

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024/031809

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

.....
SIGNATURE

.....
DATE

In the matter between:

PREFERENCE CAPITAL (PTY) LTD

Applicant

and

NOMAGEBA TRADING CC (in business rescue)

First Respondent

(Registration Number: 2005/028915/23)

NOMATHAMSANQA ZULU

Second Respondent

(Identity Number: [...])

JERIFANOS MASHAMBA NO

Third Respondent

(In his capacity as business rescue practitioner)

of the First Respondent)

ID NO: [...])

COMPANIES AND INTELLECTUAL PROPERTIES

COMMISSION

Fourth Respondent

TURN AROUND MANAGEMENT ASSOCIATION

SOUTHERN AFRICA CHAPTER

Fifth Respondent

(Registration number: 2005/033371/08)

JUDGMENT

LABUSCHAGNE AJ

[1] On 9 April 2024 the applicant applied in the urgent court for an order:

- “2. *That the resolution adopted by the board of directors of the first respondent on 1 March 2024 to voluntarily begin business rescue proceedings and place the first respondent under supervision be set aside in terms of section 130(1)(a) and/or section 130(5)(a) of the Companies Act, 71 of 2008.*

3. *That the first respondent be placed under provisional winding-up in the hands of the Master of the High Court in terms of section 130(5)(c)(i) of the Companies Act, 71 of 2008.*

4. *That a rule nisi be issued calling upon all affected parties to show cause on a date to be arranged with the Registrar why the first respondent should not be finally wound up."*

[2] As an alternative to the above relief and in the event of the court finding that there are not sufficient grounds for setting aside the aforesaid resolution, the applicant applied for an order in the following terms:

- "5. That the appointment of the third respondent as the nominated business rescue practitioner of the first respondent be set aside in terms of section 130(1)(b) of the Companies Act, 71 of 2008.*
6. *That this court appoint an alternate business rescue practitioner in terms of section 130(6)(a) of the Companies Act, 71 of 2008 to be nominated by the fifth respondent.*
7. *That the business rescue practitioner appointed in terms of section 130(5)(b) of the Companies Act, 71 of 2008 be afforded sufficient time to form an opinion whether or not the first respondent is, or appears to be financially distressed or has a reasonable prospect of being rescued.*
8. *That the second and third respondents be ordered to pay the costs of the application on the scale applicable between attorney and client."*

- [3] The matter initially stood down to enable the third respondent to be in court. Counsel then appeared for the first to third respondents but contended that he did not have enough time to obtain proper instructions. There was no formal request for a postponement.
- [4] The applicant and the first respondent had concluded a loan agreement on 15 October 2021, in terms of which the applicant would make available a loan facility of R2 million available to the first respondent. Repayments would be made in terms of the loan schedule by way of monthly debit orders. As security for the repayment obligations the first respondent pledged and ceded any proceeds standing to the credit of any bank account, together with all receivables due and owing to the applicant.
- [5] The applicant advanced the aforesaid amount to the first respondent and on 15 October 2022 the applicant and the first respondent concluded a written cession agreement giving effect to the aforesaid security agreement.
- [6] The first respondent breached these obligations under the loan agreement by failing to make timeous payments to the applicant in terms of the agreement. The first respondent is therefore indebted to the applicant in a balance of R1 695 250.00. Against the backdrop the first respondent's directing mind, the second respondent, passed a resolution in terms of section 129(1)(a) placing the first respondent in business rescue.
- [7] The facts of this matter demonstrate a degree of urgency that warrants the matter being heard on the basis thereof. If the first to third respondents were

to successfully commence business rescue proceedings, it would provide a temporary moratorium on the rights of claimants against the company or in respect of property in its possession. It is because of this moratorium imposed when a company enters into business rescue, that the court in **Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd** 2012 (JDR) 1053 (ECP) held that the nature of the relief sought renders the application urgent.

[8] Business rescue initiated by a resolution may provide an undeserved moratorium “*by a stroke of the company pen by passing and filing a section 129(1) resolution*” (**Climax Concrete supra** at par [38]). The potential for abuse needs to be guarded against as it would adversely affect the interests of creditors.

[9] The applicant contends that it and other creditors have already suffered significant financial losses at the hands of the first respondent and that such losses can only be diminished by the control of the first respondent vesting in a liquidator.

[10] In respect of urgency, it is necessary to determine whether the applicant would obtain substantial redress in due course or not.

[11] In **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others** [2011] ZAGPJHC 196 (23 September 2011) the court stated at paragraph [7]:

“It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.”

[12] The continuation of business rescue poses the risk of diminishing the return dividend of creditors where liquidation is unavoidable. On this score the applicant will not obtain substantial redress in due course unless the application is heard as urgent.

[13] Section 130(1)(a) of the Companies Act provides that a resolution placing a company into business rescue may be set aside on the grounds that there is no reasonable prospect for rescuing the company (section 130(1)(a)) or that the company has failed to satisfy the procedural requirements set out in section 129.

[14] An applicant must satisfy the court that any of the grounds listed in section 130(1)(a) is present and that it is just and equitable to set the resolution aside (section 130(5)(a)(ii)).

[15] The Supreme Court of Appeal in **Panamo Properties (Pty) Ltd and Another v Nel NO and Others** 2015(5) SA 63 (SCA) at paragraph [32] held:

“Insofar as it may be suggested that the use of the word ‘otherwise’ in s 130(5)(a)(ii) points in favour of this furnishing a separate substantive ground for setting aside the resolution, I do not agree. In my view the word is used in this context to convey that, over and above establishing one or more of the grounds set out in s 130(1)(a), the court needs to be satisfied that in the light of all the facts that it is just and equitable to set the resolution aside and terminate the business rescue. It is not being used in contradistinction to the statutory grounds, but as additional thereto. This is consistent with the meaning ‘with regard to other points’ given in the Oxford English Dictionary.”

[16] The applicant needs to establish therefore that, on the facts, there does not exist a possibility based on reasonable objective grounds that the first respondent can be rescued and that it is just and equitable for the resolution to be set aside.

[17] Judgments have been taken against the first respondent as follows:

17.1 R8 954 198.30 on 12 February 2024 in favour of SARS under case number 328/24 in this Division;

17.2 R26 077.42 on 25 January 2024 in favour of Standard Bank under case number 118149/23 out of the Gauteng Local Division, Johannesburg;

- 17.3 R1 895 052.80 on 1 November 2023 in favour of Standard Bank under case number 74852/23 out of the Gauteng Local Division, Johannesburg;
- 17.4 R4 591 654.60 on 6 September 2023 in favour of Nedbank under case number 57223/23 in this Division;
- 17.5 R767 519.35 on 10 December 2023 in favour of Bid Food (Pty) Ltd under case number 2692/22 out of the Gauteng Local Division, Johannesburg;
- 17.6 R309 000.00 on 24 May 2023 in favour of the Food and Beverages Manufacturing Sector Education and Authority under case number 49351/22 out of the Johannesburg High Court;
- 17.7 R76 129.43 on 31 October 2022 in favour of Cessna Meat Suppliers CC under case number 21988/22 out of the Randburg Magistrate's Court;
- 17.8 R2 968 755.40 on 21 September 2021 in favour of SARS in respect of VAT under case number 43714/21 out of the Gauteng Local Division, Johannesburg.
- [18] In addition, the credit report reflecting the aforesaid judgments confirms that the first respondent is in respect with the payment of its lease as at 24 January 2024 in the amount of R24 015.50.

- [19] In addition to the aforesaid the first respondent is liable to the applicant for the balance of the loan, being R1 695 250.00.
- [20] A further procedural requirement of section 129 is that a sworn statement of facts relevant to the grounds on which the board resolution was founded must be included in the notice of the resolutions. The sworn statement provided in this matter does not provide any relevant grounds on which the first respondent's resolution was founded.
- [21] The sworn statement states *inter alia* that the first respondent will recover debts from its debtor. The first respondent has however ceded all of its book debts to the applicant.
- [22] The sworn statement by the first respondent does not comply with the requirements of section 129(3)(a).
- [23] The first respondent has judgment debts against it totalling R19 612 402.30, of which an amount of R11 922 953.20 is for judgments obtained by SARS. The first respondent is in addition indebted to the applicant in a secured amount of R1 695 250.00, the applicant having taken cession of the first respondent's debtors. Whatever recoveries may therefore be made from debtors of the first respondent, would accrue to the applicant based on its cession of book debts.
- [24] The board of a company may only pass a resolution voluntarily placing the company into business rescue if the board has reasonable grounds to believe that there appears to be a reasonable prospect of rescuing the

company (section 129(1)). On the facts of this matter, there could be no reasonable subjective belief that the first respondent could be rescued.

[25] The minutes of the board meeting does not disclose any grounds for a belief that the company may be rescued.

[26] The fact that such a decision was taken by the second respondent in the face of the crippling debt of the first respondent and its bleak prospects of recouping outstanding debts is a cause for concern. I am satisfied that the decision to place the company into business rescue was to avoid an inevitable liquidation. There are no objectively reasonable grounds for believing that the first respondent could be saved or that a better dividend would be obtained by means of business rescue. Business rescue will merely delay the inevitable and whittle away what is available for a dividend upon liquidation.

[27] As the above facts already establish a basis for setting aside the resolution, it is not necessary to deal with the suitability of the third respondent as business rescue practitioner.

[28] I am satisfied that:

28.1 There was as at 1 March 2024 no reasonable prospect for rescuing the first respondent;

28.2 In passing a resolution on 1 March 2024 placing the close corporation into business rescue the “board” of the first respondent

(the second respondent) failed to satisfy the procedural requirements as set out in section 129 of the Companies Act, as there were no reasonable grounds for a belief that the company could be rescued;

28.3 I am further satisfied that it is just and equitable for the resolution to be set aside.

[29] The applicant has established its *locus standi* to apply for the liquidation of the first respondent by means of the aforesaid debt. The first respondent is clearly unable to pay its debts (section 344(f) read with section 345(1)(c) of the Companies Act, 61 of 1973). The statutory formalities have been complied with.

[30] I am further satisfied that:

30.1 The first respondent has not and cannot pay its creditors;

30.2 The first respondent cannot recover any further debt because of the cession of book debts;

30.3 The first respondent owes SARS the amount of R11 922 593.70 in terms of judgments;

30.4 The first respondent is using business rescue for purposes of delaying an inevitable liquidation.

[31] I am therefore satisfied that it is just and equitable to wind-up the first respondent.

[32] I therefore make the following order:

1. The matter is heard on the basis of urgency.
2. The resolution adopted by the directing mind of the first respondent on 1 March 2024, placing the first respondent under voluntary supervision and business rescue is set aside.
3. The first respondent is placed in provisional winding-up.
4. A rule nisi is issued calling upon all interested parties to advance reasons why the court should not order the final winding-up of the respondent on 13 June 2024.
5. A copy of the order is to be served upon the first respondent at its registered address.
6. A copy of the order is to be served upon the first respondent's employees by affixing the order on a notice board within its premises.
7. This order is to be served on the third respondent at his place of employment.

8. A copy of the order is to be delivered to the South African Revenue Service.
9. A copy of this order is to be published in the Government Gazette and in the Citizen Newspaper.
10. A copy of this order is to be delivered to each known creditor by email.
11. The costs of this application are to be paid by the directing mind of the first respondent, namely the second respondent.

LABUSCHAGNE AJ