SWART v BEAGLES RUN INVESTMENTS 25 (PTY) LTD (FOUR CREDITORS INTERVENING) 2011 (5) SA 422 (GNP) E

Citation	2011 (5) SA 422 (GNP)
Case No	26597/2011
Court	North Gauteng High Court, Pretoria
Judge	Makgoba J
Heard	May 26, 2011
Judgment	May 30, 2011
Counsel	*MMW van Zyl SC* for the applicant. *DM Leathern SC* for the first and second intervening creditors. *D Prinsloo* for the third intervening creditor. *R Raubenheimer* for the fourth intervening creditor.
Annotations	Link to Case Annotations

F

Flynote : Sleutelwoorde

Company — Business rescue — Requirements — Guidance to be found in judicial G management under old Act — Must be reasonably probable that company viable and capable of ultimate solvency, and that it will, within reasonable time, become successful concern — Whether company will be able to carry on business on solvent basis, and/or whether granting of business rescue will result in creditors achieving better dividend — Interests of creditors to prevail when weighing up interests of company and H creditors — Companies Act 71 of 2008, s 131(4)(a).

Headnote : Kopnota

The sole director and shareholder of a company brought an urgent application seeking an order placing the company under supervision and to commence business rescue proceedings under s 131(4)*(a)* of the Companies Act 71 of 2008. Certain of the intervening creditors opposed the application.

I The business rescue plan brought about by the 2008 Companies Act is an innovation, but s 427 of the now repealed Companies Act 61 of 1973 (which provided for the circumstances in which a company might be placed under judicial management) is of assistance here. It stated that when any company as a result of mismanagement or for any other reason —

(a) was unable to pay its debts or is probably unable to meet its obligations; J and

(b) had not become or was prevented from becoming a successful concern, A and there was a reasonable probability that if it were placed under judicial management it would be able to pay its debts or to meet its obligations and become a successful concern, the court could (if it appeared just and equitable) grant a judicial-management order in respect of that company. (Paragraphs [23] and [24] at 428D – G.)

What must be reasonably probable under s 427 of the old Act is that the B company is viable and capable of ultimate solvency, and that it will within a reasonable time become a successful concern. By 'successful concern' it is intended that it will be able effectively to carry on its operations in accordance with its main object, and yield a return to its shareholders and creditors.

(Paragraph [25] at 428H – I.)
The court has a discretion as to whether to order supervision or business rescue C even if it is found that the requirements set out in s 131(4)*(a)*(i) – (iii) of the new Act have been satisfied. In exercising its discretion the court has to determine whether a case has been made out that the company will be able to carry on business on a solvent basis, and whether any case has been made out that the granting of business rescue will result in creditors achieving a better dividend. (Paragraph [37] at 431B – C.) D
Where an application for business rescue entails the weighing-up of the interests of the creditors and the company, the interests of the creditors should carry the day (as had been the case in applications for judicial management). The present application falls to be dismissed because there is absolutely no basis for contending that the respondent will be able to carry on business on a solvent basis, and no case was made out that the granting of a business E rescue will place the creditors of the respondent in a better position than what they would be in winding-up. (Paragraphs [41] – [42] at 431G – I.)

Cases Considered

Annotations:

Reported cases F

*Millman, NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd intervening*1972 (1) SA 741 (C): dictum at 744E – H applied

*Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd*2000 (4) SA 598 (C): dictum at 616A – D applied.

Statutes Considered

Statutes

The Companies Act 71 of 2008, s 131(4)*(a)*: see *Juta's Statutes of South Africa* G *2010/11* vol 2 at 1-465.

Case Information

Application for supervision and business rescue of a company under the Companies Act 71 of 2008.

MMW van Zyl SC for the applicant. H

DM Leathern SC for the first and second intervening creditors.

D Prinsloo for the third intervening creditor.

R Raubenheimer for the fourth intervening creditor.

Cur adv vult. I

Postea (May 30).

Judgment

Makgoba J:

[1] The applicant brought this urgent application seeking an order:

[1.1] That the non-compliance of the rules of this court with regard to J

A form of service be condoned, and this matter be heard as an urgent application.

[1.2] That the respondent be placed under supervision in terms of the provisions of s 131(4)*(a)* of the Companies Act 71 of 2008, and commencing business rescue proceedings.

B [1.3] That Johannes Jacobus van Huyssteen be appointed as interim practitioner of the respondent in terms of s 131(5) of the Companies Act 71 of 2008.

[2] Subsequent to the filing of the application, first, second and third intervening creditors intervened as creditors, and are opposing the C application for business rescue. The first intervening creditor (FirstRand Bank Ltd) also seeks an order that a winding-up application it brought against the respondent under case No 8037/11 in this court, be heard urgently and simultaneously with this application, and that a winding-up order be granted.

D [3] During the course of the hearing of this application on 26 May 2011, the fourth intervening creditor gave notice of its intention to intervene as a creditor. The fourth intervening creditor has on this day concluded a written agreement with the first intervening creditor (FirstRand Bank), in terms whereof the fourth intervening creditor purchased FirstRand Bank's right, title and interest in the claim that FirstRand Bank had E against the respondent. As a result of this development the first intervening creditor withdrew the liquidation application it has brought against the respondent. Henceforth, the first intervening creditor ceased to be a party to the present proceedings.

F [4] On 30 May 2011 the fourth intervening creditor, after filing and serving a formal application, was granted leave to intervene as such, and duly joined as a party to the present proceedings. In its notice of motion the fourth intervening creditor seeks an order that the main application (that is, the present application) be postponed for a period of three months, alternatively that the respondent be placed under supervision in G terms of s 131(4)*(a)* of the Companies Act 71 of 2008, and commencing business rescue proceedings. In essence, the fourth intervening creditor supports the present application.

[5] The applicant is the sole director, and the only shareholder of the respondent. The respondent's business consists mainly of a chartering H concern, and dealing in exotic wildlife species. As far as the charter business is concerned, respondent is the owner of various aircraft, including a Beechcraft King Air 200 aeroplane and a Bell Textron 206L-3 helicopter. As a result of various reasons the financial affairs of respondent deteriorated to such an extent that respondent is currently I not in a financial position to meet its immediate financial obligations.

[6] The second intervening creditor obtained judgment against the respondent, pursuant to a provisional-sentence summons on 9 March 2011. The court order agreed upon by the parties provided inter alia for a period of 30 days for respondent to market and sell the two aircraft referred to above, which was unsuccessful, and eventually the aircraft J was put on auction on 6 May 2011, and sold for a total price insufficient

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to pay the outstanding judgment debt with interest. I am told that the A outstanding debt is presently estimated at R11 000 000, with interest accruing at 1% per week or approximately R14 000 per day.

[7] The third intervening creditor's claim against the respondent is estimated at R45 000, being in respect of legal costs incurred when it B opposed the applicant's application to stop the auction for the sale of the aircraft on 6 May 2011. The third intervening creditor acted as an auctioneer in the aforesaid sale.

[8] The fourth intervening creditor, having substituted the first intervening creditor, now has a claim against the respondent for an amount of R3 100 000. C

[9] Consequently, the second, third and fourth intervening creditors are the affected persons, as contemplated in s 128*(a)* of the Companies Act 71 of 2008. They have the necessary locus standi to participate as parties in these proceedings and as creditors of the respondent. D

[10] The applicant's case is that the respondent is currently financially distressed, in that it lacks the necessary cash flow in order to be able to pay E all debts as they become due and payable; that the respondent is financially distressed as envisaged in s 128*(f)* of the Companies Act 71 of 2008, as it is reasonably unlikely that the respondent will be able to pay all its debts as they

become due and payable within the immediately ensuing six months. The applicant submits further that, if respondent is not placed under supervision, and the execution process of the second intervening creditor is to continue, there is no reasonable prospect that respondent can pay its debts as they become due, within the next six months. F

[11] The applicant further submits that, if the respondent is placed under supervision, the business rescue proceedings commence, and a business plan is implemented in order to rescue the affairs of the respondent, all the creditors of respondent would be fully paid in due course, and respondent would be granted the opportunity to proceed G with its business.

[12] The second and third intervening creditors oppose the application on the grounds that the application for business rescue is in itself an abuse of process, and is a culmination of a number of attempts to avoid H and postpone payment of the respondent's debts; that the applicant demonstrates in this application a complete negation of the rights of creditors, and has carried on the business of the respondent company under admittedly insolvent circumstances, recklessly, and under circumstances where a number of transactions ought to be set aside in terms of the Insolvency Act 24 of 1936 read together with the I Companies Act 61 of 1973, in turn read together with the Companies Act 71 of 2008.

[13] The opposing creditors submit that the applicant, Mr Swart, has used this company (respondent) as if it were his alter ego, and has conducted the affairs of the company without paying due and proper attention, as would be expected from a director of a company to ensure J

Makgoba J

A that creditors are not prejudiced by his actions, and has in fact simply ignored the rights of such creditors and the company's obligations to them.

[14] A business rescue plan is a novelty brought about by the new B Companies Act 71 of 2008, which came into operation on 1 May 2011. The business rescue proceedings are provided for in Chapter 6 of this Act. Section 128(1)*(b)* defines a 'business rescue' as 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 C 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 D 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.

E [15] For purposes of this judgment it is appropriate to set out the provisions of s 131 of the Companies Act 71 of 2008 in full:

'**131 Court order to begin business rescue proceedings**

(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business F rescue proceedings.

(2) An applicant in terms of subsection (1) must —

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

G (3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1), the court may —

(a) make an order placing the company under supervision and commencing business rescue proceedings,

if the court is H 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-related matters; I 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) dismissing the application, together with any further necessary and appropriate order, including an order placing the company J under liquidation.

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(5) If the court makes an order in terms of subsection (4)*(a)*, the A court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147. B

(6) 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 C

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

(7) In addition to the powers of a court on an application contemplated in this section a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company. D

(8) A company that has been placed under supervision in terms of this section —

(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132(2); and E

(b) must notify each affected person of the order within five business days after the date of the order.'

[16] The preamble to the Act inter alia reads: 'to provide for efficient rescue of financially distressed companies'.

[17] Section 128(1)*(a)* defines an 'affected person' in relation to a F company and within the context of this application as a shareholder or creditor of the company.

[18] From the definitions referred to above it is clear that the purpose of Chapter 6 of the Act with regard to business rescue is to assist a financially distressed company by means of a business rescue plan, as G contemplated in s 150 of the Act, in order to maximise the possibility of the company continuing on a solvent basis, or to achieve a better return for the company's creditors or shareholders, in comparison to a liquidation.

[19] The procedure prescribed by Chapter 6 of the Act is to some extent H similar to a liquidation procedure, with the important distinction that the aim is to protect the company in that it will continue to exist on a solvent basis, after payment of creditors. In this regard the appointment of a practitioner is similar to the appointment of a liquidator, and the participation of creditors and affected persons at a meeting of creditors is similar to the rights accruing to creditors in the event of liquidation. I

[20] It is common cause in the present case that the respondent is financially distressed. In the founding affidavit, as well as the replying affidavit, the applicant states that the respondent merely needs some time in order to dispose of movable assets, in order to pay all creditors J

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A and continue with business. The applicant then submits that there will be no prejudice to creditors if business rescue proceedings are ordered and commenced.

[21] The requirements for the granting of an order sought by the applicant are contained in s 131(4)*(a)*(i) – (iii) which can be summarised B as follows:

(1) that the company is financially distressed; and

(2) that with respect to an employment-related matter the company failed to pay any amount; or

(3) it is otherwise just and equitable to do so for financial reasons, C and there are reasonable prospects of rescuing the company.

[22] In the event of the requirements as set out and summarised above being met, the court should exercise its discretion in favour of granting the order sought. *In casu*, however, the question arises as to whether the D respondent has met the requirements.

[23] As pointed out earlier, the aspect of a business rescue plan brought about by the new Companies Act is a new innovation, and without precedent in our law, in particular with regard to case law. In my view, s 427 of the now repealed Companies Act 61 of 1973 can be of assistance E in this regard.

[24] Section 427(1) of the old Act provides for the circumstances in which a company may be placed under judicial management. It provides that when any company by means of mismanagement or for any other cause —

F *(a)* is unable to pay its debts or is probably unable to meet its obligations; and

(b) has not become or is prevented from becoming a successful concern,

and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations G and become a successful concern, the court may, if it appears just and equitable, grant a judicial-management order in respect of that company.

[25] Essentially, in relation to s 427(1) of the old Act, what must be reasonably probable is that the company is viable and capable of ultimate H solvency — see *Millman, NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd intervening*1972 (1) SA 741 (C) at 744E – H — and that it will, within a reasonable time, become a successful concern: *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd*2000 (4) SA 598 (C) at 616A – D. By 'successful concern' it is intended, in my view, that it will be able effectively to carry on its operations in accordance with its main object and yield a return to its shareholders and I creditors.

[26] The question whether the applicant in this case has made out a proper case that the respondent is financially distressed (which is common cause), and there exists a reasonable prospect that through J business rescue proceedings respondent can be rescued and continue

business in solvent circumstances should be weighed against the requirements A and/or principles set out above, and the evidence presented in the papers before me.

[27] The opposing creditors submitted that the present application is an abuse of the process of the court, and simply an attempt to prevent the B sale of the assets and/or the winding-up of the respondent which must take place; that the applicant, who is in control of the respondent, has sought to prevent the first and second intervening creditors from exercising their rights in terms of the law inter alia by:

(1) giving notice of intention to oppose the winding-up application, but never filing papers therein, while on common-cause facts, it is clear C that the respondent is insolvent, and has not been able to make payment of its debts;

(2) making promises to pay to both first and second intervening creditors, but never making payment thereof; and

(3) seeking to prevent the sale of the aircraft by way of auction, by D seeking an interdict in this court, notwithstanding the court order and agreement giving rise to such auction, which application was dismissed with costs.

The above submissions made by the opposing creditors are sound, correct and relevant in the adjudication of this matter. E

[28] It is quite clear that the respondent is insolvent, and that the movable and immovable property belonging to it will be insufficient to make payment to its creditors. In the founding affidavit the applicant refers to a proposed agreement which the applicant says the respondent attempted to enter into, which provided for the sale of the plane, the F helicopter, the farm belonging to the respondent, and all the game for a purchase price of R15 000 000. The R15 000 000 is insufficient to make payment to the admitted creditors. On his own version in para 9 of the founding affidavit the applicant states that the respondent's total indebtedness is R16 148 000.

[29] The only other asset of any note is a loan account of some G R72 343 000 (as set out in annexure RS3) where moneys have been lent to a related company known as Biz Africa 111 (Pty) Ltd (trading as Business Solutions Africa) of which the applicant is the sole director. The applicant steadfastly refuses to give any information, does not indicate the nature of the transaction, and places nothing before court to indicate H that such money can or ever will be repaid.

[30] If one scrutinises annexure RS3, being the statement of assets and liabilities of the respondent as at 30 April 2011, one comes to a conclusion that the total assets amount to R87 843 000 while there are I admitted liabilities of R16 148 000, and a shareholder's loan of sum R165 517 000, thereby indicating that the company is hopelessly insolvent. A rhetorical question may arise as to whether a business rescue plan as envisaged and sought by the applicant is feasible in the circumstances.

[31] Mr *Leathern SC*, on behalf of the first and second intervening creditors, correctly submits, with reference to the allegations in J

Makgoba J

A para 45.5 of the first intervening creditor's answering affidavit, that annexure 1A1*(a)* thereof indicates that the value of the property belonging to the respondent is no more than R15 000 000, and that respondent is unable to raise any finance whatsoever. The applicant does not join issue with the intervening creditor in regard thereto, nor is any B explanation given regarding the huge discrepancy between the figures provided by him and the value as reflected in annexure 1A1*(a)*. I agree with Mr *Leathern*'s submission that the applicant is being less than frank, and lacks the bona fides in bringing this application.

[32] This application was launched on the basis that the respondent was C possessed of assets which exceed its liabilities, and that it would be able to continue with the charter business, and to sell a substantial amount of game in order to pay its debts. This entire basis for the application falls away inter alia as a result of the following:

(1) the total assets of the respondent, for the reasons set out hereinbefore, amount to only R15 000 000, this taking into account the D movable property, immovable property, aircraft and game;

(2) the second intervening creditor is in possession of the King Air plane as well as the Bell helicopter, and in terms of s 134(1)*(b)* of the Companies Act 71 of 2008 is entitled to retain possession thereof, and thus such will not be available for use in the charter E business to enable the respondent to earn income; in any event, the income from the 'charter business' has been ceded to the second intervening creditor, and will not be utilised for payment of other creditors.

[33] Mr *Leathern* furthermore raised an interesting issue regarding the F value of the game owned by the respondent. Apart from the clear indication of R15 000 000 as the value of all the assets of the respondent put together, it is also quite clear that the valuations on which this application is based hold very little relationship to reality.

[34] In this regard Mr *Leathern* submits: while the female buffalo are valued, in annexure RS5 to the applicant's founding affidavit, at an G amount in excess of R1 000 000 per buffalo, the respondent in August 2010 sold buffalo, three females together with three calves, for an amount of R310 000 each at one auction. A buffalo bull, which according to applicant is valued in excess of R700 000, was sold for R70 000, and five buffalo cows for an amount in excess of H R180 000 each, none of which is disputed by the applicant. Thus the cows which were used in the calculation of the value of the game as 30, in excess of R1 000 000 per cow, could have a value as low as R5 400 000 (if they still exist), and the male buffalo (if they exist), instead of being valued at R5 606 957, could be valued at as little as R560 000.

I [35] Based on this good argument by counsel, I come to the conclusion that the value of the game as given by the applicant in annexure RS5 is inflated, and thus rejected.

[36] I need to mention that even the existence of this game is seriously disputed. In his supporting affidavit the attorney for the second J intervening creditor stated that very little game could be found after they had

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attended at the farm. The manager there had discussed the matter for A ten minutes with the applicant and his legal advisor. The only answer is a vague allegation that, while the legal representative may have visited a farm, Klipvlei, there is a denial that they went to the correct farm.

[37] The court has a discretion as to whether to order supervision or B business rescue, even if it is found that the requirements therefor as set out in s 131(4)*(a)*(i) – (iii) of the Act have been made out in the application. In exercising my discretion in this matter I have to determine whether a case has been made out that the respondent company will be able to carry on business on a solvent basis, and/or whether any case has been made out that the granting of business rescue will result in C creditors achieving a better dividend.

[38] The applicant has studiously avoided making payment of the respondent's debts, incurred further debts, and has simply advanced funds in excess of R72 000 000 to Business Solutions Africa, while under insolvent circumstances, and steadfastly refuses to give any D explanation to his creditors, to the respondent's creditors or the court. On his own version the applicant has steadfastly refused to sell any assets to make payment to his creditors.

[39] In my view it is the applicant himself as sole director and shareholder who is the only interested party in the continuation of the E respondent as a going concern, but he steadfastly carried on business in a reckless manner. The applicant does not take this court or his creditors into his confidence by giving any detail regarding the loan of a substantial amount in excess of R72 000 000 to an entity known as Business Solutions Africa, of which he is the sole director.

[40] It is common cause that the respondent has been in financial F distress for at least a year. While this was obvious to all involved, the applicant did nothing about it, refused to sell any assets, incurred further debts, making loans, and refused to sell any assets to make payment to his creditors.

[41] Where an application for business rescue, as was the case in G applications for judicial management, entails the weighing-up of the interests of the creditors and the company (or the applicant in this case, they being the same), the interests of the creditors should carry the day.

[42] I accordingly come to the conclusion that there is absolutely no H basis for contending that the respondent will be able to carry on business on a solvent basis, or that there is any prospect thereof. No case has been made out that the granting of a business rescue will place the creditors of the respondent in a better position than what they would be in winding-up.

[43] I grant the following orders: I

1. The application for postponement of these proceedings by the fourth intervening creditor is refused.

2. The main application by the applicant, Mr Swart, is dismissed with costs, such costs to include the costs of senior counsel, where applicable. J

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Makgoba J

A Applicant's Attorneys: *Diemont Inc*.

First and Second Intervening Creditors' Attorneys: *Rorich Wolmarans & Luderitz Inc*; *Laas Doman Inc*.

Third Intervening Creditor's Attorneys: *Serfontein Viljoen & Swart*.

B Fourth Intervening Creditor's Attorneys: *JA Kruger Attorneys*.