



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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|------------------------------|--------|
| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case number: 2083/2021

In the matter between:

LOUIS JOSEPHUS JACOBUS OOSTHUIZEN

Applicant

And

HEEVER BOERDERY CC [IN LIQUIDATION]

First Respondent

NOLWAZI PRECIOUS ZULU N.O.

Second Respondent

(in her capacity as duly appointed liquidator of
Heever Boerdery [in liquidation])

In the counter application between:

REENEN RANCH CC

Applicant / Intervening

creditor

And

HEEVER BOERDERY CC [IN LIQUIDATION]

First Respondent

NOLWAZI PRECIOUS ZULU N.O.

Second Respondent

LOUIS JOSEPHUS JACOBUS OOSTHUIZEN

Third Respondent

COMPANIES AND INTELLECTUAL PROPERTY

Fourth Respondent

COMMISSION

HEARD ON: 14 NOVEMBER 2021

JUDGMENT BY: DANISO, J

DELIVERED ON: 24 FEBRUARY 2022

- [1] This is an application by a creditor for an order placing the first respondent a farming enterprise trading at farm number 195 Spaarveld, in Marquard (“the CC”) under supervision and commencing business rescue proceedings as contemplated in section 131 (4) (a) of the Companies Act (“The Act”).¹
- [2] The CC has been in voluntary liquidation since 25 November 2020.
- [3] Reenen Ranch CC (“Reenen Ranch”) is a judgment creditor of the CC. The debt emanates from a judgment it obtained against the CC and its members on 12 November 2019 for an amount of R476 436.00. Pursuant to the CC’s failure to satisfy the judgment debt, the sheriff attached and sold the CC’s farm in execution to Reenen Ranch. The transfer is pending.
- [4] Reenen Ranch has filed an application to intervene in the proceedings to seek the dismissal of the business rescue application and simultaneously launched a counterapplication in terms of which it seeks an order for the setting aside of the voluntary liquidation proceedings.
- [5] The applicant opposed both the application to intervene and the counterapplication.
- [6] Business rescue is a company rehabilitation program in terms of which a financially distressed business is placed under temporary supervision of a

¹ Act 71 of 2008.

business rescue practitioner to restructure its financial affairs to enable it to continue trading on a solvent basis instead of undergoing liquidation proceedings.²

- [7] It is the applicant's case that the CC's voluntary liquidation was initiated by a special resolution adopted by its members, Ms Jannette van den Heever and Messrs Daniel Theodorus van den Heever and Theodorus Ignatius van den Heever at a meeting held on 16 November 2020.³ Mr Daniel Theodorus van den Heever ("the deceased") signed the special resolution some days before on 13 November 2022 at his home and this is due to the fact that he was avoiding being at the meeting where his former spouse would have been present as she is also a member of the CC. They were not on good terms, furthermore, he was also on bed rest recuperating from an illness. He passed away on 17 November 2020.
- [8] The catalyst for the voluntary liquidation was the CC's inability to pay its debts as and when they became due. The second respondent was appointed as a liquidator and at that time, the CC was indebted to Oos Vrystaat Bedryf ("OVK") in an amount of R2,3million and a total of R1,5million was owed to other creditors including Wesbank vehicle finance in the amount of R100 000.00, the applicant R274 350.00, Reenen Ranch R476 436.00. The members of the CC's salaries were also outstanding.
- [9] The applicant submits that the CC is no longer insolvent but merely financially distressed and this is due to the fact that pursuant to the deceased's demise the proceeds of his life policy were utilized to settle OVK's debt. The CC's liabilities have accordingly been reduced to R1. 5million.
- [10] It was submitted by counsel for the applicant that the CC is not yet in a position to settle its outstanding debts within the ensuing six months however there is a

² *Panamo Properties (PTY) LTD and Another v Nel and others* NNO 2015 (5) SA 63 (SCA) para 1.

³ Annexures "LJ4", "LJ5", and "LJ6" attached to the founding affidavit are copies of the notice of the meeting, the minutes of the meeting and the signed special resolution respectively.

reasonable possibility of its cash flow being enhanced by a prospective income of an amount of R1 343 000.00 which includes an amount of R500 000.00 as a cash advance from a relative Mr Stefan Johan van den Heever, the rest will be contributed by Mr Theodorus Ignatius van den Heever, one of the CC's members from his own income that he earns from doing contractual work and proceeds from farming activities he will be conducting at Mr. Stemmet's farm viz. planting of sunflowers and soy and cattle rearing. OVK has also increased the CC's credit facility to R4,072,280.00.

- [11] It is on that basis that the applicant contents that the liquidation proceedings must be converted to business rescue in order to facilitate the restructuring and rehabilitation of the CC's finances to enable it to continue its existence on a solvent basis and if the business rescue measures subsequently fail, the CC can revert back to liquidation.
- [12] Reenen Ranch also seeks the termination of the CC's voluntary liquidation however on different grounds namely that, the voluntary liquidation proceedings were initiated by a fraudulent special resolution in that not all the members of the CC were present at the special meeting convened for the adoption of the special resolution. According to the documents relied upon by the applicant, the copies of the notice of the meeting, the minutes and the special resolution (annexures "LJ4", "LJ5", and "LJ6") the special resolution was adopted on 16 November 2020, however during the period 15 to 17 November 2020 the deceased was terminally ill and confined to the Old Age home until he passed away on 17 November 2020, therefore, he could not have signed the resolution on the date and at the place specified in the said documents.
- [13] Reenen Ranch further states that the deceased did not even sign the said documents on 13 November 2020 because for the entire period that the deceased was ill he was in isolation at the high care unit of the old age home. In his forensic report and confirmatory affidavit⁴, Mr Hannes Hattingh a forensic document examiner confirms that the signature which is purported to be the deceased's signature on the special resolution is a forgery therefore, the

⁴ Annexure "RR4.1" to "RR4.9" and "RR8.2" attached on Reenen Ranch's founding affidavit.

resolution is null and void and the resultant voluntary liquidation proceedings are defective they must be set aside.

- [14] The business rescue application is opposed on the basis that it is an abuse of court process. It arises simply as the result of the CC's remaining members' *mala fide* intentions aided by the applicant aimed at preventing the transfer of the CC's farm to Reenen Ranch at all costs and this conclusion is confirmed in an email from a cousin of the CC's members Mr Stefan van den Heever dated 3 February 2021⁵ where he states the following:

"...I would like to express the urgency in keeping the family farm in the Van den Heever's ownership. Our grandfather did not set this farm up with hard work, difficulty and good planning to be stolen away by the big farmers surrounding him."

- [15] It was contended on behalf of Reenen Ranch that CC has lost its main source of income pursuant to the sale of its farm in execution, any income generated by the CC hereafter would go to the insolvent estate which is subject to the control of the liquidator and the credit advances relied upon by the CC would only assist the CC in settling its current debts and not to maintain its business operations. In that regard, there is no reasonable possibility of the CC continuing to trade on a solvent basis the application ought to be dismissed with costs.

- [16] It has been conceded by the applicant that as a creditor, Reenen Ranch is an affected person as described in section 129(1) of the Act therefore entitled to intervene in these proceedings. Leave is accordingly granted to Reenen Ranch to intervene and oppose the application.

- [17] I'm in agreement with Reenen Ranch's contentions that the discrepancies between the applicant's documentary evidence (Annexures "LJ4", "LJ5", and "LJ6") and its version regarding the circumstances under which the special resolution was adopted casts doubt on the applicant's version that the special

⁵ Annexure "L12" paginated page 55.

resolution was adopted properly. *Ex facie* the documents, an impression is created that the deceased was present at the special meeting and voted in favour of a special resolution to be passed to place the CC in voluntary liquidation whereas on the applicant's own admission, the deceased was neither at the meeting nor resolved with the other members for the CC to be placed under voluntary liquidation. It is on this basis that I conclude that the special resolution which initiated the process of voluntary liquidation is null and void, the voluntary liquidation process is defective it ought to be set aside.

[18] Section 131 (4) sets out the requirements for the purposes of obtaining an order placing a company under supervision and commencing business rescue. It reads as follows:

“(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 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.”

[19] On the applicant's own admission, the CC is unlikely to be able to pay its debts as they fall due and payable within the ensuing six months including a judgment debt which resulted in the sale in execution of its farm. The applicant has not provided any financial statements to show its liquidity or even identify any realisable assets to satisfy the CC's debts. I'm thus persuaded that the CC is financially distressed as contemplated in section 128(1)(f) of the Act.

[20] The onus is on the applicant to establish the grounds upon which it would be just and equitable to place the CC under business rescue and that there is a reasonable prospect for rescuing the CC.

[21] On the facts germane to this matter, the applicant has proposed a business rescue plan which is premised on a speculated income to be generated from farming activities in terms of a private arrangement involving a member of the CC and another farmer. The details of the terms of the farming agreement and the precise income expected to be generated have not been set out with sufficient particularity to enable the court to establish that if the plan is approved it will result in a better return for the CC's creditors as opposed to the liquidation of the CC.

[22] The applicant also relies on cash advances from a member's salary, a relative of the members of the CC and from its credit provider OVK. I'm of the view that what stands to be achieved with this proposal is merely to replace one creditor with another. As correctly pointed out by counsel for Reenen Ranch, if the funds do materialize as alleged, they will only settle the CC's current debts and not to maintain its business operations.

[23] Having regard to the facts of this matter, I'm not persuaded that there are reasonable prospects that the CC can be rescued.

Costs

[24] The applicant has substantially failed in its case as a result I see no reason to depart from the general rule that a successful party is entitled to its costs.

[25] In the result, the following order is made:

(1) The business rescue application is dismissed with costs.

(2) The counterapplication is upheld with costs to the extent that:

2.1. The special resolution dated 17 November 2020 is declared null and void and it is hereby set aside.

2.2. The voluntary liquidation of Heever Boerdery CC is hereby set aside.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Adv. JB Cilliers

Instructed by:

JC Scheepers Attorneys

BLOEMFONTEIN

Counsel on behalf of the intervening creditor:

Adv. S Grobler

Instructed by:

FJ Senekal Inc.

BLOEMFONTEIN