R5 million – which was not even signed by the BRP and offeror – and the second, which followed hot on the heels of the first, for R5.25 million. The first offer was purportedly made in late June 2015 and the second in early July 2015. Both were subject to the suspensive conditions that CMN consent to the sale (which it has refused to do); and provided such consent was forthcoming, the approval of what appears to be a 100% bank loan to enable the offeror to pay the purchase price.

[21] In both of these offers it is recorded that the applicant and Koorts jointly and severally warrant:

> *'7.2.5 That the Seller's books and records pertaining to the business have been properly maintained according to law, save for the finalisation of the Seller's audited financial statements for both of the financial years ending on 28 February 2013 and 2014 respectively.'*

[22] It can thus safely be inferred that, as late as July 2015, and despite the BRP's assertion to the contrary in the business rescue plan of 6 March 2015, the financial statements for the years ended February 2013 and 2014 had still not been finalised just over a month before the application served before me.

The position of CMN

[23] During argument it was conceded on behalf of the BRP and Koorts that the applicant is both factually and commercially insolvent. It is thus not necessary to deal with CMN's allegations in this regard and I will only highlight the following pertinent aspects pointed out by CMN in its affidavits as well as argument on its behalf.

[24] First, in the affidavit deposed to by Koorts on 25 November 2014 in support of the application for voluntary business rescue, it was alleged that:

'5. The Applicant renders services as a real estate agency.

6. Due to the recession the Applicant was placed under extreme financial pressure and suffered [sic] *to meet all its financial obligations due to the reduction in workflow.*

7. The above gave rise to the Applicant experiencing financial difficulties and finally created financial distress for the Applicant as the Applicant could no longer meet its financial obligations as it [sic] *became due.*

8. As a result of the above the Applicant has fallen into arrears with its accounts and the debt multiplied increasingly.

9. Due to this fact it is unlikely that the Applicant will be able to meet its financial obligations as they become due and payable within the next 6 months…'

[25] These allegations are in direct contradiction to those of the BRP, recorded in the business rescue plan, that the applicant had over the past three years made great strides in improving its cash flow problem and by steadily settling its creditors.

[26] CMN has gone to considerable lengths to try to resolve the matter of the applicant's indebtedness, as is borne out by the protracted negotiations which followed the institution of action in 2013 and culminated ultimately in summary judgment being granted against Koorts. It seems that this was something of a hollow victory for CMN given that Koorts appears to be a man of straw who has

thus far managed to successfully play for time insofar as both the applicant's and his own indebtedness to CMN are concerned.

[27] On the applicant's own version, the best offer received for the property has been R5.25 million which would, at best, meet roughly half of the applicant's indebtedness. There is no indication on the papers that the BRP has received any other offers. Leaving the rental and estate agent's income out of the equation for the reasons already mentioned, at best for the applicant, its only other source of income (residential letting commission) of an average of R12 404 per month is a drop in the ocean when regard is had to the fact that the interest component alone which continues to accrue on the outstanding capital sum exceeds R85 000 per month.

[28] CMN argues that, not only could Koorts not truly have believed that there was a reasonable prospect of the applicant being saved when he applied for the second time for its voluntary business rescue, there is no prospect whatsoever of the applicant being saved.

CMN's first attack

[29] It is CMN's position that the resolution adopted by the applicant in support of its application for voluntary business rescue is a nullity because it failed to comply with the mandatory publication requirements of s 129(3) of the Act as read with regulation 123 of the Companies Regulations 2011.

[30] In short its complaint is that the applicant filed the resolution at the CIPC on 24 November 2014 but failed to publish a notice of the resolution in the prescribed manner within five business days thereafter, i.e. by 1 December 2014. Alternatively, if the date of the CIPC's stamp of 26 November 2014 is to be taken as the correct filing date, then the applicant's publication of its resolution was similarly out of time, because publication took place on 2 December 2014 and 5 December 2014 respectively.

[31] It is also submitted that the applicant failed to comply with regulation 123(2)(b)(ii) of the regulations, in that it failed to conspicuously display a copy of the Notice of Commencement of Business Rescue at its principal place of business or on its website and persists in this failure.

[32] On the other hand the BRP argues that the applicant has complied with the relevant publication requirements, alternatively has substantially complied therewith.

[33] In *Panamo Properties (Pty) Ltd v Nel and Another NNO* (35/2014) 2015 ZASCA 76 (27 May 2015) it was held at para [29] that:

> *'Once it is appreciated that the fact that non-compliance with the procedural requirements of s 129(3) and (4) might cause the resolution to lapse and become a nullity, but does not terminate the business rescue, the legislative scheme of these sections becomes clear. The company may initiate business rescue by way of a resolution of its board of directors that is filed with CIPCSA. The*

resolution, and the process of business rescue that it commenced, may be challenged at any time after the resolution was passed and before a business rescue plan is adopted on the grounds that the preconditions for the passing of such resolution are not present. If there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity and is liable to be set aside under s 130(1)(a)(iii). In all cases the court must be approached for the resolution to be set aside and business rescue to terminate. That avoids the absurdity that would otherwise arise of trivial non-compliance with a time period, eg the appointment of the business rescue practitioner one day late as a result of the failure by CIPCSA to licence the practitioner timeously in terms of s 138(2) of the Act, bringing about the termination of the business rescue, but genuine issues of whether the company is in financial distress or capable of being rescued having to be determined by the court. There is no rational reason for such a distinction.'

[34] For present purposes, I will assume, without deciding, that the applicant has substantially complied with the publication requirements contained in the Act. To my mind, a finding either way would make little difference, given what follows.

CMN's second attack

[35] CMN relies on s 130(1)(a)(i) and (ii) of the Act as well as *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers and Others* (228/2014) [2015] ZASCA 69 (20 May 2015) and *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA).

[36] S 130(1)(a)(i) and (ii) provide 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…'*
>
> [S 130(2) is not relevant]

[37] In *African Banking Corporation of Botswana Ltd* it was held at paras [30] and [34] that:

> *'[30] I am mindful of the warning by this court in Oakdene against being prescriptive about the assessment of reasonable prospects of rescue. But there can be no dispute that the directors voting in favour of a business rescue must truly believe that prospects of rescue exist and such belief must be based on a concrete foundation. Given the apparent state in which Kariba's affairs were when the resolution to commence business rescue was taken, there could have been no true basis, on 31 January 2012, for Mr and Mrs Nchite to believe that there were reasonable prospects of Kariba's rescue…*
>
> *[34] The true state of Kariba's affairs as at January 2012 and its anticipated operations could not be established without an update of the books of account, conducted on sound accounting principles, proper valuation of the company assets, and substantiated prospective income and expenditure. All these were lacking and no cogent case was made to support an opinion of reasonable*

prospects of rescue. Consequently, the resolution to commence business rescue was taken without a proper basis and falls to be set aside.'

[38] CMN submits that the findings in *African Banking Corporation of Botswana Ltd* are those which should be made in this matter. It contends that having regard to the facts the true financial status of the applicant could not have been known to Koorts when the resolution was passed in late November 2014. As such, there could have been no true basis at the end of November 2014 for Koorts to have believed that there were reasonable prospects of the applicant's rescue.

[39] There can be little doubt that CMN's contentions are correct. Counsel for the applicant and Koorts correctly did not dwell on this aspect. He rather focussed on whether the BRP has produced a business rescue plan which is reasonably capable of consideration within the ambit of the Act, or put differently, whether the plan has some merit to it for purposes of business rescue as contemplated in the Act.

[40] In *Oakdene* the court, dealing with the meaning of *'a reasonable prospect'* held as follows:

*'**A reasonable prospect***

[29] This leads me to the next debate which revolved around the meaning of "a reasonable prospect". As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427(1) of the 1973

> Companies Act *(see eg* Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd *2012 (2) SA 423 (WCC) para 21). On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on "reasonable" – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers.'*

[41] Counsel for the applicant and Koorts did not take issue with the figures provided by the BRP, but sought to persuade me that the reasonable prospect lay in affording the BRP time to sell the property on the open market so as to achieve a higher dividend for CMN than on a forced sale scenario. When he was asked about the best offer received of R5.25 million, he argued that this offer had been made at a time when the applicant was self-evidently distressed and that with time a better price could be achieved.

[42] However this amounts to pure speculation, which is precisely what the court warned against in *Oakdene*. The BRP has not produced a shred of evidence to suggest that, with time, there is a reasonable prospect of securing a better offer. What we do know is that: (a) only two offers were received from the same offeror over the eight month period following the applicant being placed in voluntary business rescue; (b) both offers were made shortly prior to the hearing; (c) the higher of the two offers is substantially less than the market value of the property;

(d) the only realistic prospect of CMN recovering any portion of the monies owing is on sale of the property, given the stark fact that even if the applicant continues to trade it will be unable to meet its payment obligations; and (e) interest is accruing on the amount owing at the alarming rate of more than R85 000 per month.

[43] The BRP has suggested that liquidation will inevitably result in a forced sale of the property. This is not correct when regard is had to s 386(4)(h) of the Companies Act 61 of 1973 which confers on a liquidator the power to sell property by private treaty.

[44] CMN is the only creditor which stands to gain. It has advanced cogent reasons why it is opposed to the purported rescue continuing. Neither the BRP, the applicant nor Koorts have been able to satisfactorily gainsay those reasons. Neither the applicant nor Koorts have made a single payment on account of the indebtedness since 1 April 2011. Having regard to what was expressed in *Oakdene* at para [38] I can see no reason why CMN's opposition should be regarded as unreasonable or *mala fide*.

[45] As was stated in *Oakdene* at para [33]:

> *'[33] My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the*

liquidation provisions of the 1973 Companies Act *which had, incidentally, been preserved, for the time being, by item 9 of schedule 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.'*

Conclusion

[46] Counsel for the applicant and Koorts accepted that in the event of the business rescue being terminated CMN has made out a proper case for provisional liquidation and has furthermore complied with the necessary procedural requirements.

[47] CMN has asked for the costs of its opposition to the main application to be paid by Koorts personally in terms of s 130(5)(c)(ii) of the Act. While there is merit in this request it is unlikely to have any practical effect on its own, and I thus intend ordering that such costs be borne by the applicant and Koorts jointly and severally.

[48] **In the result an order is granted in the following terms:**

1. The applicant's application to extend the date for publication of the business rescue plan is dismissed with costs, such costs to be paid by the applicant and the fourth respondent jointly and severally.

2. The resolution adopted by the member of the applicant in terms of section 129 of the Companies Act 71 of 2008 on 19 November 2014 is set aside.

3. The applicant and fourth respondent shall jointly and severally pay the costs of the third respondent in applying to set aside the resolution.

4. The applicant is placed in provisional liquidation in the hands of the Master of this Court.

5. A rule *nisi* is issued calling upon the applicant and any other interested party to show cause to this Court, if any, on TUESDAY 13 OCTOBER 2015 why the applicant should not be placed in final liquidation.

6. Service of this order shall be effected on:

6.1 The South African Revenue Service;

6.2 The registered office or principal place of business of the applicant;

6.3 All employees of the applicant;

6.4 Any trade union representing such employees; and

6.5 By publication in one edition of each of the Cape Times and Die Burger.

7. The costs of the counter-application (save as set out in paragraph 3 above) shall be costs in the liquidation.

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J I CLOETE