

IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 38906/2012

15/8/2012 *M.G. Tolmay*

15/8/2012

IN THE MATTER BETWEEN:

MADODZA (PTY) LTD (in business rescue)  
AND

APPLICANT

ABSA BANK LIMITED

FIRST RESPONDENT

UYS MATYEKA SCHWARTZ ATTORNEYS

SECOND RESPONDENT

THE SHERIFF: NELSPRUIT

THIRD RESPONDENT

RAND MERCHANT BANK

FOURTH RESPONDENT

NEDBANK LIMITED

FIFTH RESPONDENT

WESBANK

SIXTH RESPONDENT

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JUDGMENT

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TOLMAY, J:

- [1] The applicant who is under business rescue, brought an urgent application to prohibit the Sheriff of Nelspruit from removing several vehicles from the possession of the applicant, until such time as the business rescue proceedings have come to an end as envisaged by sec 132(2) of the Companies Act, No 17 of 2008 (the Act). These vehicles were financed by the first, fourth, fifth and sixth respondents.
- [2] It is common cause between the parties that the applicant failed to appoint a business rescue practitioner within 5 days after business rescue proceedings commenced as required by sec 129(3) of the Act.
- [3] The relief sought is based on sec 133(1) of the Act which reads as follows:
- “133. (1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –*
- (a) With the written consent of a practitioner;*
  - (b) With the leave of the Court and in accordance with any terms of the Court considers suitable”*

## **BACKGROUND**

- [4] The applicant conducts business as a transport company and requires the vehicles referred to in the notice of motion to perform its business. The business rescue proceedings commenced on 22 November 2011 in terms of sec 129(3) of the Act and the business rescue practitioner took control of the company assets and financial affairs on 20 January 2012. The vehicles are essential to the applicant's business and to the success of the business rescue proceedings.
- [5] A business plan was developed in terms of the requirements of the Act, after a meeting of creditors, the business plan was revised. The creditors rejected the revised business plan. The applicant launched an application in this Court on 25 May 2012 in terms whereof the applicant seeks an order setting aside the vote rejecting the proposed business plan in terms of sec 153(1)(a)(ii) and that the revised business plan be adopted, alternatively be referred to the affecting parties of the applicant to be adopted by them in terms of the Act. The first respondent, together with the effected creditors entered a notice of opposition and the application is yet to be adjudicated upon.
- [6] On or about 26 June 2012 the third respondent, on instructions from the second respondent and armed with warrants for delivery of goods, sought to remove the vehicles from the applicant's place of business, which led to the launching of this application.

- [7] The respondent's case is that the return of the vehicles falls outside the moratorium envisaged by sec 133 of the Act, final court orders for the return of the vehicles having been obtained prior to the commencement of the business rescue proceedings. The respondent contends that the vehicles did not form part of the assets of the applicant nor was the applicant in lawful possession of the vehicles at the time of the commencement of the business rescue. The reason being that the finance agreements in respect of the vehicles were cancelled during 2010 because of the failure of the applicant to pay the monthly rentals and/or lease payments in respect of the finance agreements.
- [8] In the light of the aforesaid, it is common cause that all of the above mentioned court orders were granted before the applicant commenced with business rescue proceedings on 22 November 2011. None of these orders are the subject of appeals or rescission applications. In terms of the aforementioned court orders the vehicles must be returned to the finance companies.
- [9] Attempts were made to execute on the aforesaid orders on 22 August 2011. Due to the fact that applicant informed the sheriff that it was under business rescue, which was not correct at the time, the Sheriff of his own volition did not execute.

### THE APPLICANT'S RIGHT TO REMAIN IN POSSESSION OF THE VEHICLES

[10] The applicants base their right to remain in possession of the vehicles on the fact that sec 133 prohibits *inter alia* enforcement actions during business rescue proceedings.

[11] It was argued by the applicant that if the purpose of business rescue proceedings is considered a company should be allowed to restructure its affairs in a way to allow it to continue operating<sup>1</sup>. It is apparent that the applicant will not be able to proceed with its business if the vehicles are to be returned, it follows that the business rescue proceedings will fail if return of the vehicles is ordered.

[12] The Act does not define "legal proceedings" or "enforcement action". In **Henochsberg**<sup>2</sup> the following was said:

*"Although no definition of the terms "legal proceeding" or "enforcement action" are provided in Chapter 6, it is clear that the intention of the provision is to cast the net as wide as possible in order to include any conceivable type of action against the company. In Investec Bank Ltd v Bruyns 19449/11 (WCC): 14 November 2011 the Court described the moratorium granted by sub-s (1) as a general provision that affords the company protection against legal action on claims in general .... The whole purpose of a business rescue proceeding is to offer the company some breathing space in order to allow its*

<sup>1</sup> Sec 128(1)(b), Henochsberg on the Companies Act, Act 71 of 2008 p 443

<sup>2</sup> Henochsberg, supra, vol 1, p 470-471

*affairs to be restructured in such a way as to allow it to continue operating as a successful concern. One of the reasons informal creditor workouts are not always successful in practice, is due to the fact that creditors cannot be prevented from taking enforcement proceedings, including an application for the winding-up of a company, while the informal workout is in the process of being negotiated.*

*It is to be noted that this provision does not only prohibit legal proceedings and enforcement action against the company itself, but also in relation to specific property belonging to the company, or property that is lawfully in its possession.”*

[13] I was also referred to the position in Australia, Canada and England<sup>3</sup>. It is clear from a perusal of the application of similar proceedings in these countries that the net is indeed cast wide in order to guarantee the success of saving companies in financial distress.

[14] In this regard, in England the following was found in **Re Atlantic System plc**<sup>4</sup>

*“5.2 Thus the making of an administration order triggers the liked prohibition on proceedings being brought or continued against the company as the prohibition which exists, and has long existed, when a winding-up order is made. The owners of property, and of charges over property, are disabled*

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<sup>3</sup> A Critical Comparison between Australian and Canadian Creditor Protection Regimes: Voluntary Administration and CCAA, Bryn M. Hunt pl

<sup>4</sup> [1992] ALL ER 475 (CA) at 488

*from exercising their proprietary rights unless the administrator consents or the court gives leave.”*

- [15] It would seem that internationally the end result sought to be achieved by business rescue is to have a business continue as a going concern. This may have as a result that the owners of property may be limited in exercising their proprietary rights<sup>5</sup>. It would seem on a perusal of the Act that, that is also what our Act seeks to accomplish. As was stated in **Oakdene Square**<sup>6</sup>:

*“[12] The general philosophy permeating the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name “business rescue” and not “company rescue”. This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors’ interests to a broader range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employees, may, in the end prove to be a better option for creditors in securing full recovery from the debtor. To rescue the business, provision is made to “buy into” the procedure without fear of losing such investment in an ailing company, by securing repayment as a preferential repayment, as part of this “post-commencing financing”. Post-commencement creditors are thus offered a “super-priority” as an*

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<sup>5</sup> Re Atlantic Systems plc, supra, 488, 489, Lethman Brothers Holdings Inc v City of Swan & Others 265 ALR 1 at 8, Insolvency and Restructuring Law in Canada: Understanding the general principles of the Canadian Landscape, September 2009, Aubrey Kauffmann, p 1,3, Air Canada (Re) [2003] OJ No 1157, p3

<sup>6</sup> Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd 2012(3) SA 273 (GSI) par 12 p 278

*incentive to assist the company financially. The facility of a business rescue is now also available to close corporations.”*

[16] It was argued by the applicant that in the light of the purpose for business rescue the respondent should not be allowed to enforce the execution of the existing court orders. The argument went further to say that the effect of sec 133(1) is that legal proceedings are automatically stayed. Execution or enforcement actions may not be initiated, and if already commenced should be stopped until the written consent of the business rescue practitioner or the leave of the court is obtained. This argument seems to be correct, but the wording of sec 133 must be considered to determine whether the applicant can claim a stay of proceedings in the circumstances of this case.

[17] Sec 133 requires that the assets must either be the property or in the lawful possession of the company. It is common cause that the vehicles are not the property of the applicant. In the light of the fact that the agreements were cancelled and the fact that applicant was ordered to return the vehicles, applicant did not prove that it was in lawful possession of the vehicles. In my view, the applicant failed to meet the requirements of sec 133 and therefore cannot succeed in its application.

[18] I therefore find that the applicant is not in lawful possession of the vehicles and therefore applicant is not entitled to the relief claimed.

**NON COMPLIANCE WITH SEC 129(3)**

[19] The applicant also contends that the application cannot succeed due to non-compliance with sec 129(3) of the Act.

[20] Sec 129(3) of the Act read as follows:

*“(3) Within five business days after a company had adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must –*

*(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and*

*(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.” (my underlining)*

[21] It is common cause that the applicant failed to appoint a business rescue practitioner within 5 days after business rescue proceedings commenced, as envisaged by sec 129(3).

[22] Sec 129(5) read as follows:

*“(5) If a company fails to comply with any provision of subsection (3) or (4) -*

*(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and*

*(b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.”*

[23] The applicant argued that business rescue proceedings remain in effect until a court with competent jurisdiction orders otherwise. The wording of sec 129(5) is clear, if there is no compliance the business rescue proceedings is a nullity.

[24] In the matter of **Advanced Technologies and Engineering Company (Pty) Ltd (In Business Rescue)**<sup>7</sup>, Fabricius J stated as follows:

*“The purpose of s 129(5), is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given*

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<sup>7</sup> Advanced Technologies and Engineering Company (Pty) Ltd (In Business Rescue) v Aeronautique Et Technologies and Others Judgment given on 6 June 2012

*context. If there is non-compliance with s 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to "substantial compliance". The requirements contained in the relevant sub-sections were either complied with or they were not. In this case they were not, for the reasons stated herein above."*

[25] I agree with this interpretation. Consequently this application must fail for this reason too.

#### **CONCLUSION**

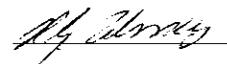
[26] Due to the fact that the applicant did not meet the requirements of sec 133 pertaining to lawful possession as well as not complying with sec 129(3) the application must fail.

#### **COSTS**

[27] The first respondent requested me to order that the business rescue practitioner pay the costs on an attorney and client scale, *de bonis propriis*. I am however of the view that such an order is not appropriate, as the business rescue proceedings are still pending and the court which deal with that will be in a better position to evaluate the actions of the business rescue practitioner.

[28] I make the following order:

1. **The application is dismissed.**
2. **The applicant is ordered to pay the costs, which will include the costs of two counsel.**



**R G TOLMAY**

**JUDGE OF THE HIGH COURT**

MADODZA (PTY) LTD (IN BUSINESS RESCUE)

V

ABSA BANK LIMITED AND OTHERS

CASE NO: 38906/2012

JUDGE: TOLMAY

DATE OF HEARING: 18 JULY 2012

DATE OF JUDGMENT: 15 AUGUST 2012

ATTORNEY FOR APPLICANT: MORNE COETZEE ATTORNEYS

ADVOCATE FOR RESPONDENTS: S J J VAN RENSBURG

ATTORNEYS FOR RESPONDENT: UYS MATYEKA SCHWARTZ ATTORNEYS

ADVOCATE FOR RESPONDENT: J P DANIELS (SC)

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