



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

Case no: 13205/2022

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHERS JUDGES: NO	
(3) REPORTABLE: NO	
(4) REVISED	
(5) OF INTEREST TO OTHERS JUDGES: NO	
(6) REVISED	
.....	29 AUGUST 2022
SIGNATURE	DATE

In the matter between:

PAULETTE BEZUIDENHOUT

APPLICANT

and

VINCENT AMORETTI (PTY) LTD (in liquidation)

FIRST RESPONDENT

CHARLOTTE PELSER N.O.

SECOND RESPONDENT

BURGERBRUG BELEGGINGS (PTY) LTD

THIRD RESPONDENT

MASTER OF THE HIGH COURT

FOURTH RESPONDENT

COMPANIES INTELLECTUAL PROPERTY

COMMISSION

FIFTH RESPONDENT

JUDGMENT

MOLEFE J

[1] This is an application for rescission of a liquidation order and an order placing the first respondent, Vincent Amoretti (Pty) Ltd (in liquidation), under business rescue. The applicant, Paulette Bezüidenhout, is the major shareholder of the first respondent (the company) which was finally liquidated on 7 December 2021 (the liquidation order). The applicant seeks to set aside the liquidation order on the basis that the third respondent, Burgerbrug Belegginas (Pty) Ltd, who was the petitioning creditor, failed to comply with the peremptory provisions of the Companies Act 61 of 1973, (the old Companies Act) by failing to serve the liquidation application and the provisional order on the company's employees. The applicant also seeks an order placing the company under business rescue in terms of section 131 of the Companies Act 71 of 2008 (the new Companies Act), on the basis that there is a reasonable prospect that the company may be rescued.

[2] The second respondent, Charlotte Pelser N.O, in her capacity as the provisional liquidator filled notice to abide by the decision of the Court but has filed an affidavit setting out relevant facts that require consideration by the Court in deciding whether the company can successfully be rescued. The third respondent opposes the application.

[3] The company is a manufacturer and supplier of wooden doors, frames and high-end joinery and mouldings using high quality imported timber. The company has been trading since January 2013 and has thirty (30) employees. On 28 June 2021, the third respondent launched an application for liquidation of the company. Pursuant to the aforesaid application, a provisional liquidation order was granted on 14 September 2021 and a final liquidation granted on 7 December 2021.

The Legal principles

[4] Section 346(4A)(a)(ii) of the old Companies Act requires of an applicant in a winding-up application to furnish the employees of the relevant company with a copy of the application and reads as follows:

'When an application is presented to the Court in terms of this section, the applicant must furnish a copy of the application –

- (i) . . .
- (ii) to the employees themselves –
 - (aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company;
 - or
 - (bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application'.

[5] Section 354 of the old Companies Act provides as follows:

'354. A Court may stay or set aside winding-up.

- (1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
- (2) The Court may, as to all matters relating to a winding-up have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.'

The powers conferred on this Court by s 354 are very wide. They certainly allow, if not require, the Court to have regard to events subsequent to the winding-up of the company.

Rescission of the liquidation order

[6] It is common cause that the third respondent is the property owner and that the company leases commercial premises from the third respondent, which are situated at 14 Bloubokkie Street, Koedoespoort Industrial, Pretoria (the leased premises). The applicant submitted that the third respondent knew that company conducted its business from the leased premises and that all the company's employees could be located there. In support of its liquidation application, the third respondent's attorney, Mr Nusscheus, deposed to an affidavit wherein he purported

compliance with s 346(4A) of the old Companies Act, and stated that service could not be effected on the employees as 'the premises of the company were found locked'. The return of service indicates service on the company at the registered address, being 27 Gemsbok Street, Koedoespoort Industrial, Pretoria, by affixing to the principal door.

[7] Counsel for the applicant argued that the aforesaid return of service refers to the company and not the employees, and there is no other return of service evidencing service on the employees. It was further argued that the third respondent caused the liquidation application to be served at the company's registered address, which it knew to be vacant in circumstances where it (and its attorney) was aware that the company and its employees could be found at the leased premises. Counsel further submitted that it is noteworthy that the provisional order provides for service on the company's employees at its premises, and the third respondent knows that the company's premises are not located at its registered address. The applicant contended further that the third respondent failed to comply with s 346(4A)(a)(ii) of the old Companies Act.

[8] It is the applicant's submission that our Courts have consistently held that provisions of s 346(4A)(a)(ii) are peremptory, and in this regard relied on *Hendricks NO and Other v Cape Kingdom (Pty) Ltd* where it was stated that:

'It seems plain that the provisions of s 346(4A)(a)(ii) of the Act are peremptory in nature. This is the view to which Davis J came in his judgment in the liquidator's application. He summarised his view expressed in para 29 of the judgment as follows:

"To sum up, a Court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the parties which are specified in s 346(4A). I do not consider that the inherent jurisdiction would extend the power of the court."¹

[9] This application is brought in terms of rule 42(1)(a) of the Uniform Rules of Court in terms of which the Court may in addition to any other powers it may have, *mero muto* or upon the application of any party affected, rescind or vary an order or

¹ *Hendricks NO and Other v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC) para 31.

judgment erroneously sought or granted in the absence of any party affected thereby. In general terms, a judgment is erroneously granted if there existed at the time of its issue, a fact of which a Court was unaware, which would have precluded the granting of the judgment, and which if the Court was aware of would not have granted the judgment.² It is the applicant's submission that the third respondent's failure to comply with s 346(4A)(a)(ii) falls squarely within the ambit of rule 42(1) and that the liquidation order must be rescinded.

[10] The applicant's high water mark in respect of the rescission of judgment is that the service of the application for winding-up as well as the provisional order was not served on the employees as it was effected at the company's registered address and not at the leased premises and as such there was non-compliance with the peremptory requirements of s 346(4A) of the old Companies Act.

[11] In *Stratford and Others v Investec Bank Limited and Others*³ the Constitutional Court held that:

[42] Failure to furnish the employees with the petition may not be relied upon by the debtor opposing sequestration when the question to be decided is whether sequestration is to the advantage of creditors. In *EB Steam Company* the Supreme Court of Appeal stated that the purpose is not to provide a "technical defence to the employer, invoked to avoid or postpone the evil hour when winding-up or sequestration order is made." (Emphasis added.)

The third respondent's version

[12] In terms of a default judgment granted on 14 December 2021, the company remains indebted to the third respondent in the sum of R828 552.57, together with the interest at a rate of 7, 25% for arrears with its lease payment obligations including an unliquidated claim for damages. Counsel for the third respondent argued that in terms of rule 42(1) of the Uniform Rules of Court, the applicant *inter alia* seeks an order to have the company restored to its insolvent status and to trade in insolvent circumstances in total disregard of the Company's body of creditors.

² Occupiers, *Berea v De Wet* NO 2017(5) SA 346 (CC) at 366E-367A.

³ *Stratford and Others v Investec Bank Limited and Others* (CCT 62/14) [2014] ZACC 38; 2015 (3) BCLR 358 (CC); (2015) 36 ILJ 583 (CC) (19 December 2014).

[13] Counsel further argued that in granting the provisional winding-up order, the Court expressly ordered that service on the company and its employees be effected on its registered address. The second service affidavit confirms that all the provisions of the provisional order had been complied with. In terms of the provisional order, and on 14 October 2021, service was effected by the Sheriff on the company, the company's employees and any registered trade union of the employees at the company's registered address. There was accordingly strict compliance with s 346(4A) of the old Companies Act, more importantly, strict compliance with the directive contained in the provisional order.

Analysis

[14] In *Praetor and Another v Aqua Earth Consulting* it was held that:

'... the Uniform Rules of Court provide that service of process upon a company may be effected at its registered office. Sections 346 and 346A of the 1973 Companies Act which remain of application in respect of compulsory winding-up proceedings against allegedly insolvent companies, provide for service of the application, and any resultant winding-up order to be effected on the company. The contents of the other provisions of the Act just described and the relevant rules of Court shows that the scheme of the legislation clearly contemplates that such service will be effected at the company's registered office. These considerations are important to the achievement of "an ordered judicial process".⁴

[15] In this case, the similar circumstances as in *Praetor* do not result in the order being erroneously granted in the relevant sense of the term. In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*,⁵ the Supreme Court of Appeal confirmed that the default judgment to which a party was procedurally entitled could not be said to have been erroneously granted in light of a subsequently disclosed defence. Furthermore, in *Hendricks*⁶ relied upon by the applicant, the Court actually confirmed that substantial compliance with s 346(4A) of the old Companies Act would suffice.

⁴ *Praetor and Another v Aqua Earth Consulting CC* (162/2016) [2017] ZAWCHC 8 (15 February 2017)

⁵ *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* [2007] ZASCA 85 (1 June 2007).

⁶ *Hendricks NO and Other v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 WCC.

[16] Based on the above, the rescission of the winding-up order is with no merit. I am satisfied that the service of the winding-up application and the provisional order served at the Company's registered address, the Company's employees and the trade union was in substantial compliance with s 346(4A). The rescission application should therefore fail.

The business rescue relief

[17] Section 131(4) of the new Companies Act provides that:

- '(4) After considering an application in terms of ss (1), the court may –
- (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that:
 - (i) the company is financially distressed;
 - (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment matters; or
 - (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or
 - (b) dismiss the application together with any further necessary or appropriate order, including an order placing the company under liquidation.'

[18] Business rescue has one of the following objectives:

18.1 to restructure the affairs of the company in an attempt to ensure that the company continues in existence on a solvent basis; or

18.2 if it is not possible for the company to so continue in existence, that the business rescue results in a better return for the company's creditors and shareholders than would ordinarily result from immediate liquidation of the company⁷.

[19] Section 131(2) (b) of the new Companies Act states that the application placing the company under supervision and commencing business rescue proceedings must be served on the company and the Commission and must notify each affected person of the application in the prescribed manner.

⁷ Section 128(1)(b)(ii) of the new Companies Act.

[20] On the applicant's own version, the company is financially distressed. The first requirement of s 131(4)(i) is therefore satisfied.

[21] As indicated above, the second respondent, the provisionally appointed liquidator of the company filed an affidavit setting facts that the Court ought to take cognizance of so as to assist the Court to properly adjudicate the matter. No costs were sought by the second respondent. The following objective and undisputed facts appeared in the affidavit.

Non-compliance with statutory provisions

[22] The applicant failed to comply with s 131(2)(b) by failing to serve the application on all creditors of the company, as well as the company's employees. The applicant also failed to adequately address the disclosure of creditors and to address annexure CP 21, a list of company creditors dated 21 January 2022. There are at least six (6) further creditors of the company that have not received notice of this application. In addition, no notice was given to Checkers, Chamberlains, Leroy Merlin and Mike Buyskes who are all affected parties.

[23] The following relevant facts regarding the company's true financial position are set out in the second respondent's affidavit.

Annual financial statements

[24] The total assets amounted to R2 335 765. 00, total liabilities to R 3 268 111.00 and non-current liabilities amounted to R3 605 896.00. The accumulated loss is reflected as R4 538 242.00. The current assets were reflected as R1 546 606.00 while the current liabilities amounted to R 268 111.00. Non-current assets total of R789 159.00 consists of (i) computer equipment to the value of R16 352.00; (ii) motor vehicles to the value of R236 919.00; (iii) leasehold improvements to the value of R91 630.00; and (iv) machinery to the value of R52 6080.00.

[25] The second respondent's submission is that, based on the signed financial statements for the year ending 28 February 2021, the company appears not only to be factually insolvent but also commercially insolvent with a possibility of only 47% of the current liabilities that could be paid.

Immovable assets

[26] There exist a lot of uncertainty as to the true state of affairs regarding the ownership of the company assets. Whilst the applicant alleged that all the assets are wholly owned by the company, various claims by third parties including family members of the applicant have been made claiming ownership of such assets. The applicant has failed to provide probative proof evidencing such ownership. Several of the assets are still under hire purchase.

[27] The valuation report and the inventory prepared by Asset Auctions on 21 January 2022 reveals the plant equipment, office furniture and stock at hand to be valued at R750 000. The applicant's stepson, Matthew Amoretti, has proclaimed ownership in his capacity as Director of Barkley and Mille Machinery Rental (Pty) Ltd of over 12 x machinery equipment. Marius Aucamp and Riekie de Later also claimed ownership of approximately 54 movable assets.

[28] The two company vehicles, a 2019 Hyundai Kona and a 2014 Tata bakkie were valued (based on their forced value) at R245 000.00 and R47 000.00 respectively. The Hyundai vehicle makes up a quarter of the company assets value as per financial statement, and the applicant claimed it as her own. The applicant has to date failed to pay any equity over the company estate despite several demands, thereby diminishing the company estate, which is not to the benefit of the creditors.

[29] At this stage, it is impossible to establish the true financial position of the company and what assets the company owns. Without this essential information, it is the second respondent's submission that the Court will not be able to accurately assess and determine whether the company ought to be placed under business rescue or not.

Creditors

[30] In the application, the applicant listed eight (8) creditors with a total of liability of R3 235 464.25. The applicant, however, omitted to mention that the Tata motor vehicle is under vehicle finance with Liquid Vehicle Finance, accuracy provider of Wesbank, and the company is still indebted to Wesbank in the amount of R57 760.50. Furthermore, the list submitted by Mr Amoretti on 21 January 2022 differs from the list submitted by the applicant, in that, the applicant failed to mention six (6) creditors owed approximately R208 408.00. No evidence is provided by the applicant of any payments made to these creditors. The second respondent will also become a creditor of the company for remuneration for work performed or for compensation for expenses incurred before rescue proceedings began.⁸

[31] The second respondent's conclusion is that various creditors have not been disclosed as well as the amounts owed to undisclosed and disclosed creditors, nor any interest payable. Therefore, on the applicant's version alone, there are simply insufficient assets to satisfy and pay all the creditors.

Analysis

[32] The fundamental issue when considering a business rescue is whether there is a reasonable prospect of rescuing the company. If a company is not a candidate for business rescue and cannot achieve either of the objectives set out in s 128(1)(b) (ii), then it should be placed in liquidation.⁹ The applicant must establish grounds for the reasonable prospects of achieving one of the two goals in s 128(1)(b).¹⁰

[33] Whether the company is financially distressed as contemplated by s 128(i)(f) of the new Companies Act and eligible to enter into business rescue requires careful consideration of the definition:

⁸ Section 136(4) of the Companies Act.

⁹ Dr E Levenstien 'South African Business Rescue Proceedings issue 4 November 202, Lexis Nexis, 7 – 10 (issue 1).

¹⁰ *Oakdene Square Properties (Pty) Limited and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA).

33.1 Section 128(1)(f)(i) provides that it appears reasonably unlikely that a company will be able to pay all of its debts as they become due and payable within the immediately ensuing six (6) months.

33.2 Section 128(1)(f)(ii) provides that it appears reasonably likely that the company will be insolvent within the ensuing six (6) months.

This section therefore contemplates that companies that are financially distressed in the context of a six (6) months window period are companies that are not yet insolvent and that there are still some viability and real prospects of them being rescued. Confusing a company that is already 'insolvent' with one that is 'financially distressed' is a dangerous mistake.¹¹

[34] The applicant's submission in support of her contention that there is a reasonable prospect of rescuing the company is that the causes of the company's financial distress was the Covid-19 pandemic, which resulted in a downturn in business. The applicant argued that there is compelling evidence of a substantial amount of new and prospective business as the applicant has submitted a number of quotations and prospective business which demonstrate that the company has no shortage of work and can generate sufficient income to pay its creditors. It is further submitted that the applicant has secured cheaper lease premises for the company which will reduce its fixed expenses and increase the income available to pay creditors.

[35] The Court should scrutinise the facts in each matter carefully, and exercise its discretion in a manner that does not disadvantage the creditors. The Court remains with the discretion under s 131(4)(a) of the new Companies Act to place a company in business rescue on grounds that it is otherwise just and equitable to do so for financial reasons. Supporting and cogent evidence reflecting that there is a reasonable prospect that the company can be rescued is absent in this case.

[36] On the applicant's own version, the company suffered financial hardship already in 2019. In that regard, the second respondent maintains that the company is

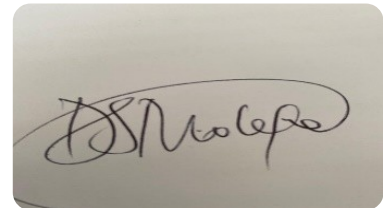
¹¹ Dr E Levenstien 'South African Business Rescue Proceedings issue 4 November 202, Lexis Nexis at page 7 – 25 (issue 3).

clearly insolvent and accordingly not a suitable candidate for business rescue. The second part of s 128(1) requires a glance into the future to see whether the company will be insolvent in the next six (6) months period. In my view, the company is already beyond this stage and as per its own financial statements already insolvent.

[37] I am not convinced that the applicant has set out a concrete plan for consideration which support any prospect of the business being restored to a successful one. Furthermore, the applicant has failed to make a full and frank disclosure of all assets and all creditors to reasonably come to the conclusion that the company business can be successfully rescued. The entire application is based on unsubstantiated and speculative grounds.

[38] In the circumstances the following order is made:

38.1. The application is dismissed with costs.

A rectangular box containing a handwritten signature in black ink. The signature appears to be 'D S Molefe' written in a cursive, flowing style.

D S MOLEFE
JUDGE OF THE HIGH COURT

This judgment by the Judge whose name is reflected herein, is delivered and submitted electronically to the parties/their legal representatives by e-mail. This judgment is further uploaded to the electronic file on this matter on Caselines by the Judge or his / her secretary. The date of the judgment deemed to be 29 August 2022.

·
APPEARANCES:

Counsel for the Applicant: Adv N G Louw

Instructed by: TMJ Attorneys

Counsel for Respondents: Adv L W de Bear

Instructed by: Johan Nysschens Attorneys

Date heard: 05 May 2022

Date of Judgment: 29 August 2022