

THE REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2944/2022

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

DATE

SIGNATURE

In the matter between:

GOUWS, DERICK

APPLICANT

and

**ERAKI TRADING 12 CC T/A TIMMERMAN'S
KITCHENS**

FIRST RESPONDENT

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION (CIPC)**

SECOND RESPONDENT

CALGRO M3 PROCUREMENT SERVICES (PTY) LTD

THIRD RESPONDENT

Delivered: 16 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 16 August 2023.

Summary: Business Rescue Application – s 131 of the Companies Act 71 of 2008 (Companies Act) – definition of business rescue - s 128(1)(b) of the Companies Act – requirements thereof – business rescue vs liquidation – “reasonable prospect”-onus on the applicant to prove that there is a reasonable possibility of achieving a rescue of the business or a reasonable prospect that business rescue will result in a better return for creditors compared to a liquidation – applicant provided unsubstantiated and uncorroborated evidence – no solid information – applicant therefore failed to discharge onus.

JUDGMENT

PG LOUW, AJ

Introduction

- [1] This is an application to place the first respondent (Eraki) under supervision and to commence business rescue proceedings in terms of s 131 of the Companies Act 71 of 2008 (Companies Act).
- [2] The applicant (Mr Gouws) is the sole member of Eraki.
- [3] The third respondent (Calgro) was granted leave to intervene in the business rescue application.
- [4] On 10 October 2019, Calgro instituted liquidation proceedings in this division, against Eraki, under case number 34440/2019.
- [5] On 25 October 2021, Wright J granted an order placing Eraki under provisional liquidation. The return date was 31 January 2022.
- [6] The business rescue application was instituted on 27 January 2022.

[7] I was informed that on the return date, 31 January 2022, Windell J granted an order suspending the liquidation proceedings pending the adjudication of the business rescue application.

Background facts

[8] Eraki and Calgro have a long-standing business relationship. Eraki and Calgro concluded a written supplier agreement during January 2017 for the manufacturing and installation of kitchens and built-in cupboards for a development known as Fleurhof Development Extension 37, to the value of approximately 11.2 million rands. Eraki would supply goods and/or services to Calgro in terms of the supplier agreement.

[9] Eraki is a timber company specialising in the production and installation of kitchen cabinets and cupboards in the property development and construction industry.

[10] Calgro has been Eraki's biggest source of income for a number of years.

[11] According to Eraki, Calgro paid it a total amount of R 2 113 531.83 in terms of the supplier agreement, and it also has a damages claim against Calgro for an amount of approximately R 2 889 114.96.

[12] In granting the provisional winding-up order, Wright J stated, *inter alia*, the following in his judgment:¹

“3. Eraki raises many disputes of fact and it raises a counterclaim. These defences notwithstanding, Eraki is in the all too comfortable position that it has, or perhaps more probably had, the money but has never delivered the kitchens despite it having been given the choice by Calgro to repay money or deliver the kitchens.

¹ Annexure “FA2” to the founding affidavit.

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4. The failure by Eraki to do either is strong evidence that it can't repay. The admission in Eraki's email that it diluted the early pre-payments from Calgro is further proof of inability to pay. It underscores the lack of a serious defence to the claim of Calgro.
 5. Nowhere does Eraki seriously dispute the debt to Calgro. Such a line of defence would need convincingly to deal with the admitted dilution of Calgro's funds. It does not."

Business rescue

[13] "Business rescue" is defined as:²

"[P]roceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

[14] Mr Gouws states the following in the founding affidavit:³

"I propose a business rescue plan that would focus on the diligent and effective litigation of its claim against Calgro (and other/potential claims that

² S 128(1)(b) of the Companies Act 71 of 2008.

³ Para 14.

Eraki could still bring). The business rescue plan will likely result in a better return for Eraki's creditors than would result from a final liquidation".

[15] Mr Gouws relies on the allegations that, if Eraki is placed under business rescue, a manufacturer and installer of kitchen granite tops and counters, namely Turaco Granite Services (Pty) Ltd (Turaco), is "*willing to subcontract to Eraki the manufacturing and installation of kitchen cupboards at approximately 1,452 residential units in respect of new property development in Ga-Rankuwa ... This will generate an income stream for Eraki of approximately R1,4 million.*"⁴

[16] Mr Gouws also relies on a "*firm undertaking*" by Turaco that it would also subcontract Eraki in the next development phase entailing the building of 2,200 units to be utilised for student accommodation. According to Mr Gouws:⁵

"The entire project, including the first and second phases, must be completed within 18–36 months. The estimated net profit margin equates to R3,452,000.00 for the entire project. In confirmation, I attach hereto a letter from the accounting officers of Turaco dated 27 January 2022 and marked annexure "**FA9**"."

[17] This would mean that Mr Gouws anticipates the business rescue proceedings to endure for a period of at least 18 to 36 months, which is contrary to the purpose of business rescue proceedings.⁶

[18] Annexure "FA9" to the founding affidavit⁷ appears to be a letter signed by what appears to be Turaco's accountant and states, *inter alia*, that:

⁴ Founding affidavit: para 39.

⁵ Id.

⁶ See *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) at para 10; and *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) at para 11.

⁷ Page A193.

“I have been instructed by Mr Gouws to state that Eraki Trading 12 CC Trading as Timmermans has been awarded the subcontractor contract for the Garankuwa Project, however, this can only be awarded to Timmermans with the company is (*sic*) a going concern and not under liquidation. This project totals 1 452 units. Timmermans has calculated that the projected nett income from this project will be R 1000 per unit, with an estimated total profit of R 1 452 000.00.”

- [19] The author of this letter has not filed a confirmatory affidavit. The statement that he has been *instructed* to state that Eraki has been awarded a subcontract, is not satisfactory.
- [20] The director and shareholder of Turaco is Mr Gouw’s son. He did not depose to a confirmatory affidavit either.
- [21] Mr Gouws also states that other developers who previously subcontracted to Eraki “*are willing to consider to employ Eraki again if placed under business rescue ...*”.⁸ These allegations are not corroborated at all.
- [22] Premised on these uncorroborated sources of Eraki’s “*potential income stream*”, Mr Gouws alleges that if Eraki is now liquidated, a dividend of 21 cents in the rand will be realised, whilst if Eraki is placed in business rescue “*and is successful in its claim*” its assets will be R 3 669 144.96 and its liabilities R 1 600 851.57 and, with the sub-contracting work, “*the likelihood (sic) of restoring the business again into a profitable entity is reasonably certain*”.⁹
- [23] In so far as Eraki’s claim against Calgro is concerned, Mr Gouws contends that it is unlikely that Eraki’s claim will be effectively litigated if Eraki is placed in liquidation because a liquidator would need a contribution from Eraki’s creditors to fund the litigation, but that Calgro is unlikely to fund such litigation. However, if Eraki is placed under business rescue, so the contention goes, the

⁸ Founding affidavit: para 42.

⁹ Founding affidavit: para 43 to 47.

income generated from the sub-contracting work will enable the business rescue practitioner to effectively litigate Eraki's claim.¹⁰

[24] Whilst there may be merit in the submission that Calgro, as major creditor of Eraki, will not fund litigation against itself by a liquidator, Calgro will probably not vote in favour of the proposed business rescue plan either – as submitted by Mr Pottas, who appeared on behalf of Calgro.

[25] The counterclaim is faced with challenges. Firstly, Wright J has already expressed a *prima facie* view on its prospects. Secondly, the supplier agreement contains a clause which expressly precludes liability for a damages claim.¹¹

[26] Be that as it may, a liquidator will be in a position to consider and persist with the claim if it has merit.

[27] In so far as the sub-contracting work is concerned, in my view, Mr Gouws has not discharged his onus.

[28] Speculative and uncorroborated evidence has been put up in support of the business rescue application. I am not satisfied that there is a reasonable prospect that business rescue will result in a better return for Eraki's creditors compared to a liquidation. In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*,¹² the court stated the following:

“[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*

¹⁰ Founding affidavit: para 51 to 53.

¹¹ Clause 11 of the supplier agreement.

¹² 2013 (4) SA 539 (SCA).

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.”

[29] Ms Jooste appeared for Mr Gouws. She referred me to *Propspec Investments (Pty) Ltd v Specific Coast Investments 97 Ltd and Another*¹³ where Van der Merwe J stated that:

“[12] In my view, a prospect in this context means an expectation. An expectation may come true or it may not. It therefore signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable. In my judgment, a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds.

[13] ... I refer especially to the underlying philosophy thereof, that, in order to prevent unnecessary negative economic and social impact, business rescue is to be preferred to liquidation, and to the fact that judicial management under the previous Companies Act failed mainly because of the high threshold of proof required ...”.

[30] These trite principles do, however, not assist Mr Gouws in the business rescue application because he has not met the threshold of proof required.

[31] In *Absa Bank Ltd v Newcity Group (Pty) Ltd and another related matter*¹⁴ Sutherland J (as he then was) said the following in this regard:

¹³ 2013 (1) SA 542 (FB).

¹⁴ [2013] 3 All SA 146 (GSJ).

[20] First, a decision must be made whether to grant or refuse a business rescue order. The appropriate test has been extensively considered in several decisions, and it is unnecessary to traverse the jurisprudence yet again. (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC at [20]–[24]; *Koen & Another v Wedgewood Village Golf and Country Estate* 2012 (2) 378 (WCC) at [13] – [19]; and *Oakdene Square Projects (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (GSJ) at [12] – [18]). The upshot of these decisions, as I understand them, renders the law to be as follows:

20.1 The purpose of a business rescue is that set out in section 128(1)(b) of the Companies Act, 2008 and it is these statutory objectives which is the aim of an order. These objectives are defined as follows: 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

20.2 The threshold standard for deciding that an order is appropriate is whether there is a reasonable prospect or reasonable possibility of achieving a rescue through those statutory objectives; and in this regard, the point of departure is that it is preferable to rescue a company than to let it drift, or sometimes plummet, into extinction. (e.g. *Oakdene* at [12]; *Southern Palace (supra)*)

20.3 A close scrutiny of the factual platform presented and the rationale mounted on that platform is required in order to decide if the threshold standard has been met. This assessment must be made on solid information presented to the court, not upon conjecture.

20.4 Moreover, in this regard, the risk of abuse or manipulation of the rescue application process, through ‘un-genuine’ applications to procure an illegitimate immunity must be guarded against.” [Underlining added.]

[32] I am not persuaded that the business rescue application is based on *solid information*. The potential sub-contracts with Turaco have not been corroborated. One would expect, at least, confirmation thereof by Mr Gouws’ son on behalf of Turaco. No evidence of the *willingness* of other developers who previously subcontracted Eraki to again employ the services of Eraki has been presented. Eraki’s counterclaim against Calgro appears, *prima facie*, to have slim prospects of success. It is in any event something which a liquidator can investigate and pursue.

[33] In the premises, Mr Gouws has not met the threshold standard of showing that there is a reasonable possibility of achieving a rescue of Eraki or that business rescue will likely result a better return for Eraki’s creditors or shareholders compared to liquidation.

Order

[34] In the circumstances, the following order is made:

1. The application is dismissed, with costs.

PG LOUW
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Counsel for Applicant: Adv MF Jooste
Instructed by: DF Oosthuizen Attorneys

Counsel for Third Respondent: Adv R Pottas
Instructed by: Barnards Inc

Date of hearing: 17 May 2023

Date of judgment: 16 August 2023