



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

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

DATE:
SIGNATURE OF ACTING JUDGE:

CASE NUMBER: 2020/12079

In the matter between:

LOCKSTOCK INVESTMENTS (PTY) LTD
AND 47 OTHERS

Applicants

and

PETER VAN DEN STEEN N.O.

First Respondent

DAVID LAKE N.O

Second Respondent

GROUP FIVE LIMITED (in business rescue)

Third Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Fourth Respondent

ABSA BANK LIMITED

Fifth Respondent

FIRSTRAND BANK LIMITED

Sixth Respondent

HSBC BANK LIMITED

Seventh Respondent

BOUNDARY TERRACES NO 14 (PTY) LTD

Eighth Respondent

THE AFFECTED PERSONS OF GROUP FIVE LIMITED

Ninth Respondent

JUDGMENT

ALI AJ

[1] The first and second respondents are the business rescue practitioners, the third respondent is the company in business rescue, they are the applicants in this matter and shall be referred to as (“the BRPs”). The respondents in this application are the applicants in the main application and shall be referred to as (“Lockstock”). The BRPs have launched a rule 30(2)(b) application.

[2] The relief sought by the BRPs is to set aside the notice of motion and founding affidavit of Lockstock in the main claim. In the alternative they seek to set aside that portion of the notice of motion that requires them to deliver their answering affidavits, if any, no later than fifteen days after delivering their notice of intention to oppose.

[3] The relief sought by the BRPs is to deliver their answering affidavit within fifteen days of the later of (i) Lockstock being granted leave by the court in terms of section 133(1)(b) of the Companies Act 71 of 2008 (“the Act”) to commence and/or proceed with the main application under this case number; and (ii) Lockstock having attended to effect service upon each of the remaining affected parties as provided for in paragraph 3.1 of the order

granted on 22 July 2020.

- [4] Lockstock were given an opportunity to remove the cause of complaint as set out in the notice. It chose not to remove the cause of complaint.

Grounds of Complaint

- [5] The BRPs have raised two grounds of complaint.

The first ground:

“The applicants [Lockstock] are required to make out a case why they should be granted leave by the court to commence or proceed with the main proceedings, and in accordance with such terms as the court considers suitable, in terms of section 133(1)(b) of the Companies Act, 2008. The BRPs are prejudiced by this omission because in the absence of Lockstock making out a case for why leave should be granted, the second respondent and I, as the business rescue practitioners [the BRPs] as well as the court, are deprived of any basis upon which to consider consenting to the commencement of the proceedings, in the case of the practitioners, or granting leave to commence or proceed with the proceedings, in the case of the court.

The objecting respondents [the BRPs] are accordingly prejudiced in being required to deliver answering affidavits where the applicants [Lockstock] have not made out a case for the grant of such leave and where such leave should in any event be obtained by the applicants [Lockwood] from the court before the objecting respondents [the BRPs] are required to deliver an answering affidavit.”

The second ground:

“The opposing respondents [the BRPs] cannot be expected to deliver answering affidavits in circumstances where necessary affected parties have not yet been served with the main application. Until they are so served, the applicants [Lockstock] are non-suited by way of a material non-joinder from obtaining any relief against the respondents that have been served, in particular, the objecting respondents [the BRPs]. The objecting respondents [the BRPs] are prejudiced in having to deliver answering affidavits in circumstances where it may be that the applicants [Lockstock] do not effect service upon the remaining affected parties, and so are not in a position to obtain any relief. The remaining affected parties, once served, are also deserving of an opportunity to make submissions as to whether the statutory moratorium on legal proceedings in terms of section 133 should be uplifted.”

[6] Lockstock oppose the rule 30 application on the grounds that:

Rule 30 is an inappropriate application and has no application here as the rule applies only to irregularities of form and not to matters of substance. Lockstock rely on *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO*¹.

It accepts that section 133 requires them to obtain permission, which they can obtain on their own.

¹ 1981 (4) SA 329 (O).

- [7] The BRPs contend that it is for Lockstock who have commenced with the main proceedings to persuade the court, that such leave need only be obtained at the hearing of the main application.
- [8] Lockstock's standpoint is that rule 30 has no application here as the rule applies only to irregularities of form and not to matters of substance. And secondly, if one can conceptually obtain leave in terms of section 133 of the Act at the hearing of the main application, it flows that the issue is not procedural and is primarily (if not exclusively) a matter of substance. Once it is accepted that the granting of relief under and in terms of section 133 of the Act is a matter of substance and not form, it must follow that compliance with section 133 of the Act falls outside the scope of rule 30.
- [9] For most of the answering affidavit, Lockstock state, at length the difficulties it encountered in obtaining details of the affected parties. However, Lockstock contends that if the present application did fall within the ambit of Rule 30, the BRPs are required to show prejudice that they have or will suffer as a result of the irregular step.
- [10] Lockstock substantiate their contention by extrapolating that when leave is obtained at the hearing of the main application, it means that the issue is not procedural which then becomes a matter of substance. And if this happens, the granting of relief under and in terms of section 133 is a matter of substance and not form, it must follow, Lockstock further contend, that compliance with section 133 falls outside the scope of rule 30.

- [11] Section 133(1)(a) and (b) provides for a general moratorium on legal proceedings against a company which is in business rescue except with the written consent of the business rescue practitioner or “with the leave of the court and in accordance with any terms the court considers suitable.”
- [12] Lockstock are required to make out a case why they should be granted leave to commence or proceed with the main proceedings in accordance with such terms as the court considers suitable.
- [13] Lockstock seek that this application be dismissed. Lockstock contends that the issue as to whether they should get permission should be left to the court hearing the main proceedings.
- [14] Were that the case, it would mean that the BRPs are to file their answering affidavits now. To file their answering affidavits in circumstances, where Lockstock might not be given permission to bring the main application.
- [15] The second ground of complaint relates to the service of the main application upon the necessary affected parties. There was much ado about obtaining the requisite details of the affected parties. Ultimately, Lockstock are required to effect service on all the affected parties. Until such time where all the affected parties are served, the BRPs contend that they are not in a position to file their answering affidavit. It is in issue that not all the affected parties have been served with the main application.

[16] In SA Airlink (Pty) Ltd and South African Airways (SOC) Limited & others² it was held that the intention of section 133(1) is to cast the net as wide as possible in order to include any conceivable type of action against the company which is under business rescue. It held further that the moratorium is necessary for the effectiveness of the business rescue procedure.

[17] The contention of Lockstock that to interpret rule 30 which is procedural vis-à-vis substantive, where if it is not the one then it should be the other, is contrary to what was held by Fabricius J in Cheetah Chrome South Africa (Pty) Ltd³ where the learned Judge repeated what he had said in a recent judgement delivered by him in the matter of Absa Bank Limited and Another v CSARS (21825/19 [2020] ZAGPPHC 414 where it was held: (at para 10).

“a technical approach is to be avoided nor should an excessively formalistic approach in the application of the Rules be adopted. One should aim at an expeditious and inexpensive approach to determine cases on their real merits. See: Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278 F-G. In recent times the above well-known considerations have been amplified by the notion that Rules of Court should be seen and given life against the background of relevant constitutional law considerations, such as the right of access to Courts.... The core function of a Court is after all to dispense justice without being hamstrung. The object of courts is two-fold: the first is to ensure a fair trial or hearing. The second is to ‘secure the inexpensive and expeditious completion of litigation and.... to

² [2020]ZASCA 156 (30 November 2020)

³ And Dilokong Chrome Mine (Pty) Limited (in business rescue) and Others – case no: 45259/2020 GPHC

further the administration of justice. See: Eke v Parsons [2015] ZACC 30 at par [39] and [40], as well as Kgolane v Minister of Justice 1969 (3) SA 365 (A) at 369 H”

[18] Fabricius J in the Cheetah Chrome South Africa (Pty) Ltd matter, *supra*, (at para 13) after considering various authorities⁴ outlined the relevant principles emanating from these decisions and which are applicable hereto. The learned Judge held that the principles outlined below are to be considered in each particular case. These are:

“In certain instances, but not in all, a formal application is required to place sound factual material and sound legal contentions before the court;

In other cases such facts may be self-evident. Context is everything in law, I may add;

Whenever relaxation is sought, the rights of the company, affected persons and the interests of those persons must be considered in the context of the purpose of the particular business rescue plan;

The court has a wide discretion dictated by the interests of justice. It must be asked: what is the purpose of the moratorium in any given context, and what will be the consequence of it being lifted?

Will the particular business rescue plan be enhanced or defeated by the moratorium being lifted?

The object and purpose of business rescue proceedings as set out in s7(k) and 128(b) of the Act must be considered;

“Exceptional circumstances” are however not required;

An application can be brought within the context of a main application;

It is not necessary to establish on a prima facie basis that the main application will succeed, as long as the basis laid is bona fide and reasonably arguable.”

⁴ Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Co (Pty) Ltd [2016] JOL 36732(GSJ), LA Sport 4 x 4 Outdoor CC v Broadwalk Trading 20 (Pty) Ltd 2015 JDR 8405 GP (a full bench decision of this division), Arendse and Others v Van der Merwe and Another NNO 2016 (6) SA 490 (GJ), Msunduzi Municipality v Uphill Trading 14 (Pty) Ltd 2015 JDR 0702 CKZP, and Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) [2017] 1 All SA 862 (WCC) at para 54

[19] In the present matter, Lockstock have not included or proposed any terms for the court who will be seized with the main application, to consider that any terms may be suitable in the circumstances. To do so, the court must take all the factors into account. Lockstock, is after all, seeking the indulgence of the court, to grant leave. Seeking leave to proceed is not there for the asking. A substantive application to seek leave is necessary.

[20] It is my view that Lockstock have not made out a case why leave should be granted at the main hearing. Lockstock do not provide any reasonable explanation, let alone any explanation why leave should be granted in their favour to apply for leave at the main hearing.

[21] Lockstock are required to address each of the principles as set out by Fabricius J in their application for leave whether the application is argued upfront or at a separate hearing. Lockstock, in this application have not done so.

[22] While I accept that our courts tend to agree that a flexible approach be followed and that a one-size-fits-all approach is to be avoided. What will be required and what will be sufficient, will depend on the circumstances of each particular matter. It will in each case be a matter for the court's discretion, which as was held recently in *Arendse*, is to be exercised judicially on the basis of considerations of convenience and fairness, and what will be in the interests of justice.⁵ The Gauteng Division in the Full Bench appeal of LA

⁵ *Booyesen v Jonkheer Boerewynmakery (Pty) Limited and another* 2017 (4) SA 51 (WCC)

Sport 4x4 Outdoor CC and another v Broadsword Trading 20 (Pty) Ltd and others⁶ called for a flexible approach, which depends on the circumstances of the case. The court in *Booyesen v Jonkheer, supra*, adopted a similar approach, that a flexible approach is to be adopted, depending on the circumstances of the case.

[23] The BRPs, have outlined, at great length, the prejudice it will endure if the rule 30 is not upheld. In respect of the prejudice it will suffer, the BRPs have outlined, *inter alia*, that the main application is lengthy and comprises complex issues including challenging alleged financial assistance rendered by Group Five to related companies many months before for billions of rands- the various lenders are also cited as parties; the opposition to the main application will involve multiple and lengthy answering affidavits; the BRPs will prepare opposing papers while the court may reject leave to proceed; the BRPs will accumulate expenses for a matter that might not proceed.

[24] There is great merit in the BRP's contention, I may find that they will suffer prejudice. While I accept all of this, I believe that the prejudice is immense and irreparable and accordingly I conclude that Lockstock must first acquire the permission of the court, where section 133 provides "with the leave of the court and in accordance with any terms the court considers suitable". Until Lockstock have done so, the BRPs are not required to file their answering affidavits. The Order will reflect this.

[25] Lockstock have not set out, in detail, reasons for applying for leave at the

⁶ [2015] ZAPPHC 78 (GP), 2015 JDR 0405 (GP)

main hearing. They wish to approach the court at the main hearing as of right. Lockstock have not properly canvassed the rights of the business rescue practitioners, the rights of the company and the rights of the affected parties.

[26] A further consideration to bear in mind is that whenever relaxation is sought, the rights of the company, affected persons and the practitioner must be protected.⁷

[27] In light of the above, the rights of the affected persons are not raised as the service of the main application has not been finalised, alternatively that the service of the main application is in the process of reaching finality. The rights of the affected persons have not been set out at all in the main application.

[28] Insofar as the contention raised by Lockstock that rule 30 does not apply to omissions but to positive steps or proceedings and as a result rule 30 has no place in this application. My view is to adopt the approach set out by Fabricius J in the Cheetah Chrome case, *supra*, where it was held that a technical approach is to be avoided nor should an excessively formalistic approach in the application of the Rules be adopted. (at para 10).

[29] In the result, I make the following order:

1. The first, second and third respondents [“the BRPs”] need only deliver their answering affidavits within fifteen days of the later of:

1.1 the applicants [Lockstock] being granted leave by the court in

⁷ LA Sport case, *supra*

terms of section 133(1)(b) of the Companies Act, 71 of 2008 to commence and / or proceed with the main application under this case number;

1.2 Lockstock having attended to effect service upon each of the remaining affected parties.

2. I believe that the matter does not warrant the employ of 2 counsel.

Lockstock are to pay the costs of one counsel.

N. ALI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

This judgment was prepared and authored by Acting Judge Ali. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

DATE OF HEARING: 28 JULY 2021

DATE OF JUDGMENT: 10 AUGUST 2021

COUNSEL FOR THE APPLICANT: J M HOFFMAN

INSTRUCTED BY: SWARTZ WEIL VAN DER MERWE GREENBERG INC

COUNSEL FOR FIRST TO THIRD RESPONDENTS:

A SUBEL SC & B M GILBERT

INSTRUCTED BY: WERKSMANS