

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: **19th December 2022** Signature:

CASE NO: 32779/2020

DATE: 19TH DECEMBER 2022

In the matter between:

MOODLEY, SELVAN

Applicant

and

ADZAM TRADING 48 (PTY) LIMITED

First Respondent

NAICKER, CINDY N O

Second Respondent

SAMONS, THOMAS HENDRIK N O

Third Respondent

**COMPANIES & INTELLECTUAL
PROPERTY COMMISSION**

Fourth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Fifth Respondent

SOUTH AFRICAN REVENUE SERVICES

Sixth Respondent

Coram: Adams J

Heard: 28 October 2022

Delivered: 19 December 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII.

The date and time for hand-down is deemed to be 11:30 on 19 December 2022.

Summary: Company – Companies Act 71 of 2008, s 129(1) and s 130(1)(a) – business rescue – directors' resolution to begin business rescue – grounds on which such resolution to be set aside – Requirements of section complied with – there is no reasonable basis for believing that the company is financially distressed – application granted.

ORDER

- (1) In terms of section 130(1)(a) of the Companies Act, Act 71 of 2008, the resolution passed by the board of the first respondent on 28 February 2020, in terms of which it was resolved that the company voluntarily begins business rescue proceedings and that it be placed under supervision, be and is hereby set aside.
 - (2) There shall be no order as to costs relative to this application.
-

JUDGMENT

Adams J:

[1]. The first respondent (Adzam) is a property owning company and owns a commercial property in Brentwood Park, Benoni – worth approximately R30 million. It carries on business mainly in the field of letting of commercial premises to a number of commercial tenants, which include sister companies in a group of companies under the control of the applicant (Mr Moodley), who was the sole director of Adzam until he removed himself as such on 25 February 2020 and appointed in his place, his daughter, Natasha Naidoo. Adzam's main source of income is the rental it receives from the letting of the commercial premises situated at the aforementioned property, and its income amounts to approximately R250 000 per month. Until about July 2021, Adzam's main

external independent creditor was the fifth respondent (Standard Bank), who was owed about R3.9 million in respect of a medium-term loan, which was secured by a continuous covering mortgage over Adzam's property in favour of Standard Bank. That debt was paid in full and extinguished in its entirety by Adzam during July 2021.

[2]. On 28 February 2020, the board of Adzam (Natasha Naidoo) passed a special resolution in terms of section 129(1) of the Companies Act¹ ('the Companies Act'), in terms of which it was resolved that the company voluntarily begins business rescue proceedings and that it be placed under supervision. Pursuant to this resolution, the second respondent (Ms Naicker or 'the BRP') was duly appointed as the Business Rescue Practitioner of Adzam on 3 March 2020. Mr Moodley, who, by all accounts remained in charge and in control of Adzam and its business, despite the appointment of his daughter as its sole director, was not happy with Ms Naicker's appointment for the reasons elaborated on in the paragraphs which follow.

[3]. In this application, which is opposed only by Ms Naicker, Mr Moodley applies, in terms of s 130(1)(a)(i) of the Companies Act, to have set aside the said resolution and to take Adzam out of business rescue. The application, according to the founding affidavit, is based on the fact that the company is no longer financially distressed, is able to pay its debts and no longer needs to be under business rescue.

[4]. The issue to be decided in this application is therefore whether Mr Moodley has made out a case for the setting aside of the said resolution. Put another way, the question to be answered is simply whether Adzam is financially distressed and in need of supervision. That question should be answered against the factual backdrop of the matter. In that regard, the relevant facts are set out in the paragraphs which follow. It must be said however that the papers in this application are voluminous and that is only because the parties, instead of dealing with the true facts in the matter, opted to engage in their affidavits in rather acrimonious exchanges and a fair amount of unnecessary mudslinging between them.

¹ The Companies Act, Act 71 of 2008;

[5]. The reason for Adzam voluntarily commencing business rescue proceedings, Mr Moodley explains, was on the advice of the third respondent (Mr Samons), who completely misrepresented to him the purpose of such proceedings and the way it works in practice. All that Mr Moodley had in mind was to negotiate, through the process, a reduced monthly instalment in respect of the mortgage bond and the medium-term loan agreement with Standard Bank. It was not his intention to hand over the control and the running of Adzam to a third party as, so Mr Moodley submits, there was no need for that. There was an additional reason for the business rescue proceedings and that related to the fact that the Liquidator of one of the companies in his group of companies, which, according to Mr Moodley, owed Adzam an amount of R13 255 213.63, had become extremely antagonistic towards him and his companies and it was explained to him that business rescue somehow would be one way of shielding Adzam from the onslaught by the said liquidator.

[6]. The specific advice which Mr Moodley received from Mr Samons in February 2020 was that it would be best to place Adzam into business rescue on 'a temporary short-term basis' to ensure that no legal action would be instituted against it by, amongst others, the aforementioned liquidator. This was suggested as a defensive move against the constant attacks by the liquidator, who, so Mr Moodley alleges, was not acting in good faith. Mr Samons also suggested the change of directorship of Adzam as further protection against the attacks by the Liquidator. Mr Moodley accepted the advice from Mr Samons without questioning it, as he was recommended by his sister.

[7]. Mr Moodley now knows that he received bad advice from Mr Samons. The legal position was misrepresented to him and, moreover, he was not given any explanation as to the effects that the business rescue proceedings would have on his company and its business. Neither was it explained to him that the control of the company would be 'placed into the hands of strangers'. He was assured that he would continue to run the company and that the Business Rescue Practitioner would simply approach Standard Bank for a restructuring and keep the liquidator 'off of his back'.

[8]. Importantly, Mr Moodley's explanation relating to the financial position of Adzam is to the effect that, but for the fact that it required some breathing space in relation to payment of the monthly bond repayments, the company was definitely not in financial distress. All that it required was for the bond repayments of R111 893.49 per month to be reduced by fifty percent, which was the main purpose of putting the company into business rescue. The loan agreement was to be restructured with a view to alleviating the pressure on the company's cash flow. Adzam was otherwise financially healthy, as it presently is, with its assets worth at least R30 million and the total of its liabilities (excluding the subordinated 'internal' ones) amounting to about R3.9 million, giving a net worth of at least R26 million.

[9]. This explanation by Mr Moodley as the reason why Adzam was placed in business rescue, whilst criticized by Ms Naicker as being fanciful and as an indication that Mr Moodley acted in bad faith at the time, is not disputed by her. It is so that Mr Moodley may have been a bit naïve, but it cannot possibly be suggested that the version should be rejected out of hand. It most certainly is, in my view, not so far-fetched and unsustainable to be rejected despite not being disputed. Moreover, the version is supported and corroborated by the objective documentary evidence, such as the affidavits in support of the application to the fourth respondent (CIPC) for confirmation of the business rescue proceedings and for the appointment of the Business Rescue Practitioner.

[10]. This then means that as and at the date on which business rescue proceedings were commenced in terms of s 129(1) of the Companies Act, there were no reasonable grounds on which it could be said that Adzam was financially distressed. This, in itself, is sufficient reason for the s 129(1) resolution to be set aside.

[11]. What is more is that Adzam's position, after commencement of the business rescue proceedings, has in fact improved. At the first creditors' meeting during March 2020, the only external creditor present was the Standard Bank, which proved a claim for the R3.9 million. This is the debt which, as indicated supra, was extinguished by Mr Moodley during July 2021, which

means that, after that date, Adzam truly had no debts, other than subordinated ones with related entities and individuals. Furthermore, on 26 October 2020, Ms Naicker published a business rescue plan in terms of section 150(1) of the Companies Act, which was subsequently rejected at a meeting of creditors on 2 November 2020. The meeting, at which Standard Bank held the majority of voting rights, also rejected a proposed extension of time for the purpose of preparing an alternative plan. No further steps in the business rescue proceedings were thereafter taken, which means that the said proceedings should be terminated in terms of s 153(5) of the Act.

[12]. For all of these reasons, I am of the view that the said resolutions should be set aside as prayed for by Mr Moodley. The simple fact of the matter, in the words of s 130(1)(a)(i), is that 'there is no reasonable basis for believing that the company is financially distressed'. In sum, as submitted by Mr Moodley, and not seriously disputed by Mr Naicker, the company owns an unencumbered asset worth over R30 million. Its rental income is approximately R250 000 per month, and its overheads are about R100 000 per month. This means that on a monthly basis Adzam generates sufficient income to at least cover its overheads and other expenses, and it is well enough to run itself under the management of Mr Moodley and his daughter. It is a fact that even whilst the company was under business rescue, it was being run efficiently and effectively by them. The debt owing to the only external creditor, Standard Bank, has been settled in full and there are no further long-term liabilities of any significance.

[13]. The other supposed creditors, which Ms Naicker avers should be considered for purposes of this application, notably First National Bank ('FNB'), which are the bankers of Adzam and Mr Moodley, can safely and should be disregarded. In any event, FNB did not submit a claim at the first meeting of the creditors of Adzam. And that debt is being serviced by Mr Moodley, who signed a personal surety for payment thereof. As for the 'contingency claim' by the sixth respondent (SARS), as rightly submitted by Mr Zimmerman, who appeared on behalf of Mr Moodley, SARS did not prove a claim at the first creditors' meeting. Mr Moodley avers, and again this is not seriously challenged by Ms Naicker, that Adzam has now – possibly belatedly – submitted its annual

returns, which probably means that its position viz-a-viz SARS has been regularised or is in the process of being regularised. I cannot accept the contention by Ms Naicker that there is a large amount due to SARS as such claims are not supported by the documentation and contradicts what Mr Moodley says in that regard. It is also so, as contended by Mr Moodley, that SARS can in any event be dealt with outside of business rescue proceedings and, and to the extent that there is any debt due to SARS, the company will have sufficient income to pay same off.

[14]. The only other creditors are the family trust (the Infinity Trust, which is the sole shareholder of Adzam), Mr Moodley and his other family members, who have all confirmed that their loans are subordinated. It has always been indicated by these creditors that they would not be submitting claims in the business rescue proceedings so as to ensure that the company runs smoothly and operates a profitable business. These claims can and will be dealt with by the family internally, and do not require the assistance, nor supervision of a BRP. Finally, the latest financial statements of Adzam do not reflect a company in financial distress.

[15]. I therefore reiterate my view that there are no reasonable grounds for believing that Adzam is in financial distress – far from it.

[16]. There was a number of preliminary legal points *in limine* raised by Ms Naicker in her opposition to Mr Moodley's application. I will now proceed to deal briefly with those points, all of which are void of any merit.

[17]. Ms Naicker takes issue with Mr Moodley's *locus standi in iudicio* and contends that he is not 'an affected person' as envisaged in s 130(1), which reads in the relevant part as follows: -

'130 Objections to company resolution

- (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-
- (a) setting aside the resolution, on the grounds that-
 - (i) there is no reasonable basis for believing that the company is financially distressed;
 - (ii)'.

[18]. Section 128 defines 'affected person' in this context and in relation to a company, as *inter alia* a shareholder or creditor of the company and an employee thereof. Mr Moodley, in his affidavits, confirmed that, after stepping down as a director of Adzam, he continued working for the company as a Chief Executive Officer, making him an employee of the company and therefore an 'affected person'. He also confirmed that the company owed him money in his personal capacity as he had taken care of some of its debts, such as payment of the salaries of some of its employees. These averments are not seriously challenged by Ms Naicker, although she expressed serious reservations about the veracity of those averments.

[19]. I have no reason to reject those claims and am of the view that Mr Moodley is an 'affected person' as envisaged by the said section. Ms Naicker's legal point in that regard therefore stands to be dismissed.

[20]. Secondly, it is contended by Ms Naicker that there has not been proper service of the application on all 'affected persons' as provided for in s 130(3). In particular, so it is contended by Ms Naicker, the application was not served on any of the affected persons other than on Standard Bank. There is no merit in this contention for the simple reason that Standard Bank was the only creditor, which proved a claim against the company in the Business Rescue Proceedings. There are no other persons, which ought to have been served, And, therefore, this point likewise stands to be rejected.

[21]. I am therefore satisfied that Mr Moodley has made out a case for the 28 February 2020 special resolution to be set aside. In view of my aforesaid finding, it is not necessary for me to deal with the claim for the alternative relief to have Ms Naicker removed as the Business Rescue Practitioner nor do I have to deal with the myriad of other issues raised by the parties in their reams and reams of affidavits and attachments.

[22]. As for costs, I am of the view that, whilst it can be said that Mr Moodley was successful in his application, it should be borne in mind that Ms Naicker, probably through no fault on her part, was parachuted into the position she found herself in as the BRP of Adzam. She did not appoint herself and, whilst

some of her conduct may be described as questionable, she for the most part acted in terms of her statutory duties and obligations. I am therefore of the opinion that no order as to costs would just and fair to all concerned.

Order

[23]. Accordingly, I make the following order: -

- (1) In terms of section 130(1)(a) of the Companies Act, Act 71 of 2008, the resolution passed by the board of the first respondent on 28 February 2020, in terms of which it was resolved that the company voluntarily begins business rescue proceedings and that it be placed under supervision, be and is hereby set aside.
- (2) There shall be no order as to costs relative to this application.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	28 th October 2022
JUDGMENT DATE:	19 th December 2022 – judgment handed down electronically
FOR THE APPLICANT:	Attorney Rael Zimmerman
INSTRUCTED BY:	Taitz & Skikne Attorneys, Johannesburg
FOR THE FIRST AND SECOND RESPONDENTS:	Advocate K Reddy
INSTRUCTED BY:	Vezi & De Beer Incorporated, Parkmore, Sandton
FOR THE THIRD, FOURTH, FIFTH AND SIXTH RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance