REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 36492/2018

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	~~YES~~/NO
2.OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
3.REVISED	
13/12/2019	
DATE	SIGNATURE

In the matter between:

ZIKHULISE AUTO RECOVERIES (PTY) LTD **(Registration No.: 2008/022302/07)**	First Applicant
MABONG FLORA-JUNIOR MPISANE	Second Applicant
DERRICK SIBONGISENI NTOMBELA	Third Applicant
and	
ZIKHULISE AUTO RESTORERS (PTY) LTD **(IN FINAL LIQUIDATION)** **(Registration No.: 2017/039864/07)**	First Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
SHAWN WILLIAMS N.O.	Third Respondent
GERARD LEONARD PARIS N.O.	Fourth Respondent
THE MASTER OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA	Fifth Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Intervening Party

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JUDGMENT

DIPPENAAR J

[1] The applicants seek an order: (1) placing the first respondent ("ZAR") under supervision in terms of s131(1) of the Companies Act[1] ("the Act") and directing that business rescue proceedings are commenced with effect from date of issue of the application in terms of s132(1)(b) of the Act; (2) appointing Mr KR Knoop as business rescue practitioner and (3) costs against any party who opposes the application. The first respondent ("ZAR") is an entity in liquidation.

[2] The application is only opposed by the intervening party, the South African Revenue Services ("SARS"). The liquidators of ZAR abide the court's decision but have filed an extensive affidavit providing the factual position of ZAR.

[3] The application was not served on the intervening party ("SARS"), the major creditor in ZAR"s estate, nor was it notified of the proceedings, resulting in it launching an application for leave to intervene in these proceedings. This application was not opposed. During the hearing, I granted SARS leave to intervene. The applicant

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[1] 71 of 2008

conceded that the costs of such intervention should be borne by the applicants on an unopposed scale.

[4] SARS opposes the business rescue application on various grounds. It contends that: (1) the business rescue application constitutes an abuse of the court process; (2) ZAR is not a suitable candidate for business rescue as envisaged in chapter 6 of the Act; (3) ZAR is commercially and factually insolvent; (4) the applicants failed to established a reasonable prospect that either of the two objectives of the business rescue can be achieved; (5) the proposed business rescue plan presented by the applicants is not detailed, nor does it take into account SARS' claims against ZAR and is set out in vague and speculative averments; (6) ZAR no longer has a business that requires rescue; and (7) the applicants approach this Honourable Court with unclean hands and the sole purpose of the business rescue application is to frustrate and delay the liquidation process.

[5] SARS had launched the proceedings which resulted in ZAR being placed in final liquidation. SARS is a major creditor of ZAR, which is indebted to SARS in amounts of R 3211 167.77, R1 949 821.25 and R337 366.16 respectively in respect of assessed income tax, assessed VAT and outstanding PAYE.

[6] The first applicant and ZAR are companies in the Mpisane group, comprising entities in which the second applicant and her husband, Mr Wiseman Sibusiso Mpisane have at least a 50% interest and in respect of which the second applicant is the managing member or director. The second applicant is the deponent to the applicants' affidavits.

[7] A provisional preservation order, sought at the instance of SARS, was granted in respect of the assets of the second applicant and Mr Mpisane and an entity styled Zikhulise Group (Pty) Ltd on 23 November 2016 ("the KZN preservation order"). That order is still in force. In terms of that order joint curator bonii ("the curators") were appointed in whom the right title and interest in all the assets of the second applicant

vests, including her shareholding and membership interests in any entities. This includes her shareholding in the first applicant and ZAR. The order expressly provides that no-one except the curators may deal with the second applicant's assets, subject to the conditions and exceptions in that order. The second applicant is further only entitled to continue exercising her functions subject to the authority and express instructions or directions of the curators. In terms of the order, no-one, except the curators may deal with the respondents' assets, save with the consent of the applicant, SARS, which consent may not be unreasonably withheld. Although litigation subsequently ensued regarding the curators, resulting in the curators being substituted with other individuals, the order remains of full force and effect.

[8] A similar provisional preservation order was granted at the instance of SARS by the Gauteng High Court, Pretoria and the same curator bonii were appointed to ZAR and other entities on 11 November 2016. This order was made final on 23 January 2018, with certain amendments. The order concerned the assets of a number of associated entities, including ZAR and similarly placed the control of assets and any management functions under the control and subject to express instructions and directions of the curator bonii.

[9] After raising an aggregate assessment of R 7 488 005.88 for outstanding taxes during August 2016, SARS launched a winding up application against ZAR on 13 September 2016, resulting in a final order being granted on 19 June 2018.

[10] Pursuant to the granting of the final winding up order an auction of ZAR's assets was scheduled for 4 October 2018. A belated application for leave to appeal was launched, which was never prosecuted. The auction has never taken place. SARS characterises the present application as an abuse of process, aimed at thwarting the liquidation process and the sale of ZAR's assets.

[11] The applicant's case is that the business of ZAR was successful until SARS obtained a judgment in an amount of R2 880 724.45 during January 2016. It is

contended that all ZAR's assets were sold at a sale in execution in May 2016 for the paltry sum of R7 190.00. ZAR's business ground to a complete halt and was only restarted as a result of the first applicant advancing loans to it from time to time to meet its capital and operating expenses, deferring payment of invoices for services rendered and loaning certain vehicles to it at sub market related rentals.it is alleged that the first applicant has not proved a claim in the estate of ZAR due to "the foreseeable risk of a contribution". The founding papers do not particularise the amount of such alleged claim.

[12] The facts which emerge from the affidavit of ZAR's liquidators paint a very different picture. Significantly, none of these facts are strenuously contested in reply by the applicants, nor do they meaningfully deal with them. Instead, the applicants argue that the failure of the ZAR liquidators to oppose the business rescue application is significant and should be considered as a factor supporting the granting of the application. I do not agree. There may be many reasons why the liquidators have not formally opposed the application, including a lack of funds to do so. It would serve no purpose to speculate on this issue.

[13] The liquidators of ZAR, the third and fourth respondents, complain that they have had no co-operation from the second applicant in the winding up proceedings. The conduct of the second applicant in dealing with the liquidators of ZAR illustrates a pattern of frustration and a lack of co-operation.

[14] To date, no statement of affairs of ZAR has been completed, despite the liquidators' numerous attempts to obtain same. Its assets and liabilities were not disclosed. The liquidators were advised by one of the former curator bonii, Mr Strydon and the former legal representative of ZAR and the second applicant, Ms Faber, that ZAR had not been trading since the middle of 2016. It later appeared that the liquidators had been misled and that ZAR was still trading during August 2018. The true position is still unclear as the second applicant has provided conflicting versions on this issue and it is doubtful whether there is any business which can be rescued. It appeared to the

liquidators that the business of ZAR had been continued by the Mpisanes, who simply transferred the business of ZAR to another entity and have prejudiced ZAR's creditors. After investigation, the liquidators were able to compile a list of ZAR's assets, including numerous vehicles. The sale of these assets has been prevented by further litigation, including the present application.

[15] The applicants emphasise the purpose of business rescue set out in s7(k) of the Act, being to provide for the efficient rescue and recovery of financially stressed companies in a manner that balances the rights and interests of relevant stakeholders.

[16] The applicants contend that considering the forced sale value of ZAR's assets, after deduction of the administration and advertising costs and fees pertaining to the sale, creditors would not receive any awards. They contend that creditors would receive a greater return under business rescue that that which may be derived from a liquidation. This complies with the alternative goal envisaged by s128(1)(b)(iii) as read with 128(1)(h) of the Act.

[17] The case of the applicants is based on a tender and undertaking by the second applicant that she, as 50% shareholder of ZAR, would consent to the business rescue practitioner restructuring the equity of ZAR by transferring all of her shares to the first applicant. The first applicant, as 50% shareholder of ZAR, would in turn introduce a shareholder loan in an amount of R800 000.00, which amount has been deposited in trust with the applicants' attorneys of record. The first applicant would introduce a further R200 000.00 as post commencement finance for the business rescue practitioner to recommence the business operations of ZAR. This is the high watermark of the case for business rescue. It is argued that the R800 000 in trust ensures a better return to ZAR's creditors or shareholders than the no return they will receive in liquidation.

[18] The applicants have not however contended that any permission was sought or granted by the curators of the first and second applicants to give effect to the

proposed transactions. In fact, it is contended that the absence of consent at this juncture is not a stumbling block to the business rescue in that if the curators seek to obtain control of the funds currently in the trust account, the business rescue practitioner could later terminate the business rescue proceedings on that basis.

[19] The relevant portions of s131 of the Act provide:

> "(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing a company under supervision and commencing business rescue proceedings.
>
> (2) An applicant in terms of subsection (i) must –
>
> (a) serve a copy of the application on the company and the Commission; and
>
> (b) notify each affected person of the application in the prescribed manner.
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> ...
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> (4) 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 a 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."

[20] The applicants have not illustrated compliance with the peremptory provisions of s131(2)(b) of the Act which requires that every affected person must be notified of the application in the prescribed manner. It is common cause that ZAR's major creditor, SARS was not notified of the application. The applicants did not even in their founding papers provide a list of ZAR's creditors and there is no evidence that its other creditors or affected persons were notified. This in itself justifies the dismissal of the application. There are however further reasons to do so.

[21] The applicants allege that they are affected persons as the first applicant is a creditor of ZAR, the second applicant a 50% shareholder and the third applicant the authorised representative of the employees of ZAR.

[22] SARS's challenge to the locus standi of the first and third applicants has merit and is conceded by the applicants in reply. The first applicant has not established its locus standi as creditor but has made vague allegations without any substantiating proof. The evidence presented by SARS that the employees allegedly represented by the third respondent as well as the third respondent are not employed by ZAR, but rather by another entity, Zikhulise Group (Pty) Ltd, remained unchallenged in reply.

[23] SARS concedes that ZAR is financially distressed. Although it is competent to convert liquidation proceedings to business rescue proceedings, where a company is insolvent good prospects of rescue (or achieving the alternative goal envisaged by s128(1)(b)(ii) of the Act) must be shown[2].

[24] The central issue in this application is whether there is a reasonable prospect that the second applicant's proposal will result in a better return for ZAR"s creditors or shareholders than would result from the liquidation.

[25] The proposed restructuring of the second applicant's shareholding in ZAR would require the consent of the curators in terms of the KZN preservation order. No case is made out that such consent has or will be granted. Although the founding papers state that the amount of R800 000.00 which was placed in the trust account of the applicant's attorneys of record emanated from the first applicant, the bank statements of the first respondent do not confirm this.

[26] Moreover, it is clear that the consent of the first applicant's curators should have been obtained and I agree with SARS' contention that the provision of such funds by the first applicant would be unlawful, absent the requisite consent. I further agree with SARS' contention that such amount is likely to be claimed by those curators as soon as they become aware of the funds currently in trust. The proposed plan was misconceived from inception and flagrantly disregarded the existence of the preservation orders. I am not persuaded that the applicants have illustrated any reasonable prospect as required by s131(4).

[27] It follows that the application must fail.

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[2] Richter v Absa Bank Ltd 2015 (5) SA 57 (SCA) at para 12 and Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and another intervening).[2]

[28] It is thus not necessary to deal with the remaining issues raised by SARS in any detail, save for its argument that the application constitutes an abuse of process. Considering the second applicant's manifest failure to disclose all the relevant facts and her brazen conduct in relation to this matter and the other extant court orders, SARS' contention is well founded. I am fortified in this view by the recent turn of events.

[29] After the hearing and on 11 December 2019 the applicant's attorney of record, appropriately and in compliance with his duties as an officer of court, notified this court and SARS that he received instructions subsequent to the hearing on 29 November 2019 and after judgment was reserved, to transfer the funds held in trust in accordance with the second applicant's tender, to certain parties. This resulted in the basis of the tender underpinning the application falling away as there are no funds available in trust.

[30] SARS has not sought a punitive costs order. This would have been an appropriate case to consider the granting of such order as especially the second applicant's conduct is worthy of censure. There is no basis to deviate from the normal principle that costs follow the result. It was not disputed that the employment of two counsel were justified.

[31] I grant the following order:

[1] The application is dismissed;

[2] The applicants are directed to pay the costs of the intervening party, including the costs of the intervention application and the costs consequent upon the employment of two counsel, jointly and severally, the one paying the other to be absolved.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 29 November 2019
DATE OF JUDGMENT	: 13 December 2019
APPLICANT'S COUNSEL	: Adv. SK Dayal SC
APPLICANT'S ATTORNEYS	: Maharaj Attorneys
INTERVENING PARTY'S COUNSEL	: Adv. EM Coetzee SC : Adv C Naude
INTERVENING PARTY'S ATTORNEYS	: MacRobert Attorneys