

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2023-

107019

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

In the matter between:

NEDBANK LIMITED
(Reg No. 1951/000009/06)

Applicant

and

PACINAMIX (PTY) LIMITED (In Business Rescue)
(Reg No.2011/121606/07)

First Respondent

FANELESIBONGE DONNA DUBE N.O
in her capacity as trustee of the
SENGWAYO TRUST (IT 022055/2017)

Second Respondent

FEZILE ASHELIEGH DUBE N.O
in her capacity as trustee of the
SENGWAYO TRUST (IT 002055/2017)

Third Respondent

RALPH FARREL LUTCHMAN N.O

Fourth Respondent

MOLEDI MOSA N.O

Fifth Respondent

CHRISTIAAN CERVAAS HERBST N.O

Sixth Respondent

SANDRA BESWICK N.O

Seventh Respondent

CARDLESS (PTY) LTD

Eighth Respondent

**THE COMPANY AND INTELLECTUAL PROPERTY
COMMISSIONER**

Ninth Respondent

ALL AFFECTED PERSONS OF PACINAMIX (PTY) LTD

Tenth Respondent

JUDGMENT

WINDELL, J:

Introduction

[1] This is an urgent application, brought on a semi-urgent basis. The applicant, Nedbank Ltd (Nedbank) seeks an order, firstly, setting aside the resolution taken by the board of the first respondent, Pacinamix (Pty) Ltd (the Company) on 17 July 2023 placing the Company under business rescue;¹ and secondly, the winding-up of the Company.

[2] The application is brought in terms of s 130(1) of the Companies Act 17 of 2008 (the Companies Act) on the ground that there is no reasonable prospect of rescuing the Company and/or that it is just and equitable for the resolution to be set aside. Nedbank contends that this matter is an instance in which the business rescue process is being utilised to delay the inevitable: the winding-up of the Company.

[3] Nedbank is a creditor of the Company. The Company owes Nedbank approximately R11 611 491.75 in respect of various financial agreements including an Overdraft Facility, a Commercial Property Loan, a Home Loan, a Master Rental Agreement and four Schedules, two Instalment Sale Agreements and two Nedfleet credit facilities.

¹ In terms of s 129(1)(a) of the Companies Act 71 of 2008.

[4] The second and third respondents, Fanelesibonge Donna Dube and Fexile Asheleigh Dube, are the trustees of the Sengwayo Trust (the Trust), which Trust is the sole shareholder of the Company. Only the Company and the Trust are opposing the application.

[5] Although the background facts are common cause, it is necessary to deal with it in some detail as the peculiar facts of this case ultimately influence the outcome.

Background facts

[6] The Company has been in breach of the bulk of the agreements concluded with Nedbank for more than a year. It fell in arrears when the Company was placed in provincial liquidation in terms of an application issued by the eighth respondent, Cardless (Pty) Ltd (Cardless), which order was granted on 24 August 2022. The amount due to Cardless was more than R4 000 000,00 and remains unpaid. It is however common cause that the Company was in arrears on the Commercial Property Loan, the Home Loan Agreement and the first Instalment Sale Agreement, prior to August 2022.

[7] On 4 August 2023, Nedbank cancelled all the agreements after a “dispute” arose between the Company and several interested parties as to the status of the Company, in particular, whether the Company was in provisional liquidation or under business rescue. The “dispute” arose in the following circumstances: The provisional liquidation order had a return date of 13 October 2022, on which date reasons were to be advanced why the order should not be made final. The Company opposed the application. The matter was not set down on the return date and the rule *nisi* was not extended.

[8] The Trust then filed an application on 22 November 2022 for an order, *inter alia*, converting the provisional liquidation to business rescue (the Conversion Application). In

support of this application a business rescue plan was prepared by the sixth and seventh respondents (the former BRPs), who consented to their appointment as joint business rescue practitioners of the Company in the event of the Conversion Application being successful. Initially Cardless filed an application to intervene, but subsequently filed an answering affidavit. An opposed interlocutory application in terms of Rule 30(1) ensued, which application was not finalised. The fourth and fifth respondents (the provisional liquidators) also filed an application for the extension of their powers during June 2023, which order was granted on 27 June 2023.

[9] All the above applications were issued on the basis that the Company had in fact been placed in provisional liquidation, which position was also accepted by Nedbank until July 2023. On 21 July 2023, Nedbank's attorney of record received a copy of a letter addressed by the Company's then attorney of record to the provisional liquidators, which letter stated that the provisional liquidation order, which was a rule *nisi*, had lapsed due to it not being enrolled on the return day. Therefore, so it was contended, the Company was not in provisional liquidation and a resolution was taken to place it under business rescue. Nedbank's attorney subsequently obtained copies of the resolution in terms of s 129(1) of the Companies Act as well as the confirmation from the ninth respondent (the CIPC) that the Company had been placed in business rescue on 18 July 2023. The former BRPs were subsequently appointed on 24 July 2023 in terms of s 129(3)(b) of the Companies Act.

[10] Cardless disputed the correctness of this view and issued an urgent application during July 2023, *inter alia*, seeking an order setting aside the resolution. The urgent application was opposed by the Company and the Trust. Due to the urgent application, the first meeting of creditors in the business rescue (convened for 7 August 2023), was

postponed to 11 September 2023. The urgent application was subsequently struck off the roll due to lack of urgency and is still pending.

[11] On 15 September 2023, the BRPs issued a circular indicating that they had obtained an opinion that the Company was still in provisional winding-up, and that the s 129 resolution was thus moot and their subsequent appointments 'null and void'. They stated that, as a result, they were 'forced to recognise that our [their] appointment as business rescue practitioners lacks substantial legal grounds to persist in overseeing this matter'. Nedbank's attorney accordingly addressed an urgent email on 18 September 2023 to both the attorneys of record of the Trust as well as Cardless requesting their view in relation to the circular issued by the BRPs. The Trust's attorney responded on the same day indicating that it did not agree with the BRPs and would be appointing a new business rescue practitioner. Cardless' attorney did not respond.

[12] Between 20 September 2023 and 10 October 2023 various correspondence was exchanged between Nedbank's attorney and the Company's attorneys, being both Pule attorneys and Norton Rose attorneys (Norton Rose), with the express view to establish the Company's approach in this matter. This included an initial indication by Pule attorneys that an urgent application for a declaratory order would be issued, but subsequent to various further unanswered correspondence, Nedbank's attorney addressed a letter to Norton Rose on 10 October 2023 requesting, amongst other things, the reasons why the Company could be rescued. There was no response to this letter. Nedbank thus instructed its attorney to proceed with litigation and the current application was subsequently issued on 16 October 2023 and set down in the urgent court for 14 November 2023.

[13] On Monday 30 October 2023, Nedbank received a letter from Norton Rose with a request and proposal that the application 'be removed from the urgent roll of 14 November 2023, to be set down for hearing on a later date, if still required'. The reason being that a new business rescue practitioner, Mr Samons, had been appointed by the Company, and he was in the process of taking control of and familiarising himself with the financial records and information of the Company. Although his appointment had to be confirmed by the CIPC, Nedbank was assured that Mr Samons had commenced the process of engaging with stakeholders, which 'includes directors and shareholders', and would circulate a 'new' business rescue plan as soon as it was practically and reasonably possible.

[14] At the time of the hearing of the urgent application Mr Samons appointment has been formalized. He deposed to an answering affidavit dated 13 November 2023. He stated that in anticipation of his appointment, he had carried out investigations and have considered the financial position of the Company. He also had discussions with the directors and the Trust and had prepared a report titled 'Reasonable Prospect Report' which was attached to his affidavit. He expressed the view that business rescue was a viable, sensible option and would provide better prospects to creditors and affected persons than liquidation. He submitted that the previous plan prepared by the former BRPs was inaccurate and inadequate, as it amounted to a 'structured wind-down'. He stated that a 'new' business rescue plan would be ready by 1 December 2023.

[15] In his affidavit and report Mr Samons stated that the prospects of the Company being rescued were reasonable for mainly the following reasons:

[a] The Company is an active trading entity specialising in the field of information technology, branding and renders related services, which includes social media and information technology systems management.

[b] It owns and has access to assets with a value of approximately R26 million more than the aggregate of its liabilities.

[c] It is in financial distress because of liquidity constraints, which was occasioned principally by the loss of its 'anchor client' (McDonalds).

[d] The Company 'ought to pursue a more diverse client base, *inter alia*, to ensure that future risk is better and more safely managed' and need not seek a single large new client for purposes of replacing the anchor client that it had lost.

[e] It is a fully BBEE compliant and accredited entity and is uniquely placed and well equipped to secure other sources of income.

[f] Overhead and labour costs ought to be reduced. The current premises that had always been utilized for business purposes is 'surplus to its requirements' and a tenant (which will generate additional income) and/or a purchaser (with the Company to take up smaller, far less expensive premises) must be secured.

[g] Should post commencement finance be required, this will be for limited periods and in manageable amounts and the Company's asset position should enable it secure post commencement finance.

The status of the Company

[16] Nedbank argues that the provisional liquidation order lapsed on the return date because it was not enrolled and dealt with by the court. Both the Company and the Trust agree with this position and affirm that the Company is presently under business rescue rather than provisional liquidation.

[17] Given the factual context surrounding this application, it was reasonably anticipated that there would be opposition or at least a contentious dispute regarding the Company's status. However, none of the respondents cited in the application raised any objections. Notably, these respondents comprised the provisional liquidators appointed pursuant to the provisional liquidation order, Cardless, the other creditors of the Company, and the former BRPs.

[18] The matter concerning the Company's status as it appears on the documents presented to the court is thus common cause. The provisional liquidation order has lapsed due to the complete lack of action taken on the return date. Consequently, the Company is not in provisional liquidation and is currently under business rescue.

The legislative framework

[19] The application is brought in terms of s 130 of the Companies Act. It provides that:

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) there is no reasonable prospect for rescuing the company; or
 - (iii) the company has failed to satisfy the procedural requirements set out in section 129;

.....

(5) When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may—

- (a) set aside the resolution—

- (i) on any grounds set out in subsection (1); or
 - (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;
- (b) afford the practitioner sufficient time to form an opinion whether or not—
- (i) the company appears to be financially distressed; or
 - (ii) there is a reasonable prospect of rescuing the company, and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and
- (c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including—
- (i) an order placing the company under liquidation; or
 - (ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76 (4) and (5).

[20] Section 130 of the Companies Act has been formulated to empower an affected person to not only raise an objection, but also pursue subsequent actions to set aside a business rescue resolution that has been taken in relation to that company. An application to set aside a resolution, whether in terms of s 130(1)(a)(i) or (ii) may be brought at any time after the resolution has been adopted but prior to the adoption of a business rescue plan.²

[21] Although the board is not required to convince the court that there is a reasonable prospect of rescuing the Company at the time the resolution is adopted, it may be required to do so should an affected person apply to court under s 130(1) to have the resolution set

² *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA); *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ) para 3.

aside on the grounds that there is no reasonable prospect of rescuing the company.³ In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*,⁴ the court remarked that the requirements of s 130 (1)(a)(i) and (ii) in respect of the setting aside of the resolution for business rescue in terms of s 129 must, due to the present tense used in those provisions be as at the time of considering the application, rather than at the time the resolution was taken.⁵

[22] The court has the power to set aside the resolution and make an order placing a company in liquidation. A case in point is *Commissioner for the South African Revenue Service v The Business Zone 983 CC and Others*,⁶ in which the court placed the close corporations in provisional liquidation because the corporations were factually and commercially insolvent.⁷

The current application

[23] It is trite that commercial urgency can constitute urgency in certain circumstances. Nedbank's right to set the matter down in urgent court is therefore not in dispute.⁸ The Company and the Trust however contend that the matter is not so urgent that it cannot wait another two weeks for the 'new' plan to be published and voted on. While they do not request dismissal, removal or a postponement of the application from the urgent court roll,

³ Henochsberg on the Companies Act 71 of 2008, commentary to s 131.

⁴ 2014 (1) SA 103 (KZP) para 11 and 12.

⁵ See also *The Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd* - 2021 JDR 1238 (KZP) para 23.

⁶ 2015 JDR 2382 (WCC).

⁷ See also *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Other* 2017 (4) SA 592 (GJ) para 72–76.

⁸ *IL&B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C); *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586F – G.

it is suggested that the court exercise its discretion, and *mero moto* postpone the application until a later date after the publication of the new plan.

[24] Nedbank submits that the common cause facts established a basis for the winding-up of the Company. Firstly, Nedbank's claim is not disputed by the Company or the Trust. Secondly, although the Company appears to be factually solvent in that value of the Company's assets appears to exceed its debts, it admits that it is financially distressed and the evidentiary material overwhelmingly shows that the Company is in fact commercially insolvent as it is unable to meet its current day-to-day liabilities and/or the current demands on it in the ordinary course of business.⁹ The only issue in dispute between the parties is whether there is a reasonable prospect that the Company can be rescued.

[25] The concept of reasonable prospects has been defined in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*:¹⁰

'24. Whilst every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of —

24.1 the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

⁹ See *Koekemoer v Taylor & Steyn; Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA) at paras 16 – 17.

¹⁰ 2012 (2) SA 423 (WCC).

24.2 the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

24.3 the availability of any other necessary resource, such as raw materials and human capital;

24.4 the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.’

[26] In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*,¹¹ the Supreme Court of Appeal examined the meaning of reasonable prospect. Brand JA summarized it as follows:

‘[29] This leads me to the next debate which revolved around the meaning of ‘a reasonable prospect’. 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 in terms of s 427(1) of the 1973 *Companies Act* (see eg *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) para 21). 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, it 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.’

¹¹ [2013] 3 All SA 303 (SCA) para 31.

[27] Upon his appointment on 30 October 2023, Mr Samons evaluated the Company's financial position by examining its diverse financial documentation and consulting with stakeholders (including creditors). Despite the evident deterioration of the Company's situation over the past year and the "defective" business rescue plan that the former BRPs put forth more than a year ago, he concluded that the Company could still be salvaged.

[28] He came to this conclusion, firstly, under circumstances where the Company had already been provisionally wound up previously and whilst it is still currently unable to pay its debts as and when they fall due. As of October 2022, the Company's liabilities were more than R40 million and there is no indication that any of these creditors have been paid since the provisional order was granted 15 months ago. As far as Nedbank is concerned, but for receiving some R5 million in respect of the overdraft facility due to the collection of a session of the Company's debtors, it has not received any further payment on its accounts and interest is accumulating in the meantime. Moreover, all the vehicles financed, as well as the immovable properties in terms of which the Commercial Property Loan and Home Loan were granted, are being used by the Company.

[29] Secondly, Mr Samons' report makes no mention whatsoever of the probable expenses associated with restoring the Company to operation and the probable accessibility of the requisite cash resources to support the Company's daily expenses. On the contrary, it seems that the principal aim of Mr Samons' plan is to curtail costs by means of staff downsizing and the sale of the immovable property from which the business of the Company is being conducted. To begin with, only four individuals are employed in the Company. It is uncertain how precisely this will contribute to the rescue of the Company. Furthermore, all the parties agree that the selling of the premises, proposed by the former

BRPs in the previous business rescue plan, was in fact a 'structured wind up' and therefore not a plan at all.

[30] Mr Samons then propose that he will seek out an alternative client in place of McDonalds. However, for a duration of almost two years, the Company's directors were unable to identify a suitable replacement for McDonalds. Given the lack of adequate evidence to explain his methodology, the proposition becomes exceedingly improbable.

[31] When subjected to an objective evaluation, Mr Samons' proposals are mere wishful thinking. In *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another*,¹² Van der Merwe J commented that 'vague averments and mere speculative suggestions' will not suffice in establishing reasonable prospects. In order to succeed in an application for business rescue, 'the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved'.¹³ Although the bar in establishing reasonable prospects should not be set too high, the proposals put forth by Mr Samons' proposals are purely speculative in nature. Consequently, I remain unconvinced that expending an additional two weeks to publish a new plan will advance the situation.

[32] Thirdly, Mr Samons neglected to take into account the crucial background information of the Company that is clearly relevant in determining whether there is a reasonable prospect of rescuing the Company. The Company has been in provisional liquidation for the best part of a year and under business rescue for nearly four months. During that period, it should have been under the control of the provisional liquidators and the previous BRPs. A closer examination of the financial statements attached to Mr Samons's

¹² 2013 (1) SA 542 (FB).

¹³ *Ibid* para 11.

affidavit, however, reveals a particularly worrisome entry that indicates a lack of control over the Company over the last year. Over the course of one year (31 October 2022 to 31 October 2023), trade and other receivables decreased in the 'Current Assets' column from R5,385 838 to R3,939 663. Regarding "Long Term Liabilities," there was a shareholder's loan in the value of R6,228 920 as of 31 October 2022. The shareholders' loan is recorded as R0 on 31 October 2023, while the entry for "other current liabilities" now indicates a liability of R6,687,009.

[33] Despite Mr Samons' assertion that he has conferred with the trustees and Company directors, no explanation is provided for this egregious entry. Based on the information at this court's disposal, it appears that a proportion of the revenue generated by the Company during its insolvent and essentially non-operational phase was allocated towards the repayment of loans to shareholders.

Conclusion

[34] In *Welman v Marcelle Props 193 CC and Another*,¹⁴ Tsoka J, held that 'business rescue proceedings are not for the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which, given time, will be rescued and become solvent.'

In *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (in provisional liquidation) and Others*,¹⁵ Millar J stated that:

"Business rescue provides a shield for a business that, absent the delivery of the proverbial mortal blow by an unsympathetic creditor, can be rescued. It does not and nor was it ever

¹⁴ [2012] ZAGPJHC 32 (24 February 2012) para 28; *Ziegler South Africa (Pty) Ltd v South African Express Airways SOC Ltd and Others* 2020 (4) SA 626 (GJ), para 47; *Erickson NO and others v Kgatontle Satellite Operations (Pty) Ltd* [2022] ZAGPJHC 231 (11 April 2022).

¹⁵ 2022 (5) SA 179 (GP) para 95.

intended to provide a sword to be used by the directors and/or business rescue practitioners to keep the creditors at bay, irrespective of the prospect of the payment of a better dividend and saving of the business.”

[35] The creditors are not opposing the application. It comes as no surprise. The Company has been ‘chronically ill’ for more than a year. Based on the Company’s factual history, the conditions and parties influencing its trading activities over the past year and at present remain obscure. The lack of proper control over the Company’s affairs, is to the detriment of the general body of creditors of the Company, which situation should be resolved expeditiously. Because there is no viability in the proposed plan, there is no ability for the Company to be rescued. Cash is dwindling away, and no real growth is occurring. As the income decreases, the expenses are escalating.

[36] However, considering the current circumstances, it is not only unreasonable to expect the Company to be saved, but it is also just and equitable for the resolution to be set aside and to place the Company in liquidation. The current impasse caused by the dispute as to the status of the Company is to the prejudice of the Company’s creditors. Inevitably, the Company’s assets will have to be sold and it is imperative for the disposal of assets to be effected in the process of winding-up for Nedbank’s security to be protected. It is thus apparent that an enquiry in terms of s 417 of the Companies Act 61 of 1973 should be convened.

[37] Nedbank seeks a costs order *de bonis propriis* against the parties opposing this application. In *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd*¹⁶ it was held that:

‘All of that constituted an abuse of the process of the court and an abuse of the business rescue procedure. It has repeatedly been stressed that business rescue exists for the sake

¹⁶ 2019 (4) SA 532 (SCA) para 22.

of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals, a punitive order is appropriate.'

[38] A punitive costs order against the first to third respondents is justified. Firstly, the continuation of the business rescue proceedings is used to delay a winding-up and is a clear abuse of the process. Once it became apparent that none of the other parties were responding to Nedbank's requests and no further steps were being taken to resolve the impasse brought about by the dispute as to the administration of the Company, Nedbank had no alternative but to approach this court for relief. The appointment of Mr Samons was therefore clearly triggered by the issuing of this application. Mr Samons was only approached on 26 October 2023, six weeks after the BRPs departed. The delay in approaching Mr Samons, is not explained. Despite this, the Company waited an additional week before contacting Mr Samons.

[39] Secondly, the deponent to the answering affidavit was also the deponent in the Conversion Application, and he relied exclusively on the previous business rescue plan to support the Conversion Application. Consequently, the recent denial of the proposed business rescue plan is an additional cause for concern.

[40] Thirdly, the Company has been hopelessly insolvent for a considerable period of time. The dilatory conduct of the Company and the Trust should be deprecated.

[41] Nedbank has complied with the necessary statutory requirements. In the result the following order is made:

1. The resolutions taken in terms of section 129(1)(a) of the Companies Act 71 of 2008 on 17 July 2023 placing the First Respondent, Pacinamix (Pty) Ltd with registration number: 2011/121606/07, in business rescue, is set aside;
2. The First Respondent is placed in final winding-up in the hands of the Master of the High Court.
3. The First, Second and Third Respondents are to pay the costs of this application *de bonis propriis*, such costs to include the cost of two counsel.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG
(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 November 2023..

APPEARANCES

Counsel for the applicant:

Adv. J.G. Wasserman SC

Adv. M. Reineke

Instructed by:

O'Connell Attorneys

Counsel for the first,

second and third respondent: :

Adv. A.J. Daniels SC

Instructed by:

K G Tserkezis Inc

Date of hearing:

14 November 2023

Date of judgment:

27 November 2023