REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 39261/2016

DELETE WHICHEVER IS APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED.	
.....	.....
DATE	SIGNATURE

In the matter between:

GP MSIBI ATTORNEYS INCORPORATED Applicant

and

RODEL FINANCIAL SERVICES (PTY) LTD First Respondent
SHERIFF OF THE DISTRICT OF BRAKPAN Second Respondent

JUDGEMENT

NGALWANA AJ

[1] Armed with a judgment against the applicant and the its sole director and shareholder for the payment of R734,079,92, the first respondent obtained a writ of execution against the applicant and its sole director and shareholder, Mr Msibi, pursuant to which certain listed moveable assets were attached by the second respondent on 12 September 2016.

[2] The sale in execution of those assets is scheduled for this Friday 18 November 2016. This has prompted the applicant to approach this Court for an urgent interdict to stop the sale and for the return of those assets to the applicant.

[3] The deponent to the founding affidavit describes himself as a business rescue practitioner appointed by the applicant on 10 October 2016 in terms of section 129 of the Companies Act, 71 of 2008 ("the Companies Act"). He says the commencement of those proceedings was published to every affected person, including the first respondent, on 13 October 2016. He says pursuant to section 132(1)(a) and (b) read together with section 133 of the Companies Act "*all legal proceedings [against the applicant] may not be proceeded with without the written permission of the business rescue practitioner or by leave of the court*".

[4] In resisting the application, the first respondent advances essentially two defences:

4.1 First, it says the non-joinder of the Law Society is *"fatal"*.

4.2 Second, it says business rescue provisions of the Companies Act do not apply respect of an incorporated legal practice.

4.3 Third, it says the matter is in any event not urgent.

[5] In my view, although the matter may be of interest to the Law Society and, indeed, interesting to it, it is not one in which the Law Society has a direct and substantial interest for purposes of joinder.

[6] I also doubt whether business rescue provisions of the Companies Act are confined to certain types of entities and do not extend to others. There is, in my view, no basis in law for such a distinction to be drawn simply by reason of an attorney's practice being subject to *"stringent ethical rules"* and *"fiduciary duty to clients"*. There are numerous provisions in the Financial Advisory and Intermediary Services Act, 37 of 2002 (*"the FAIS Act"*) which impose fiduciary duties on financial services providers, particularly in the manner in which they deal with client monies.

[7] For example, section 19(3) of the FAIS Act says:

> *"(3) The authorised financial services provider must maintain records in accordance with subsection (1)(a) in respect of money and assets held on behalf of clients, and must, in addition to and simultaneously with the financial statements referred to in subsection (2), submit to the registrar a report, by the auditor who performed the audit, which confirms, in the form and manner determined by the registrar by notice on the official web site for different categories of financial services providers -*
>
> *(a) the amount of money and financial products at year end held by the provider on behalf of clients;*
>
> *(b) that such money and financial products were throughout the financial year kept separate from those of the business of the authorised financial services provider and, report any instance of non-compliance identified in the course of the audit and the extent thereof; and*
>
> *(c) any other information required by the registrar."*

[8] Section 10 of the General Code of Conduct for Authorised Financial Services Providers and Representatives (*"the General Code"*) is to similar effect. What is more, section 2 of the General Code imposes a fiduciary duty on financial services providers *"at all times [to] render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry"*.

[9] Despite all these provisions, which are no different in substance from the professional strictures to which attorneys practices are subject, financial

services providers and their firms have been placed under business rescue without eliciting any demurring murmurs from creditors. An example is that of firms and financial services providers involved in litigation with pensioners in respect of complaints to the FAIS Ombud arising from property syndication schemes involving Sharemax Investments (Pty) Ltd.

[10] To my mind, the nature of an attorney's practice does not exempt that practice from business rescue provisions of the Companies Act. The provision is not reasonably capable of that construction. The *"fiduciary"* argument advanced by Counsel for the first respondent does not make it so.

[11] What remains is urgency. The basis advanced by Counsel for the applicant is that the sale for execution is scheduled to take place tomorrow – Friday 18 November 2016. But the applicant has known about this eventuality since 12 September 2016 when the assets were attached by the second respondent. The first sale in execution was supposed to take place on 14 October 2016. That it did not go ahead was by no intervention of the applicant. He says the reason was that the sale had not been properly advertised.

[12] A month after the attachment, on 10 October 2016, the applicant commenced business rescue proceedings. On the papers these appear to be nothing more than an attempt at staving off the first respondent's rightful

redress in law. Bald assertions of turning fortunes for the applicant are made without any plausible substantiation. A basis for urgency, and delay since 11 October 2016, they are not.

[13] In the circumstances, the applicant has created its own urgency.

[14] The application is struck from the roll with costs.

Order

[15] In the result, the application is struck from the roll with costs.

V Ngalwana
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the applicant:	Steyn
Instructed by:	JH Van Heerden & Cohen
For the 1st respondent:	J Erasmus
Instructed by:	Norman Berger & Partners INC
Date of heads:	15 November 2016
Date of judgment:	17 November 2016