



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

DELETE WHICHEVER IS NOT APPLICABLE

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

2/11/2017
DATE

[Signature]
SIGNATURE

2/11/17

CASE NO: 14886/2016

In the matter between:

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE ('SARS')**

APPLICANT

and

**ZIKHULISE CLEANING MAINTENANCE
AND TRANSPORT CC (Reg. no. 1997/006175/23)**

RESPONDENT

AND

CASE NO: 18101/2016

MABONGI FLORA-JUNIOR MPISANE

APPLICANT

and

**ZIKHULISE CLEANING MAINTENANCE
AND TRANSPORT CC**

FIRST RESPONDENT

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

SECOND RESPONDENT

REASONS FOR JUDGMENT

RANCHOD J:

[1] This business rescue application by Ms M.F.J Mpisane is one of three applications I heard together. The other two are a review application under case No. 34564/2016 by Zikhulise Cleaning Maintenance and Transport CC (ZCMT) and a liquidation application by the Commissioner for the South African Revenue Service (SARS) to place ZCMT in liquidation under case No. 14886/2016. Counsel for SARS said that if, due to time constraints, I was not able to deliver a reasoned judgment immediately, SARS would be content with an order, with reasons to follow later. Counsel for ZCMT did not object to this suggestion. Orders were made in the three matters with reasons to follow later. Both the review application and the business rescue applications were dismissed while the application for the liquidation of the applicant was granted provisionally.

[2] The facts in the winding up application and in the business rescue application overlap considerably. In what follows are the reasons for the dismissal of both the business rescue application and the granting of a provisional order for the winding up of ZCMT. In their written and oral submissions counsel for SARS stated that they were not requesting the court to hear the winding up application but merely to exercise its discretion in terms of s131(4)(b).

[3] The matters were allocated by the Deputy Judge President to be heard together at the request of the parties. The main reason for all three matters to be heard together without an order for consolidation was because of the considerable overlap of the facts in each matter but the relief sought in each is different. In chronological order the first application was launched by SARS for the winding up of ZCMT. The second is this application, which was launched by Ms Mpisane (who is the sole member of ZCMT) for an order that ZCMT be placed under business rescue. The third application is by ZCMT for the review and setting aside of a decision by SARS not to enter into a deferred payment arrangement with ZCMT for its tax liabilities. The common thread that runs through the applications is the tax liability of ZCMT which prompted the liquidation application by SARS, which in turn led to the business rescue and review applications by ZCMT.

[4] The relief sought by the applicant in this business rescue application is set out in the Notice of Motion. Prayers 1 and 2 are not relevant as they relate to a review application which was withdrawn after SARS raised the point that Ms Mpisane did not have *locus standi* to bring a review application in her own name together with the business rescue application. The review application had to be brought by ZCMT itself. Ms Mpisane conceded the point. Of relevance then, are prayers 3 and 4-

- '3. That the First Respondent be and is hereby placed under supervision and commencing business rescue proceedings in terms of the provisions of section 131(1) of the Companies Act No. 71 of 2008 ("the Companies Act").

4. That DAWID MAARTENS be appointed as interim business rescue practitioner for the First Respondent in terms of the provisions of section 131(5) of the Companies Act.'

Prayers 5 and 6 relate to the granting of further or alternative relief and costs to be paid by the second respondent if it opposes the application.

[5] The applicant's reasons for seeking to place ZCMT under business rescue are-

- 5.1 ZCMT is financially distressed as it is unlikely that it will be able to pay all of its debts, as they become due and payable, within the immediately ensuing six months; and/or,
- 5.2 it is otherwise just and equitable to do so; and
- 5.3 there is a reasonable prospect for rescuing ZCMT *inter alia*, on the basis of the proposed business rescue plan that is set out in the founding affidavit¹.

The factual background

[6] ZCMT is a close corporation which apparently has been primarily in the business of building low cost housing for local authorities on the strength of successful tenders. Ms Mpisane has been its sole member, controlling mind and driving force. There are several other companies and close corporations, namely Zikhulise Auto Restorers CC, Inyanga Trading 559 (Pty) Ltd, a trust called the Mkhimpi Family Trust in which Ms Mpisane has some or other interests which have not been clearly defined in these papers except that they

¹ A so-called supplementary founding affidavit was filed by the applicant providing more comprehensive financial statements and reports in support of the application.

too have claims against them by SARS for various taxes including Value Added Tax (VAT) Pay As You Earn (PAYE) and income tax. These other entities are referred to either as 'the group of taxpayers' or 'the associated taxpayers'. By all accounts the various enterprises have been very successful and so has Ms Mpisane. According to the papers their collective tax liabilities run into millions of Rands. The undisputed and disputed tax liabilities about which ZCMT and Ms Mpisane have been at loggerheads with SARS over a number of years are, according to SARS, in excess of R120 million. About R40 million relates to an undisputed tax liability and about R80 million is disputed.

[7] During 2015 ZCMT entered into protracted negotiations with SARS for the payment of its substantial tax liabilities in instalments. ZCMT applied for a deferred payment arrangement in terms of the Tax Administration Act No 28 of 2011 (the TAA). In November 2015 SARS informed ZCMT that the application for a deferred payment arrangement was approved provided ZCMT complied with certain conditions. ZCMT failed to comply and SARS declined to enter into an arrangement with it.

[8] Thereafter, SARS launched an urgent application in this court during February 2016 to have ZCMT wound up on the basis that it was unable to pay its debts as described in s345 of the old Companies Act No. 61 of 1973 (the old Companies Act) and it would be just and equitable to do so. The matter came before Legodi J on 8 March 2016 when it was postponed *sine die* and costs were reserved because the day before, on 7 March, Ms Mpisane

launched the business rescue application, which had the effect of suspending the winding up application in terms of s131(6) of the New Companies Act 71 of 2008 (the new Companies Act)².

[9] ZCMT has not filed an answering affidavit in the winding up application.

[10] SARS states in the winding up application that ZCMT has a long history of engagement with it and has been non-compliant with its tax obligations over many years. The deponent to the founding affidavit says SARS' attempts to collect the outstanding taxes have now been frustrated by ZCMT, which has commenced dissipating its assets and more specifically by channelling debts due to it to third parties by way of cession agreements.

[11] On 19 January 2016, SARS filed a statement as envisaged in s172 of the TAA for the undisputed debts as at 31 December 2015 in respect of Secondary Tax on Companies (STC); PAYE and tax. A warrant of execution was issued against movables and the Sheriff attempted to execute it on 28 January 2016 at ZCMT's business premises but found the premises to be locked. A further attempt to execute against movables was unsuccessful on 1 February 2016. As I said, the liquidation application was launched thereafter

² S131(6) provides -

'If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until—

a) the court has adjudicated upon the application; or

b) the business rescue proceedings end, if the court makes the order applied for.'

on 25 February 2016 but before the matter could be heard on 8 March 2016 Ms Mpisane launched the business rescue application the day before.

[12] I revert to the business rescue application.

[13] In paragraph 5 of the founding affidavit in the review application Ms Mpisane, who is the deponent to the affidavit, says –

‘As will become apparent hereunder, the relief regarding the business rescue of the applicant is dependent upon the grant of the present relief sought herein and there is, in any event, a substantial factual overlap between the two applications.’

[14] The review application failed. Hence, ZCMT remained non-compliant regarding its tax liabilities. SARS was therefore precluded from issuing a Tax Clearance Certificate (TCC) to ZCMT. This situation would have remained unchanged even if the business rescue application had succeeded. Counsel for Ms Mpisane appreciated the position when they stated in their heads of argument in the business rescue application –

‘37. It is true that ZCMT’s trading and the successful implementation of the final business rescue plan are dependent upon the business rescue practitioner obtaining a Tax Clearance Certificate (“TCC”) in the name of ZCMT from SARS. The possession of a current TCC is an indispensable requirement for the carrying on of ZCMT’s business It is the policy of the Local Authorities to demand a TCC from a tenderer before awarding any tender and the same applies in respect of the making of any payment in terms of a tender.’

[15] The parties' legal representatives also signed a joint practice note in which it was stated –

'The parties agreed that, given the issue in the respective applications, it would be most practical that the review application be heard first, and that, depending on the judgment in the review application, the business rescue and winding-up applications be argued thereafter.'

[16] It is clear that Ms Mpisane's case for placing ZCMT under supervision and to commence business rescue proceedings is premised on the assumption that it qualifies for a TCC. But it does not qualify for a TCC as it does not meet the requirements of s256 of the TAA.

[17] Section 256(3) of the TAA provides –

"256. Tax compliance status.—

(1) A taxpayer may apply, in the prescribed form and manner, to SARS for a confirmation of the taxpayer's tax compliance status.

(2) SARS must issue or decline to issue the confirmation of the taxpayer's tax compliance status . . . if a senior SARS official is satisfied that the confirmation of the taxpayer's tax compliance status may prejudice the efficient and effective collection of revenue.

(3) A senior SARS official may provide a taxpayer with confirmation of the taxpayer's tax compliance status as compliant only if satisfied that the taxpayer is registered for tax and does not have any—

(a) outstanding tax debt, excluding a tax debt contemplated in section 167 or 204 or a tax debt that has been suspended under section 164 or does not exceed the amount referred to in section 169(4); or

- (b) outstanding return unless an arrangement acceptable to the SARS official has been made for the submission of the return.

....'

[18] Section 167 provides for a deferred payment arrangement which never materialised as I mentioned in the review judgment. The tax debt has also not been suspended in terms of s164; the debt exceeds the amount contemplated in s169(4) (R100.00) (nor has it been alleged that SARS has determined any other amount by public notice) and s204 deals with compromise of a tax debt which is not relevant here.

[19] Without a TCC ZCMT is not able to trade and the business rescue practitioner will not be able to conduct its trading operations.

[20] Ms Mpisane also stated in the replying affidavit in the business rescue application, at paragraph 24.2 that –

'The business rescue proceedings is (*sic*) not preconditioned upon the second respondent issuing a Tax Clearance Certificate. It is precondition (*sic*) on the Court coming to the First Respondent's assistance by way of an order declaring First Respondent to be entitled to such a certificate.'

[21] Bearing in mind the provisions of s256 and the fact that ZCMT is non-compliant, this court cannot make an order that ZCMT is entitled to such a certificate.

[22] Ms Mpisane has repeatedly stated that SARS is biased and acted *mala fide* in declining to enter into a deferred payment arrangement. I do not think so, as I have said in the review judgment. In Oakdene³ it was stated –

‘If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or *mala fide*.’

[23] For all these reasons I dismissed the business rescue application.

The liquidation application

[24] The reasons for SARS launching the liquidation application has already been traversed earlier.

[25] It is important to note that where a business rescue application is dismissed s131(4)(b) provides that after considering the application the court may –

‘(b) dismissing (*sic*) the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.’

³ Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) 2013(4) SA 539 SCA at para 38 per Brand JA.

[26] I granted the order placing ZCMT under provisional liquidation as the facts set out in the liquidation application as well as those in the business rescue application justified such an order.

[27] Counsel for ZCMT submitted that it ought to be given an opportunity to file an answering affidavit in the liquidation application, should the business rescue application fail. I was of the view that that would serve no purpose as the facts set out in the liquidation application were incorporated in SARS's answering affidavit in the business rescue application and Ms Mpisane had ample opportunity to deal with them, and in fact did do so. In their written and oral submissions counsel for SARS stated that they were not requesting the court to hear the winding up application but merely to exercise its discretion in terms of s131(4)(b) for the provisional liquidation of ZCMT. No purpose would have been served in allowing an answering affidavit to be filed, more so bearing in mind that s131(4)(b) confers upon a court the discretion to place a company under liquidation where a business rescue application is dismissed. In my view the facts set out in the papers in the business rescue application were sufficient to exercise my discretion in favour of granting an order for the provisional liquidation of ZCMT.

[28] In all those circumstances I made the order that I did in the business rescue application which included the provisional winding up of ZCMT.



RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Liquidation application

Counsel on behalf of Applicant	: Adv E. Coetzee (SC)
	Adv C. Naude
	Adv K. Ramaimela
Instructed by	: MacRobert Attorneys
Counsel on behalf of Respondent	: Adv W.J Vermeulen (SC)
	Adv F. Strydom
Instructed by	: Faber Goertz Ellis and
	Austen
Date heard	: 12 June 2017
Date delivered	: 2 November 2017

Appearances

Business rescue application

Counsel on behalf of Applicant	: Adv W.J Vermeulen (SC)
	Adv F. Strydom

Instructed by	:Faber Goertz Ellis and Austen
Counsel on behalf of Respondent	: Adv E. Coetzee (SC) Adv C. Naude Adv K. Ramaimela
Instructed by	: MacRobert Attorneys
Date heard	: 12 June 2017
Date delivered	: 2 November 2017