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

Reportable

CASE NO: 9297/2016

In the matter between:

PETER ALEXANDER DALE	Applicant
And	
AERONASTIC PROPERTIES LTD	Respondent
And	
CLOETE MURRAY N.O	First Intervening Party
MOSES MACK BALOYI N.O	First Intervening Party
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Second Intervening Party
EAGLES TRUST	Third Intervening Party

JUDGMENT: 25 October 2016

DAVIS J

Introduction

[1] Applicant seeks an order placing first respondent, a company which had been wound up on 28 August 2014, under supervision and thus commencing business rescue proceedings, pursuant to s 131 of the Companies Act 71 of 2008 ('the Act'). The application has been vigorously opposed by second and third respondents and supported by the fourth respondent.

The factual background

[2] During November 2009 third respondent, the South African Revenue Services ('SARS') issued an assessment against first respondent relating to a claim for input tax in respect of value added tax. The assessment disallowed first respondent's claim in the amount of R 14 million which resulted finally in first respondent becoming liable to SARS in the sum of R 28 million. On 02 March 2011 SARS took judgment against first respondent for the sum of R 47 945 101.57 in the Magistrates Court Atlantis, pursuant to s 40 (2) (a) of the VAT Act 89 of 1991 ('VAT Act'). This amount included penalties and interest. On 24 May 2013 SARS applied for the liquidation of first respondent on the basis that it was factually and commercially insolvent, in terms of the assessment which had resulted in a liability for SARS in the amount R 28 million plus the interest and penalties. On 28 August 2013 first respondent appealed against this assessment to the Tax Court. Significantly, this appeal was dismissed on 28 August 2013 on the strength of an agreement entered into between the first respondent and SARS.

[3] On 6 November 2013 an entity, Maverick Transport CC whose sole member is applicant in the present application issued an application to place the first respondent in business rescue. This application was dismissed on 16 February 2014. On 28 August 2014 first respondent was placed under final liquidation. On 17 November 2014 first respondent filed an application for leave to appeal in respect of the order. This application for leave to appeal was dismissed on 26 June 2015. On 24 July 2015 first respondent petitioned the Supreme Court of Appeal, which application was rejected for want of compliance with the rules of the Supreme Court of Appeal.

[4] On 16 September 2015 first respondent petitioned the Supreme Court of Appeal for a second time which petition was refused on 17 November 2015. Undeterred, first respondent applied for leave to appeal to the Constitutional Court on 5 January 2016, which application was refused on 20 March 2016. Subsequent thereto, applicant launched the present business rescue application on 31 May 2016. On 13 July 2016 the first intervening parties (the liquidators) the second intervening parties (SARS) and the third intervening parties (the Eagles Trust) were granted leave to intervene respectively and accordingly became second third and fourth respondents in this application.

[5] The judgment by Cossie AJ on 27 October 2014 which set out the reasons why the first respondent was placed under final liquidation is illuminating for the purposes of the present dispute. It sets out the facts of the assessment for VAT briefly as follows: On 28 February 2009 first respondent purchased helicopters, helicopter components and spares from a company called Summer Days Trading 709 (Pty) Ltd which was represented by Mr Gary van der Merwe who appears to represent fourth respondent in this application. SARS disallowed first respondent's claim for input tax in the sum of R 14 million and, as a result, respondent became liable for the payment of R 28 million being the additional tax in terms s 60 VAT, together with the penalties and interest. In arriving at its decision, SARS had concluded that the transaction between Summer Days and the first respondent was a scheme to obtain an undue tax benefit in terms of s 73 of the VAT Act.

[6] It appears that first respondent's argument in this particular case was that while the debt relied upon by SARS was presently owed, this debt would fall away once the order of the Tax Court had been rescinded, the appeal was reheard and it was found that SARS had incorrectly applied s 73 of VAT Act.

[7] In developing its case, first respondent, to a large extent, relied on a report by one Phillip Haupt who advised it that SARS had misapplied s 73 of the VAT Act. Cossie AJ rejected the argument and went on to find that SARS was correct in its contention that there was an objection to the assessment which was finalised, there was no application for review made of the order of the tax court which had been granted by agreement and in which first respondent had been represented by counsel. No application had been made for review and neither had payment been received. For these reasons, the court was satisfied that it was just and equitable to grant the order for the winding up of the first respondent.

[8] The application for leave to appeal against this judgment was refused as was the petition to the Supreme Court of Appeal on 27 November 2015 and likewise a further application to the Constitutional Court which was refused on 30 March 2016. I should add that it was regrettable that applicant was so poorly advised on the implications of VAT pursuant to the Haupt opinion which seems neither to grasp the meaning or implications of s 73 of the VAT Act nor the consequences which must flow from the successful application of this section by SARS, which creates a reverse onus. Given the facts, this provision would have constituted a significant hurdle for first respondent. See s 73 (3) of the VAT Act. In respect of penalties,

see s 39 of the VAT Act read together with Chapter 15 of the Tax Administration Act 28 of 2011.

[9] Be that as it may, it is clear that the tax dispute between SARS and first respondent has been settled and there is nothing that this Court can do insofar as any further adjudication of the tax dispute matter is concerned.

[10] I make this comment because applicant represented himself and this Court was required to explain that the tax dispute was *res judicata*. The only issue before this Court was to determine the application that first respondent be placed under business rescue in terms of s 131 read with s 131 (4) (a) of the Act.

Business rescue

[11] The key section in dealing with this application is s 131 (4) which provides as follows:

> '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 term 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.'

[12] 'Financially distressed', as employed in this section, is defined in s 128 (1) (f) of the Act in the following terms:

(i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due an payable within the immediately ensuing six months, or

(ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

[13] There has been some dispute as to whether a company can be placed into business rescue if it is already insolvent. See *Merchant West Working Capital Solutions (Pty) Ltd v Advance Technologies and Engineering Company (Pty) Ltd and another* [2013] ZAGPPHC 109 at para 8. I agree however with the view expressed by Rogers J in *Tyre Corporation Cape Town (Pty) Ltd and others v GT Logistics (Pty) Ltd and others* [2016] ZAWCHC 124 that conceptually both commercial insolvency and factual insolvency should be treated as a form of financial distress. In *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein Kyalami (Pty) Ltd and others* 2013 (4) SA 539 (SCA) Brand JA found:

'Although the company appears to be factually solvent in that the value of its assets, at least on the face of it, exceeds its debts it is unable to satisfy the judgment debt in favour of Nedbank. This means that it is both commercially insolvent – for liquidation purposes – and "financially distressed" within the contemplation of s 134 (4) (a)(iii).'

It is not clear whether Brand JA drew a distinction between factual and commercial insolvency or whether factual insolvency was similarly treated in this judgment. What however, in my view, is important to this dispute is the finding of Rogers J that, in terms of s 131 (4) (a) (iii) of the Act, a court can grant an application for business rescue, if it is just and equitable to do so for financial reasons and that follow irrespective of whether or not the company is financially distressed. Accordingly this requirement of s 131 (4) of the Act is met in this case.

[14] The problem facing first respondent however is the requirement that in terms of s 131 (4) (a) (iii) of the Act, a court must be satisfied that there is a reasonable prospect of rescuing first respondent. In this connection Brand JA said the following in *Oakdene Square Properties, supra* at para 29:

> '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 ...
>
> 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, 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.'

[15] To rescue a company within the framework of business rescue means achieving one of the goals provided for in s 128 (1) (b) of the Act, namely 'either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process.'

[16] The primary goal is to facilitate the continued existence of the company in a state of solvency. But the attainment of its secondary goal may suffice, for a successful application, namely that, even if the achievement of the primary goal cannot be shown to be viable, a business rescue may facilitate a better return for the creditors or shareholders of the company then would result from immediate liquidation. See *Oakdene Square* at para 26.

[17] For this reason, what was incumbent upon the applicant in order to succeed in this application for business rescue, was to place before this court a factual foundation for the existence of a reasonable prospect that one or other of the desired purposes of business rescue can be achieved. See *Prospect Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and another* 2013 (1) SA 542 (FB) at para 11 together with the judgment of Brand JA in *Oakdene Square Properties, supra* at para 31. In this connection the approach adopted by Binns-Ward J in *Koen v Wedgewood Village Gold and Country Estate* 2012 (2) SA 378 (WCC) at para 17 is extremely helpful:

> 'Whatever the object of the proposed business rescue, however in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved. While it is the function of the business rescue

> practitioner, if appointed, to draw up a business rescue plan to be considered by the "affected persons", the founding papers in the business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or at the very least make out a case for the court to hold that the investigation by a business rescue practitioner to that, end in terms of s 141 (1) of the Act appears to be justified.'

This *dictum* disposes of the major argument which Mr van der Merwe, who appeared personally on behalf of the fourth respondent, sought to develop, namely that there is a basis by which this Court can make a determination that a reasonable prospect exists that would justify an order in favour of business rescue. The evidence is simply not there to support the argument.

[18] Applicant realised that the founding affidavit, upon which the application for business rescue was based, was so skeletal that without a postponement and hence the development of a further set of arguments, based on further affidavit evidence it would be impossible for this court to grant the application in terms of the test as I have outlined it. The problem for applicant is that the only evidence upon which he sought to base his case was that the asset of the first respondent which has already been sold in the amount of R 4 million, which is the price obtained at a properly advertised auction sale which took place on 26 February 2016, was grossly undervalued. In his view, the true value is in the amount of R 89 million. In support of this contention, applicant appended a valuation report dated 13 June 2013 to his papers; that is a report issued some three years prior to the current business rescue application being launched.

[19] The valuation report is not a sworn valuation. Further, it is based on various speculative developmental options, none of which are substantiated in the report. Thus, the report makes mention of the fact that the property is in close proximity to Koeberg Power Station, although how this is to be factored into a valuation is never properly explained. A vague averment is made of the possibility of the City of Cape Town utilising the site as a possible landfill site but no concrete facts were produced to illustrate how this was to occur or how viable this option might prove to be. According to the report, an offer was made in 2007, whereas the second respondent correctly noted, no facts were produced that remotely confirmed the veracity of this offer to purchase, which had allegedly been received. Significantly, attached to the papers of second respondent is a valuation report relied upon by SARS in the liquidation application which is dated 5 April 2013 and which valued the property in the amount of R 5 055, 450.00.

[20] When pressed on these points, applicant sought to provide further evidence from the bar as to the value of sand which was located on the asset, which land has already been sold. Given the amount of time that has lapsed one would surely have expected the applicant, if there was any cogent basis for these further averments, to have produced affidavit evidence to support this belated application. I should add that applicant on 2 August 2016 filed a supplementary affidavit in support of the business rescue application to which I shall return presently, but nothing about sand and its financial implications appears therein.

Evaluation

[21] The founding affidavit read together with the supplementary affidavit by applicant provides no basis, for a business rescue application, save for a vague valuation report which is not accompanied by an affidavit. On this filmiest of bases, the argument was developed that, if the application was granted and the sale was cancelled, the property would fetch sufficient either to provide a far better return for creditors or, alternatively, to rescue first respondent from its insolvent position. As I have indicated, given the noncompliance with the clear test required for an application for business rescue, there is no basis by which to grant this application.

[22] The further question therefore arises as to whether there is a basis to grant applicant a postponement. No formal application was made in this regard. The issue only was raised when it became apparent that, on the papers lodged before this court, there was no evidence sufficient to grant the application so sought.

[23] This is not the first business rescue application that concerns the first respondent. As indicated earlier, on 26 February 2014 a business rescue application was dismissed, pursuant to which a provisional winding up order was granted. That business rescue application had been launched on behalf of Maverick by applicant in this matter. Significantly, the reason given for the financial difficulties of first respondent in that case was that first respondent had "entered into a business relationship with a gentleman known as Mr Gary van der Merwe". The founding affidavit indicated that the charge of fraud had been laid by first respondent against Mr van der Merwe. In that application, that applicant had relied

on a report by one Mr Crous and hence on alleged offers for the property during 2007-2009, all of which appeared not to be bona fide offers to purchase.

[24] It is clear from the papers and hence from the chronology of this case, as I have outlined it, that a postponement should not be granted. It is but another desperate attempt to obstruct the implementation of a final order which was granted in circumstances which renders that order unassailable.

[25] Mr van der Merwe raised one further argument, namely that, were a business rescue application to be granted, somehow this would serve to exclude from the calculation of first respondent's solvency the debt owing the SARS. In so arguing, he sought to rely the decision in *CSARS v Beginsel NO and others* 2013 (1) SA 307 (WCC). This case turned on the question as to whether SARS enjoyed a preferential claim, and hence whether the business rescue practitioner had incorrectly determined that SARS' voting interest should not be afforded a different status to that of ordinary creditors. Hence, the case turned on the meaning of s 150 (2) (b) (v) of the Act, namely whether the business rescue plan could be created which would specify the order of preference in which the proceeds of property would be applied to pay creditors, if the business rescue plan was adopted. As Fourie J put it in his cogent judgment: 'The issue to be determined is whether or not SARS is to be treated as a preferent creditor in business rescue proceedings.' (at para 21)

[26] This decision cannot support an argument that, if the first respondent is placed into business rescue, the claim by SARS disappears from the calculation of whether first respondent is financially distressed. It was further argued that if SARS

is not a preferent creditor then other creditors would be able to obtain a better return, if the business rescue application is granted and business rescue therefore proceeded.

[27] To return to *Beginsel, supra* Fourie J did answered the question regarding preferences as follows:

> 'No statutory preferences are created in Chapter 6 of the Act such as are contained in ss 96-102 of the Insolvency Act. I would have expected that, if it were the intention of the legislature to confer a preference on SARS in business rescue proceedings, it would have made such an intention clear. This could easily have been done, but no trace of such intention on the part of the legislature is found in the Act. In my view, the language of the aforesaid provisions of the Act, read in context, and having regard to the purpose of business rescue proceedings, justifies only one conclusion, namely that SARS is not, by virtue of its preferent status conferred by s 99 of the Insolvency Act, a preferent creditor for purposes of business rescue proceedings under the Act.'

But this finding surely cannot be employed to support an argument that, as SARS' claim stands on the same footing as other claims, that in and of itself is sufficient to claim that the alternative purpose of business recue can be achieved, namely improved return for creditors and shareholders. The animating idea of business rescue's alternative purpose is to ensure a more advantageous realisation of assets and consequently a better return. In turn, this brings the analysis back to a search for the proof for an enhanced sale of the asset. In this case, absent evidence which would suggest that the business rescue would realise significantly more in

proceeds on behalf of creditors than would a final liquidation order, the argument must stand to be rejected. In other words, the papers do not support the argument that an improved return by virtue of a business rescue would be forthcoming.

An application for costs *de bonis propriis* against applicant's attorney

[28] Mr Leathern who appeared on behalf of the second and third respondent together with Mr Lottering, submitted that a supplementary affidavit which had been deposed to by applicant contained so many scandalous vexatious and defamatory allegations against second respondent that the attorney who had assisted applicant in the compilation of this affidavit should be ordered to pay costs on a punitive scale.

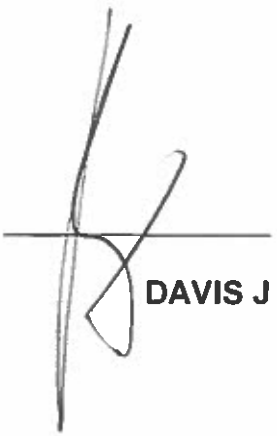
[29] I agree that the affidavit is scandalous and stands to be struck out. It is most unfortunate that unsubstantiated averments can be made, such as 'Cloete Murray cannot be trusted, his rotten, rotten and more rotten as are the other parties involved in this fraud...' Mr Dunn, the attorney who acted for himself in this part of the proceedings contended that he had conducted the case with care and diligence, had pursued his own research in order to determine whether there was justification in the averments made by his client (applicant). For these reasons, his conduct had not substantially and materially deviated from the standard expected of legal practitioners, simply because the court felt compelled to mark its profound displeasure at the conduct.

[30] There is no doubt that this affidavit constitute a regrettable element of this case and should not have been permitted to see the light of a legal day.

Unfortunately, it appears to me that Mr Dunn meticulously followed his client's instructions with a level of naivety which is most unfortunate. Even the manner in which he argued before this Court by reference to his own "personal research" showed a regrettable lack of insight or understanding of the implications of his argument and the implications thereof which have been persuasively set out by Mr Leathern. This is a case in which such an order could be granted. However, I have taken account of Mr Dunn's inexperience, that he has only been in practice for a short while and that, in my view, was clearly "led up the garden path" by his client. For these reasons, I decline to grant a punitive order in this case.

Conclusion

[31] For all of the reasons set out the application is dismissed. The applicant and fourth respondent, jointly and severally, are ordered to pay the costs of the second respondent and the third respondent which costs are to include the costs occasioned by the employment of two counsel (where so employed).



DAVIS J