



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

Case No.: **3243/2021**

In the matter between:

**JONATHAN GOOSEN**

Applicant

and

**EMOX 911 CC**  
**(Registration 1992/015948/23)**

Respondent

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**REASONS FOR EX TEMPORE JUDGMENT/ORDER DATED 18 MAY 2021**

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**SALIE-HLOPHE, J:**

1] This is an opposed application to place the respondent close corporation (Emox 911 CC) under supervision and business rescue pursuant to Section 131(4)(a)(iii) of the

Companies Act 71 of 2008 (“the Act”).<sup>1</sup> The aforesaid application is thus sought on the basis that it is just and equitable for financial reasons and there exists reasonable prospects of rescuing the respondent. The dramatis personae central to this application in respect of Emox 911 CC (“Emox”) are as follows: Mrs. Patricia Duncan (majority member), Mr. Jonathan Goosen (the minority member), Mr Tony McPherson (grandson of Mrs. Duncan) and Ms. Lydia McPherson (daughter of Mrs. Duncan). Emox is a small business which manufactures and sell oxygen producing apparatus.

2] The application was instituted on an urgent basis on 22 February 2021 after a demand, dated 13 January 2021, was addressed to the respondent in terms of section 69 of the Close Corporations Act 69 of 1984, for a debt due by the respondent and owing to Mr. Tony McPherson (McPherson), for payment in respect of a loan due and payable to him in the amount of R173 050-00. The respondent (“Emox”) was as a result of the aforementioned claimed also threatened with liquidation proceedings, without further notice, should the said amount not be effected within 21 days in which event the respondent would be deemed unable to pay its debts.<sup>2</sup> The letter of demand by McPherson was preceded by a series of events which could be best described as Goosen having discovered on 15 September 2020 that the respondent had last prepared financial statements as at 28 February 2017 and that McPherson, grandson of Mrs. Duncan, had

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<sup>1</sup> Judgment was delivered ex tempore after hearing of the matter and submissions by counsel for both Applicant and Respondent on 18 May 2021. The facts were fully ventilated during the hearing of this matter and questions were also put to counsel by the Court. This written judgment sets out the full reasons of the ex tempore judgment so delivered.

<sup>2</sup> Record page 33 - Founding affidavit - Annexure JG8

exclusively been attending to the financial affairs of the business. Goosen's email enquiries to Mrs. Duncan for more information regarding the affairs of the business were not met with a reply, prompting a follow up telephone call a few weeks later. Upon speaking with her, it was confirmed that her grandson had taken over the business and that he is in charge of the business. This is not in dispute and is common cause between the parties. An email was directed by the applicant to McPherson seeking more information about the running of the business and details as to why and on what authority McPherson operated the managing and exclusive running of the business as well as a list of various concerns, disclosure of financial statements, current state of the business as well as other related enquiries as a member of Emox. The initial response during October 2020 from McPherson was that Mrs Duncan had taken ill since 2018, that he had taken over the business, that it was still currently operating on a small scale and that there were no major news to share. He concluded that in the event of further developments, contact will be made.

3] In a follow up reply from Goosen, a detailed list of particulars *apropos* the affairs of the business were set out and transmitted to McPherson. The latter replied on 26 November 2020 that he was in the UAE and would be returning to South Africa on 3 December 2020, assuring Goosen that he will make contact upon his return to arrange for a meeting and whereat all queries will be addressed. However, on 2 December 2020, an email from McPherson's attorneys of record (Hannes Pretorius Bock & Bryant) were transmitted to Goosen that he is not to make contact with McPherson and that all communication will be dealt with by their office. On 2 February 2021 Goosen followed up

with the said attorneys c/o Mr. Wernher Bock, repeating his request for financial and other business information of Emox. Later the same day, McPherson's attorney transmitted to an email to Goosen acknowledging that he (Goosen) had telephoned their office earlier that day and attached therewith a letter of demand in terms of Section 69 of the Close Corporations Act 69 of 1984 which was *ex facie* the demand dated 13 January 2021 and delivered by hand to the registered office of Emox (c/o De Villiers and Smit Accountants).

4] Goosen called a meeting by way of a notice on 11 February 2021, issued in terms of section 48 of the Close Corporations Act, and in his capacity as a member of the respondent. The purposes of the meeting would be to discuss a number of issues relating to Emox including relevant statements for the financial year ending 2018 until 2020, alternatively management accounts for the period, list of assets and liabilities, register of fixed assets, sales, contracts, stock sheets, resolutions since 2017, details of the loan amount due to McPherson as well as SARS tax returns. Correspondence relating to the affairs of the business and addressing ancillary issues and disputes between Goosen and McPherson were also communicated to Goosen's attorney at the instance of the mother of McPherson, Ms. Lynda McPherson ("Ms. McPherson"). It was also indicated in correspondence that any communication be directed to attorney, Mr. Bock, acting on behalf of the "*McPherson family and/or Mrs. Duncan*". Matters thereafter took a further unpleasant turn, Ms. McPherson eventually communicated via the same attorneys as McPherson that they wish to have no contact with Goosen.

5] Not taking the threat of liquidation lightly, and realising that Mrs Duncan would not be attending the meeting of members given her ill health, the present application was sought. Initially the matter was opposed by McPherson, in a notice dated 10 March 2021, however no affidavit deposed by him was filed in support of his opposition. The notice of intention to oppose reads as follows:

***“KINDLY TAKE NOTICE THAT Tony Martin McPherson in his capacity as creditor of Respondent and in his capacity as primary physical and financial carer of Mrs P.H.C. Duncan (who holds 75% of the members’ interest in Respondent and who is non compos mentis due to the fact that she suffers from dementia), intends opposing Applicant’s Application under the abovementioned case numbers.”***

6] The notice of opposition appointed Hannes Pretorius, Bock & Bryant (c/o Mr. Wernher Bock) as his attorney of record whom had also prior the launch of the urgent application communicated on behalf of Mc Pherson. Heads of argument were filed on his behalf by the said attorneys. Adv. Aurret was appointed as the *curator ad litem* for Mrs. Duncan shortly before the matter was set down to be heard on 18 May 2021. However, significantly, the *curator ad litem* is also represented by the same attorneys of record for both McPherson and Ms McPherson. The continued legal representation presupposes that there is no conflict of interest, actual or potential, for the patient under curatorship on the one hand and the McPhersons on the other.

7] Whilst the initial notice of opposition was filed by McPherson as indicated above, the supporting affidavit thereto were deposed to by Ms. McPherson on the basis that she had acted under a power of attorney issued to her by Mrs. Duncan, dated 16 April 2018 due to Mrs. Duncan's failing health and her capacity to make competent decisions in respect of herself and the business of Emox. Psychiatrist, Dr. du Plessis, confirmed in a report dated August 2020, that Mrs. Duncan was at that stage in an advanced state of dementia including severe anxiety and depression which necessitated optimal treatment.<sup>3</sup>

8] It was during consultation and preparation of the opposing affidavit, at which point Ms McPherson states that she had been informed by her attorney that in circumstances wherein Mrs. Duncan becomes *non compos mentis*, the power of attorney lapses and that accordingly her authority to act on behalf of Mrs. Duncan had ceased. For these reasons an application was launched to appoint a curator ad litem to assist Mrs. Duncan in these proceedings and if so necessary, a *curator bonis*. The affidavit further addresses the requirements of a successful business rescue application and in particular that the business of Emox was not in financial distress and in no circumstances could the relief sought herein be granted.

9] In anticipation of it being held that she does not have the necessary authority to act in accordance of the power of attorney, including delegation of powers to run the business to her son, McPherson, an affidavit was deposed to as a confirmatory affidavit

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<sup>3</sup> Record page 125 – Report by Dr Louis du Plessis - Psychiatrist

by him the he is a creditor of the business and that a substantial amount of R173 050 is due and payable by Emox. By virtue of being a creditor, it was stated that he had the necessary locus standi to support the opposition to the application, however, the affidavit did not address his threat just days prior (on 4 March 2021) to launch liquidation proceedings in respect of Emox in the event of his debt being unpaid. I pause to add that McPherson's gave an undertaking in March to hold liquidation proceedings off until after appointment of a curator *ad litem* for Mrs. Duncan.<sup>4</sup> The effect of the "belt and braces" approach by McPherson was clearly to avoid possible business rescue proceedings, by either staying in effective control of the business or the proverbial scorch earth policy so to speak. If he could continue exercise exclusive control of the business, he would rather have it liquidated.

10] It is disconcerting that upon appointment of the curator *ad litem*, the latter entered the fray of this litigation as follows: (a) the notice of opposition previously filed by McPherson's attorney of record is withdrawn; (b) on the same date a notice of opposition is filed by the curator *ad litem* and (c) the notice to participate by the curator and notice of opposition to the business rescue application appoints the attorney of the McPherson's (Wernher Bock c/o Hannes Pretorius, Bock and Bryant Attorneys). Furthermore and startlingly the notice read as follows:<sup>5</sup>

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<sup>4</sup> Record page 137 – Confirmatory Affidavit by Tony Martin McPherson – dated 17 March 2021

<sup>5</sup> Record page 190 – Notice to Participate and oppose the business rescue application – dated 12 May 2021

***“KINDLY FURTHER TAKE NOTICE THAT*** *the abovementioned curator ad litem, representing Mrs. Duncan, will oppose Applicant’s application and will reply for her opposition on the affidavit filed by Mrs. Lynda Patricia McPherson deposed at Strand on the 17<sup>th</sup> day of March 2021 and filed and served on the 17<sup>th</sup> of March 2021.”* (emphasis own)

11] The aforementioned notice is filed on behalf of the curator and reads as follows:

***“KINDLY TAKE NOTICE THAT*** *a curator ad litem, Advocate Elaine Auret, was appointed by this Honourable Court to act on behalf of Mrs. Patricia Henrieta Christina Duncan “(Mrs Duncan)” and to do what is necessary to protect her interest in this application....”* (emphasis own)

12] It is a trite principle of our law that the role of a *curator ad litem* and his or her primary function is to ensure that the proprietary and other interests of the patient are adequately protected. Appointed by the Court, the curator is bestowed with an important function to assist the Court and is required to act with good faith, must do so with utmost responsibility and should refrain from being a puppet or mouthpiece for persons who seek to control the interests of the patient, for those interests (particularly in the context of the litigation of this application) required the exercise of an independent mind and to be fearlessly protective of the patient’s rights. This clearly necessitated that Adv. Auret ought to have an independent legal representative to act in the patient’s best interests in a



manner which would not possibly cause strictures to her independence to look after Mrs. Duncan's interests.

13] Furthermore the Adv. Auret did not file an affidavit or report to give the Court insight into what are obvious concerns, viz:

(a) issues relating to conflict of interest by being represented by the same attorneys of the McPherson who is a creditor of the business, who is and who has been in control of the business for some time without the necessary lawful authorisation and whom had been threatening the winding up of Emox of which the patient is a 75% majority member; and

(b) Adv. Auret instead relies on the affidavit deposed by Ms McPherson who is not an affected person in the context of business rescue proceedings nor had she (Ms. McPherson) been granted leave as an intervening party, let alone the fact that she did not apply to intervene in the proceedings;

(c) The Court's order (29 April 2021)<sup>6</sup> appointing Adv Auret as *curator ad litem* of the patient specifically states at paragraph 3 thereof that:

*"Advocate Auret is appointed as curator ad litem to act on behalf of the patient and do everything which may be necessary to protect the patient's*

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<sup>6</sup> Record page 192 – Ex parte application of Lynda Patricia McPherson for the appointment of a curator ad litem et bonis for Ms Patricia Henrieta Christina Duncan) – case number 5546/2021

*interests in the application for the business rescue of Emox 911CC, issued under case number 3242/2021 out of this Honourable Court, including but not limited to the appointment of legal representation to assist with the protection of the patient's interests..."*

14] The Court cannot attach much weight (if any) to this affidavit. It was for the curator to file a supporting affidavit, satisfying the Court as to the basis of her opposition in her position as the curator for the majority member against relief to place Emox under business rescue and address the issues which warranted an explanation from her given her role as curator. Moreover, of all the "legal representation[s]" as authorised in the order appointing her as curator, she "makes the choice" to appoint an astounding common thread throughout the entire proceedings including during the events running up to the launch of these proceedings, namely: the legal representative and spokesperson for the McPhersons.

15] The curator did not display a shred of independence and semantics are at play making a mockery of this very honourable and fundamental processes in our law being Rule 57 of the Uniform Rules of Court in applications for persons incapable of managing their own affairs, appointments of this fiduciary role to officers of the Court and the provisions in the business rescue proceedings whereby affected persons in an application for business rescue proceedings are afforded rights and remedies in terms of Section 128(1)(a)(i) of the Companies Act, Act 71 of 2008.

16] The title of “Curator” so often used in our Courts is derived from the Latin language and means: “to take care” of the patient whom form the subject matter of curatorship. Trusted with this position, the curator must not abuse his or her position and act with *uberrima fides* (utmost good faith). That is however certainly not achieved by acting in the above manner. The curator opposed this application expecting of the Court to ignore the elephant in the room. The metaphorical idiom resonates very well with the sequence of events as it unfolded in this matter, ultimately coming before this Court in the form of this application. The absence in dealing with these issues which were paramount both procedurally and in substance fortifies my view that it would have had to address issues which are controversial, patently manifest but so much of an awkward aspect, it was best to not deal with it. But like the elephant in the room, it cannot be overlooked and adverse inferences are accordingly drawn by this Court in the result.

Business rescue proceedings in terms of Section 131(1) of the Act:

17] The aforesaid section provides for the basis upon which a Court may grant an order for business rescue proceedings. An affected person (in this case the applicant (Goosen) as a 25% member of Emox may apply to a Court at any time for an order placing the company under supervision and commencing business rescue proceedings. Section 131(4) provides that after considering an application in terms of subsection (1), the court may 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;...” (bold or underline emphasis my own)

18] What is meant by “financially distressed” as required in S131(4)(1)(i) is as defined at Section 128(1)(f) that: *“it appears to be reasonably unlikely that the company will be able to pay of its debts as they become due and payable within the ensuing six month; or (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.”*

19] Much has been made in the submissions by respondent’s counsel that on the applicant falls substantially short from demonstrating that the business of Emox is in **“financial distress”** as contemplated by the S131(4)(1) and as defined in S128(1)(f). However, notwithstanding the fact that McPherson who has been in exclusive “ad hoc” control of the business for a substantial time made demand of a debt due to it, to such an extent he considered it appropriate to do so by way of a section 69 notice in terms of the Close Corporations Act, the deeming provision in that section leads to the conclusion of law that the Emox is unable to pay its debts. After all McPherson’s exclusive control of the financial affairs would have solely placed him in the position that Emox had to be placed with a formal demand to Emox to liquidate the debt due to him. It made a roundabout turn days later when he supported an affidavit by his mother, Ms McPherson, that an application for business rescue proceedings ought to be dismissed with the contempt it deserves yet it had on 4th March 2021 threatened liquidation of Emox so

much so that he undertook to hold the launch of such liquidation over until after an appointment of a curator for Mrs Duncan.

20] The argument by counsel for the respondent falls short in a number of ways. Firstly the Court is not constrained to only grant a business rescue order when a business is found to be in financial distress as defined in the act. I agree, that whether this satisfies the requirement of “financial distress” as defined in the Act may have not been satisfied on the papers. That McPherson as a creditor with sole knowledge of the financial affairs of the business would threaten to institute winding up but oppose business rescue proceedings is mutually contradictory. It questions the motives of the McPhersons, whom this Court are persuaded are the rulers and keepers of the curator, Adv. Auret, in her role as curator for Mrs. Duncan.

21] To call it out in simple terms, what the keepers of the curator and in turn the respondent (Emox 911 CC) want is that the horse should rather be shot but not offered medical care in an attempt to save it, whilst at the same time maintaining that it is healthy and galloping so economically gallantly it does not require any inspection without taking the Court into confidence as to answer the applicant’s case. Whilst this oxymoron raises eyebrows, it is not necessary for the Court to go so far in determination of this issue. The requirement of financial distress is set out specifically in S131(1)(4)(a)(i). The three requirements are not set out in a conjunctive construction, instead each requirement stands on its own just like “financial distress” is a requirement on its own in subsection (i)

thereof. Differently put, each requirement could be interpreted disjunctively and financial distress need not be a common thread in each requirement.

22] This Court is empowered to make an order to begin business rescue proceedings on the case before it if it is just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the business. It is trite that this provision provides the Court with wide powers, taking into account all relevant facts and what informs a just and equitable determination underpinned by the financial interests of the business.

23] What is evident from the papers is that McPherson was belligerent in not wanting to disclose the financial affairs and bank statements of the business to Goosen when it sought access to it. The drama further unfolded with McPherson effectively refusing to disclose the trading activities of Emox, denying access to bank statements and other requested financials and refused to give an undertaking to refrain acting on behalf of Emox until this matter was set down for hearing on 18 May 2021. Goosen approached ABSA to provide copies of bank statements which were received on 3<sup>rd</sup> April 2021. Objection was raised to the filing of a supplementary affidavit by the applicant, dealing with the contents of the bank statements on the basis that it was not entitled to file an additional affidavit nor bolster its case in a further set of papers. Clearly, Goosen's analysis of the bank statements were only able to be made once it obtained, at the very least, the bank statements from ABSA.

24] I do not share the view of the respondent that when the applicant did not get it from McPherson, it could have approached ABSA directly as a member of the business. That view is audacious to say the least. Goosen was entitled to the disclosure of information of the business, which it had sought, which was not only limited to the bank statements. The applicant should be afforded an opportunity to supplement his views, limited of course to what the bank statements revealed. To disallow it would cause injustice and allowing the respondent (via the unauthorised but exclusive manager which McPherson was at the time) to benefit from its resistance to provide the requested information would be inimical to adjudicating this matter and in particular a determination whether there are circumstances which the Court warrants as just and equitable contemplated in the relevant section.

25] Without detailing and repeating various transactions referred to in the supplementary affidavit which warrant concern to the applicant, it suffices to say that the bank statements since the passing of the erstwhile managing member, Mr. Duncan, who had passed in 2017, illustrate a trend that funds of Emox are being paid to persons who are not members of the close corporation,<sup>7</sup> funds are used to pay expenses of a personal nature and not related to expenses of the close corporation. Furthermore VAT figures paid to SARS compared to the reflected sales figures, indicate that another entity for example Emox International (Pty) Ltd has used the VAT number of this close corporation, Emox 911 CC. Put differently, the respondents VAT payments do not coincide with the

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<sup>7</sup> Record page 156 – 159

respondent's sales and furthermore the close corporation appears to be used irregularly in a number of ways including being used as a personal slush fund of the McPhersons to the detriment and improper management of the financial affairs of the close corporation.<sup>8</sup> In the absence of a reasonable explanation it is also disconcerting to this Court and clearly warrants an order which rescues this business from apparent malfeasance and save it from abuse to its further financial detriment.

26] Business rescue proceedings must not be granted on speculation or spurious grounds and objective grounds must be present for the granting thereof. I am satisfied that the facts and circumstances of this case warrants such relief.

27] Given the concerns of this Court in respect of the *curator ad litem*, Adv. Elaine Auret, under Case Number 3243/2021, the Chief Registrar of this Court is directed to:

- i) Place a copy of this judgment with the Chairperson of the Cape Bar Council and/or the Legal Practice Council.
- ii) A copy hereof shall also be filed in the Court file under the Case Number 5546/2021 In Re: Ex parte application of Lynda Patricia McPherson for the

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<sup>8</sup> Record page 160 – para 12



appointment of a *curator ad litem et bonis* for Ms Patricia Henrieta Christina Duncan, Identity Number 560427 0066 081.

- iii) A copy shall be served on the Master of the High Court with reference to both Case Numbers 3243/2021 and 5546/2021.
- iv) Service by electronic mail shall suffice as contemplated in paragraphs (i) and (iii) above and proof thereof.

28] In all circumstances of this matter and for the reasons aforesaid, the Court was satisfied that sufficient facts were before it to grant an order placing the respondent under supervision and business rescue and for a business rescue practitioner to be appointed who would be able to investigate the affairs of Emox as set out in the order attached hereto and marked as "X".



SANE-HLOPHE, J