



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

CASE NO: 10504/2016

In the matter between:

<b>DAVE TADEO NKHOMA</b>	First Applicant
<b>KGWAREDI JOHANNES ZIMBAWE</b>	Second Applicant
<b>MORTES KAMPIRA</b>	Third Applicant
<b>SAKHUMZI MGAGULI</b>	Fourth Applicant
<b>LIVENA JEAN SALMONS</b>	Fifth Applicant
and	
<b>ZONNEKUS MANSION (PTY) LTD (IN LIQUIDATION)</b>	Respondent
<b>THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE</b>	Affected Person/ First Intervening Creditor
<b>THE STANDARD BANK OF SOUTH AFRICA LIMITED</b>	Affected Person/ Second Intervening Creditor

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**JUDGMENT DELIVERED ON 11 NOVEMBER 2016**

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Weinkove A.J.

1. On 8 November 2016 I heard an application brought on behalf of Attorney Tim Dunn and various of the Applicants for leave to appeal against an Order which I made on 5 September 2016 in the above matter.
2. This application first came before me on 1 August 2016 when I made an Order by agreement postponing the matter to 5 September 2016 subject to the parties complying with the timetable in connection with the filing of Answering and Replying Affidavits and Heads of Argument.
3. When the matter appeared before me on 1 August 2016, the Commissioner for the South African Revenue Service ("SARS") and Standard Bank applied to be recognised as Intervening Creditors and, as such, affected persons.
4. On that occasion, Counsel came to introduce themselves to me outside the Court before I entered the Court and so did one Gary Walter Van Der Merwe ("Van Der Merwe"), who introduced himself as the person who represents the "other parties". When I enquired whether he had authority to appear in Court on behalf of these parties and whether he was a legal practitioner who had a right of audience in the Court, he advised me he was neither a legal practitioner nor did he have authority to represent parties in Court. I advised him that I was not prepared to allow him to represent any of the parties and he had to sit at the back of the Court when the proceedings commenced.

5. This aspect of the matter is relevant because Van Der Merwe later featured prominently in these proceedings and is referred to by the Intervening Creditors and others.
  
6. In due course, on 31 August 2016, the attorneys for Standard Bank filed an Opposing Affidavit in connection with this application for Business Rescue. I was advised in this Affidavit that this was a second Business Rescue application in connection with this matter.

My Judgment in this matter must be read together with that Opposing Affidavit because it gives the background and insight into the quality of this application for Business Rescue and the role that Van Der Merwe plays.

7. On 1 September 2016 I received a Practice Note filed on behalf of SARS wherein I was alerted to the fact that Applicants had failed to file any Replying Affidavits or Heads of Argument for the hearing of this matter on 5 September. At the same time, I received full Heads of Argument on behalf of SARS making up more than 40 pages wherein the question of Applicants' basis for bringing the application in the first place was questioned. I was reminded in these papers that Van Der Merwe, acting personally, attempted to intervene in these proceedings, ostensibly on behalf of the Eagles Trust, an alleged Creditor. This judgment must be read together with the SARS Practice Note and the Opposing Affidavits as also the Heads of Argument filed by SARS and Standard Bank.

8. I was initially under the impression that Van Der Merwe wanted to represent Applicants. At the same time, SARS filed uncontested heads of argument for striking out certain scandalous allegations which were contained in the Founding Affidavits of Applicants. The material therein was abusive and defamatory and it was pointed out that large portions of what was stated could not possibly fall within the personal knowledge of the Deponents. No explanation was provided in the Affidavits as to how the Deponents could make these statements. It was submitted that the statements were hearsay evidence and were not defined as such. It was pointed out that the founding papers alleged fraud perpetrated by SARS and its officials and asked that these statements be struck out as irrelevant, scandalous and vexatious. In respect of the chronology of this matter, SARS pointed out that they had applied for a winding-up of Respondent on 20 June 2014 and a Final Winding-up Order was granted on 28 October 2014.
9. The Business Rescue 1 application was launched by Van Der Merwe on 13 April 2015 in his personal capacity and in his capacity as a Trustee of the Eagles Trust, the sole shareholder of Respondent.
10. On 18 February 2016 Mr Acting Justice Koen dismissed this application and on 18 March 2016 dismissed the Eagle Trust's application for leave to appeal.

11. On 17 June 2016, Applicants launched the Business Rescue 2 application, which is the application I am dealing with now.
12. On 4 July 2016, the Supreme Court of Appeal dismissed the application for leave to appeal, which laid to rest the Business Rescue 1 application and left only this Business Rescue 2 application.
13. It was pointed out that Applicants' Replying Affidavits were due on 29 July and 1 August 2016. On 1 August they were afforded a reprieve in that they were given a further opportunity until 12 August to file Replying Affidavits. Needless to say, none of these Replying Affidavits have ever been filed.
14. In its Heads of Argument it is alleged that SARS is a Creditor for Respondent in assessed tax in excess of R41 million and, in addition, has instituted an action against Respondent for a claim in excess of R42 million. It is also alleged that SARS is a proven Creditor in the liquidated estate of Respondent in respect of Pay as You Earn liability in the sum of R46 026.36.
15. The papers allege that Applicants are employees of Respondent. They complain that they have not received their annual increases, leave pay or thirteenth cheques, but they do not annex any proof of employment with Respondent nor do they provide any basis for the alleged indebtedness of Respondent to them. It is also submitted that Van Der Merwe, who was

the Deponent in the Founding Affidavit of Business Rescue 1, stated that Respondent did not have employees. He furthermore stated that certain employees were owed money but in paragraph 173 stated that the employees had all been paid. I was advised that First Applicant and some other alleged employees of Respondent submitted claims in its winding-up but they subsequently withdrew these claims.

16. The question as to whether First Applicant was in fact employed by Respondent or employed by Van Der Merwe was specifically raised in SARS' Heads. Furthermore it was pointed out that during the course of a tax inquiry, SARS established that First Applicant was employed by Respondent as a gardener. This is far removed from being a "manager" as alleged in the application before me.

SARS also pointed out that Fifth Applicant testified that she was no longer an employee of Respondent but was employed by Bank of Assets, another entity connected to Van Der Merwe.

Second Applicant alleged that he worked for Van Der Merwe.

Fourth Applicant testified that he had worked as a gardener for Respondent since 2007 but that he no longer resided at Respondent's premises.

First Applicant resided at Respondent's premises, but did not work there. He also claims to have been paid by Bank of Assets.

17. The allegation is made that SARS is of the view that Van Der Merwe is the driving force behind Respondent's Business Rescue 2 application and points out that the defamatory allegations made in that application could

only come from Van Der Merwe. In fact, SARS' Heads of Argument specifically attack Applicants' *locus standi* to bring this Business Rescue application in the first place. The suggestion is made by SARS that there is no distinction being drawn between the fatal Business Rescue 1 application and the present Business Rescue 2 application. It is submitted that the whole process is an abuse of the process of the Court and is a strategy to delay and frustrate the winding-up of Respondent.

18. It is alleged that Respondent is hopelessly and factually commercially insolvent and there is no evidence before the Court regarding the nature of the business conducted by Respondent or the nature of the business intended to be conducted by Respondent. Furthermore, there is no proper business plan proposed. What is really proposed is an informal liquidation of Respondent's assets, ostensibly by Van Der Merwe.
19. The Heads of Argument, in the light of the developments which have occurred, prove significantly accurate.
20. It is specifically alleged that the application constitutes an abuse of the process of this Court and the failure to file Replying Affidavits and Heads of Argument makes these facts more serious.
21. SARS points out that Respondent's liabilities are of the order of R97 million. I was referred to the Judgment of Koen, AJ, who pointed out that Respondent is a property-owning company which owns five

immovable properties. It has no employees and conducts no business in the accepted sense of the word. At least it is not a business which can be described as on-going. The business plan which is proposed in Business Rescue 2 is to release Respondent's assets from SARS Preservation Order and for the sale of their immovable property in accordance with an offer received but no mention is made of Respondent's indebtedness to SARS for its alleged indebtedness.

22. I also received Heads of Argument on behalf of Standard Bank. The submission is made that Business Rescue 2 is not *bona fide* and was brought merely for the purposes of delaying the winding-up Respondent. These heads must also be read together with this judgment.
23. I was reminded that the Courts have in the past warned that Business Rescue applications are susceptible to abuse and should not be brought in order to thwart the liquidation of a company and that a Business Rescue application would be dismissed for this reason alone. As is pointed out, bringing a Business Rescue application brings into operation a moratorium and enables a company to avoid legitimate commercial consequences of their failure to pay their creditors.
24. Standard Bank's Heads of Argument allege that Van Der Merwe's Business Rescue application adopted identical tactics of delivering its Affidavits and Heads of Argument out of time and by seeking



postponements of the application on the date when it was supposed to be heard.

25. It is submitted that certain scurrilous and unsubstantiated allegations were made against various parties and that SARS was accused of fraud, lying and extortion. Standard Bank was accused of engaging in collusive and fraudulent conduct and gratuitously refers to its representatives as the culprit. The firm of attorneys is alleged to have acted with impropriety and without foundation and that “a huge fraud” was perpetrated by SARS and a well-known insolvency practitioner.
26. I refer to the fact that this application must also be read against the background of Standard Bank’s Heads of Argument and Notice in accordance with Cape Practice Note 44 (4). Having received these documents I then received a Notice of Withdrawal where Applicants gave notice of their intention to withdraw the Business Rescue application. That Notice was filed on 2 September and was brought to my attention on the Friday before the hearing of this matter on 5 September 2016. The Notice was given so late and without any explanation that I consider Mr Dunn’s conduct to be grossly discourteous.
27. It is against this background that my Orders of 5 September 2016 and the Order I made pursuant to Standard Bank’s Notice to ask for legal costs on an attorney/client scale *de bonis propriis* against Mr Dunn, Applicants’

attorney, must be considered. There is very little likelihood that these costs can be recovered from the Applicants.

28. As SARS pointed out, leave to appeal may only be given where the Judge concerned is of the opinion that the appeal would have a reasonable prospect of success or that there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter. Furthermore, Section 16 of the Superior Courts Act provides that when at the hearing of the appeal issues are of such a nature that the decisions sought will have no practical effect or result, the appeal may be dismissed on this ground alone. That is to say if the appeal is moot. I find that there would be no reasonable prospect of another Court reversing my order in this matter.

29. In the context of the foregoing:

(a) I gave Reasons for Judgment in respect of the various Orders I made on 5 September and in those Reasons I pointed out that leave was granted to SARS and Standard Bank to intervene because they were affected parties who had filed Affidavits and were entitled to recover costs. All my reasons must be regarded as herein set out and repeated.

(b) I dismissed the application because Applicants had already filed a Notice of Withdrawal without any tender for costs and I maintained the application itself was devoid of any merit.

- (c) I granted the striking out application because the words complained of were self-evidently defamatory and hearsay.
  - (d) I granted the Order complained of because I was satisfied that the application was brought in bad faith and that the company was in any event not reasonably capable of being subject to a Business Rescue because it was premised on the allegation that the main liabilities of the company to SARS were non-existent and fraudulently brought by SARS.
  - (e) I made the Order as to costs because I considered that these Orders were appropriate, particularly since Applicants were obviously impecunious and must have been used by the shareholders of the company or Van Der Merwe in bad faith and the appellants had made allegations which they could not have had within their own personal knowledge.
30. I had good reason and good cause to make the Orders I did. Applicants enjoyed no prospect of success on an appeal if any regard is had to the facts of this case and the Heads of Argument filed on behalf of SARS and Standard Bank to which Applicants elected not to reply. This Judgment must accordingly be read together with the Heads of Argument that I have referred to.
31. I granted the Order asked in respect of Mr Dunn because his behaviour was improper in that he did not file a Replying Affidavit or Heads of Argument in accordance with his undertaking and he did not extend this

Court the courtesy of giving adequate notice of his intention to withdraw the application in its entirety, or even explain why that withdrawal was taking place.

32. As I have indicated, I think the probabilities are that Applicants are all people who are being used by Van Der Merwe and the fact that the application was withdrawn so late in the day is reinforced by the fact that it came to my knowledge at the hearing of the application that Van Der Merwe had in fact drawn another Business Rescue application which was Business Rescue 3. That application was filed with the Court on a Saturday in the mistaken belief by Mr Dunn (who was the legal adviser) that because the Notice of Withdrawal had been filed, Business Rescue 3 would then become operative. What Mr Dunn did not advise his client, because he probably did not know, was that the application could not be withdrawn without a tender for costs. Because that tender was not made, Business Rescue 2 was not withdrawn until I dismissed it, by which time Van Der Merwe had launched Business Rescue 3, which was a nullity because the Companies Act provides that while a Business Rescue application is extant, another cannot be brought. I think the probabilities are that Van Der Merwe will fund any loss that Mr Dunn will suffer as a consequence of the costs Order which I made against him. The fact that Mr Dunn continues to act for Van Der Merwe seems to indicate that the probabilities are that these costs will be borne by the person who is equally responsible for them being incurred.

33. This judgment must accordingly be read together with the following documents:
- (a) The Practice Note filed on behalf of SARS on 1<sup>st</sup> September 2016 (5 pages).
  - (b) The Heads of Argument filed on behalf of SARS on 1<sup>st</sup> September 2016 (43 pages).
  - (c) Notice of Withdrawal filed on behalf of the Applicants on 0/09/2016 (3 pages).
  - (d) A notice for legal costs *de bonis propriis* against Attorney Dunn on 2/09/2016 (2 pages).
  - (e) A Notice in terms of Practice Notice (44)4 filed by Standard Bank on 2/09/2016 (36 pages).
  - (f) A transcript of the proceedings on 5<sup>th</sup> September 2016 (37 pages).
  - (g) Heads of Argument submitted on 7 November 2016 by SARS (10 pages).
34. In the light of the foregoing, all the applications for leave to appeal are dismissed with costs, such costs to include the costs incurred by engaging the services of two Counsel where applicable and shall be paid by the Applicants jointly and severally the one paying the other to be absolved.

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Weinkove, A.J.