IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH PROVINCIAL DIVISION 03/02/2015

DATE: ~~29 January 2015~~

CASE NO: 73789/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

29/1/2015 _____

DATE SIGNATURE

In the matter between:

ENABLE EMPLOYMENT (PTY) LTD	Applicant
and	
JORG RAINER FRESE	First Respondent
TAU PELE CONSTRUCTION (PTY) LTD	Second Respondent
STEPHANUS FRANCOIS ENGELBRECHT	Third Respondent
ABRAHAM FRANCOIS BOUWER	Fourth Respondent

MARTHINUS PHILIPPUS PRINSLOO	Fifth Respondent
XOLILE ELSON DASHEKA	Sixth Respondent
PIETER WILHELM MULLER	Seventh Respondent
JOSEPH JEREMIA DEETLEFS	Eighth Respondent

JUDGMENT

HASSIM AJ

[1] This is an application to compel a private body as defined in Promotion of Access to Information Act, Act 2 of 2000 ("*PAIA*") to allow the applicant access to records in terms of section 78. On the conspectus of the evidence, it appears that the applicant has reservations about whether the business rescue proceedings were valid or not. It seems that these reservations prompted the applicant to deliver a request for access to the records of the respondents in terms of section 50 of the Promotion of Access to Information Act, Act 2 of 2000 ("*PAIA*") read together with Regulation 10 of the Regulations made under it. The BRP failed to respond to the request within the requisite period. The applicant therefore applies for access to information under section 82(b) of PAIA. It seeks an order requiring the respondents to provide to it a number of documents concerning the business rescue proceedings. After the institution of these proceedings, the BRP provided some documents to the applicant. The applicant no longer pursues all the relief claimed in the notice of motion.

[2] The applicant seeks in terms of the notice of motion an order directing the respondents to furnish to it within 30 days of this order a number of specified documents. The notice of motion reads as follows:

> *"1 ...The Respondents be directed to furnish the Applicant with the following information, within a period of 30 days from the date of this order:*
>
> *1.1 Proof that the notice of appointment of Jorge Rainier Frese as business rescue practitioner was published to each affected person within five days after same was filed, on 24 September 2012;*
>
> *1.2 The original business rescue plan prepared by the First Respondent, as contemplated in section 150 of the Companies Act, Act 71 of 2008 ("the Act");*
>
> *1.3 Proof of the fact that a business plan was published by the Second Respondent within 25 (twenty-five) business days after the business rescue practitioner was appointed;*
>
> *1.4 The notice delivered to all affected persons, at least 5 (five) business days prior to the meeting of 13 December 2012 (being the meeting where the business rescue plan was tabled for the first time), as contemplated in Section 151(2) of the Act, including:*
>
> *1.4.1 the agenda of the meeting; and*
>
> *1.4.2 The required summary of the rights of the affected persons to participate and vote at the meeting;*
>
> *1.5 Proof of the fact that aforesaid notice was delivered to all affected persons;*[1]
>
> *1.6 The notice delivered to all affected persons at least 5 (five) business days prior to the meeting of 13 February 2013, as well as proof of the fact that same was delivered to all affected persons;*
>
> *1.7 any and all records relating of [sic] the following, in respect of the meeting of 13 February 2013:*
>
> *1.7.1 the creditors that attended the meeting;*
>
> *1.7.2 the names of the representatives that voted on behalf of each of the creditors;*

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[1] The notice which is referred to is the notice delivered to all affected persons, at least five business days prior to the meeting of 14 December 2012 (in the meeting where the business rescue plan was tabled for the first time) as contemplated in s151(2) of the Act.

1.7.3 the ballot forms completed on behalf of creditors (in the format forwarded to [the applicant] under cover of your electronic message dated 12 February 2013).

1.8 That the Respondents be ordered to pay the costs of this application jointly and severally, one to pay the other to be absolved."

[3] The respondents oppose the application on a number of grounds. I discuss these later in this judgment.

BACKGROUND TO THE APPLICATION

[4] On 17 September 2012, the board of directors resolved to place the second respondent ("*the Company*") under business rescue in terms of section 129(1)(b) of the Companies Act, Act 71 of 2008 ("*the Companies Act*"). The first respondent ("*the BRP*") was appointed as the business rescue practitioner on or about 24 September 2012.

[5] The respondents contend that a business plan was adopted at a meeting of creditors on 13 February 2013, it has been implemented, and that the BRP has filed a notice of substantial implementation of the business rescue plan on 21 May 2013, which has ended the business rescue proceedings.

IS THE APPLICANT SEEKING ACCESS TO A RECORD OR IS IT SEEKING ACCESS SIMPLY TO INFORMATION?

[6] Before I continue I am of the view that one of the grounds of opposition relied upon by the respondents can be and must be immediately considered because if I find in the respondents' favour the applicant cannot succeed.

[7] The respondents contend that what the applicant demands access to does not constitute a record contemplated in PAIA. They argue that the applicant is

seeking access to "information", which they contend is something different from a "record". The respondents proceed to argue that the applicant is seeking "information" in the nature of "proof" of publication or delivery of a document. This, the respondents claim, is not a record. I cannot agree. "Record" is defined in PAIA as meaning, "*any recorded information regardless of form or medium, in the possession or under the control of a public or private party, whether or not it was created by that public or private body.*" Hartzenberg J (as he then was) found as follows in CCII Systems (Pty) Ltd v Fakie and Others NNO 2003 (2) SA 325 (T):

"*'record' is defined in s 1 of the Act [PAIA] as 'any recorded information... regardless of form or medium ... in the possession or under the control of that public... body'. Section 29 (2) gives an idea of what recorded information the Legislature had in mind. If I understand the section correctly it relates to information in printed form, video recordings and photographs, tape recordings, computer data, all possible other forms of recordings, yet to be invented. It stands to reason that a single page can constitute a 'record'. If there is one page about one subject in the possession of a public body it is a 'record'*"

[8] The Oxford English dictionary defines the verb "record" *inter alia* as follows:

"*register, set down for remembrance or reference, put in writing or other legible shape, represent in permanent form, or otherwise for reproduction*" and the noun "record" means *inter alia* "*recorded state*", the noun "register" means *inter alia* "*book in which entries are made of details to be recorded for reference*" and the verb "*register*" means *inter alia* "set *down (name, fact, etc.) record in writing enter or cause to be entered in particular register*". The dictionary meaning of "proof" is *inter alia* "fact or evidence".

[9] It is clear that the applicant is seeking information, which is recorded. If there is no record of the information sought then the respondents must say so. If the

proof, which the applicant desires, is recorded in whatever form then it has a right to be given access thereto.

[10] I am satisfied that that which the applicant seeks constitutes a record. What the applicant seeks is recorded information regardless of the form or medium. If the information to which the applicant desires access is not "registered" in any form or medium, then it does not exist. However, this is not the respondents' case. In my view, the argument is contrived; it has no merit.

THE RELEVANT STATUTORY PROVISIONS PERTAINING TO ACCESS TO RECORDS

[11] In terms of PAIA, any person has the right to request *inter alia* a private body to grant to it access to any record of that body if:

(i) The record is required for the exercise or protection of any right;

(ii) the person complies with the procedural requirements in PAIA relating to a request for access to that record; and

(iii) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 3 of PAIA.

[12] It is therefore apparent that a person requesting access to a record of a private body must show that:

(i) what he or she requires access to is a record contemplated in PAIA;

(ii) the record is required for the exercise or protection of a right;

(iii) he or she has complied with the procedural requirements relating to a request for access to that record; and

(iv) access to that record is not refused on the recognised grounds for refusal.

[13] I have already found that what the applicant is seeking access to is a "record" contemplated in PAIA. I, find nothing wanting in the procedure that the applicant adopted in seeking access to the record. I do not understand the respondents to argue that they are entitled to refuse access to the records on any of the recognised grounds in PAIA.

DOES THE APPLICANT REQUIRE THE RECORD FOR THE EXERCISE OR PROTECTION OF ANY RIGHTS?

[14] I have expressed myself on whether there is merit in the respondents' argument that what the applicant is seeking access to is not a record contemplated in PAIA.

[15] The second ground on which the respondents resist the application is the argument that the applicant has failed to show that the records are '*required for the exercise or protection of any rights*". The respondents argue that the applicant has failed to cross the "*need to know*"[2] threshold for requests for access to the records of private bodies. At the heart of the argument is the assertion that the applicant does not qualify as an "*affected person*" contemplated in the business rescue provisions in the Companies Act because: Firstly it is not a creditor and therefore not an affected person. Secondly, the

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2 M&G Media v F I F A World Cup Organising Committee 2011 (5) SA 163 (GSJ) at [354].

applicant does not have a right to attack the business rescue after the business rescue plan has been adopted at a meeting of creditors.[3]

WHAT, IF ANY, RIGHT DOES THE APPLICANT HAVE?

[16] The respondents' counsel argued that the applicant has not passed the "need to know threshold" and it is therefore not entitled to access to the records sought. I am satisfied that the applicant has demonstrated that it is entitled to access. I deal with the threshold later in this judgment.

[17] Voluntary business rescue proceedings are initiated by the board of a company resolving in terms of section 129 of the Companies Act to begin business rescue proceedings and place the company under supervision.

[18] The company has a right (as well as an obligation) to appoint a business rescue practitioner who must meet the requirements listed in section 138 of the Companies Act.

[19] A creditor of a company under business rescue qualifies as an "affected person" in terms of the Companies Act in the context of business rescue proceedings.

[20] The long title to the Companies Act is an indicator of the intention behind the business rescue proceedings provisions. It states that the Companies Act is "to provide for efficient rescue and recovery of financially distressed companies". Section 7 lists the purposes of the Companies Act. The stated purpose in section 7(k) is to "*provide for the beginning rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders*". [underlining added] The principal stakeholders in this context are creditors, shareholders, and employees. The business rescue

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[3] Reliance is placed, in this regard, on section 130(1)(a)(iii).

provisions in the Companies Act were aimed at serving the interests of the distressed company, by imposing a moratorium on the payment of debts and serving the interests of creditors by creating a process that would yield a better return than in the winding-up of a company. Largely, however, business rescue proceedings ultimately inure to the benefit of the debtor only. A creditor has little choice but to accept whatever dividend is paid. Business rescue proceedings then yield a result, which is inimical to the laudable aim of balancing the interests of stakeholders. In the case of the liquidation of a company, various processes and mechanisms are available to a liquidator, such as sections 26-31 of the Insolvency Act, Act 26 of 1936 to impeach certain dispositions. The interrogation of anyone who has information *inter alia* as to the dealings or business affairs of an insolvent or a company under winding up are provided for in the Insolvency Act as well as the Companies Act, Act No 61 of 1973. The interrogation and impeachment mechanisms are *inter alia* for the recovery of assets to distribute among creditors to achieve the best possible return for creditors. These are not available to a business rescue practitioner in business rescue proceedings.

[21] The right of a creditor to repayment of the debt owed to him is severely compromised[4] in business rescue proceedings. The company is, permitted to the prejudice of creditors to rise from the ashes and prosper. As I see it, business rescue is akin to amnesty for a debtor. The debtor is given a new lease on life; sometimes visiting financial ruin on a creditor and maybe even to its demise. It comes therefore as no surprise that the legislature afforded a number of rights to an affected person. It may *inter alia*, in terms of section 130(1), apply to court for an order setting aside the resolution initiating business rescue proceedings. An affected person may also apply for the setting aside of the appointment of a business rescue practitioner. In terms of section 130(4), each affected person has a right to participate in the hearing of an

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4 *Cf.* s152 (4), s 154.

application to set aside the resolution as well as an application setting aside the appointment of the business rescue practitioner. These are but some of the rights afforded by the Companies Act, to an affected person in business rescue proceedings.[5]

[22] In terms of section 129(5), if a company fails *inter alia*, to publish the notice of appointment of the business rescue practitioner to each affected person within five business days after a notice of appointment of a business rescue practitioner was filed by the company, the company's resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity. An affected person has the right at any time until the adoption of a business rescue plan to apply to court for an order setting aside the resolution on the basis, *inter alia*, that the company failed to satisfy the procedural requirements set out in section 129. Section 129(5) and section 130(1) (a)(iii) are at odds. If the resolution lapses and is a nullity *ab initio*- it is *non-est*- there exists nothing to set aside.

[23] Unless all the stakeholders, e.g. creditors, employees, shareholders, the business practitioner agree that the resolution lapsed and is a nullity, there will always be uncertainty as to the status of the company and the creditor. The legislature could not have intended for this uncertainty to persist by enacting section 130 (1)(a)(iii) to preclude an affected party from seeking legal clarity as to his or her status *vis-à-vis* the company or even by the BRP for instance. In my view, such a person has a right to approach a court for a declaratory order if nothing else. It would be absurd if the legislature in enacting section 130(1)(a)(iii) intended to give legal effect to a resolution that is a nullity. No valid steps can follow upon a nullity.

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5 *Cf.* s130(1), s131(3), s139(2), s 145, s 147(1)(b), 150 (1) among other provisions.

[24] It could not have been the intention of the legislature that the adoption of a business rescue plan in all circumstances precludes a person from challenging the validity of the business rescue proceedings. If this was the intention of the legislature it means that if the initiation of the business rescue proceedings, placing the company under supervision and any process leading up to the adoption of a business plan is for instance tainted by fraud or is for some other reason is illegal or invalid that creditors and other affected parties are bound thereby. This is absurd. An illegal act cannot produce legal consequences.

[25] A creditor has the right to know whether business rescue proceeding are *extant* because if they are, the company is under a moratorium for the payment of debts and the creditor's claim may have been compromised in the business rescue plan. On the other hand, if business rescue proceedings are not alive the creditor is at liberty to pursue whatever remedies may be available to it to recover the full extent of the debt from the company. An affected person, such as the applicant, is entitled to investigate *inter alia* whether the resolution to begin business rescue proceedings was valid or not, whether the business rescue proceedings are valid or not, whether the company is or was ever under business rescue proceedings. If the business rescue proceedings have been rendered a nullity for want of compliance with section 129(3) and (4), the applicant would have the same remedies available in law to a creditor.

[26] In terms of section 129(5) the resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity, if the company fails within five business days after a company has adopted and filed a resolution to:

(i) 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 appoint a business rescue practitioner who has consented in writing to accept the appointment;

(ii) file a notice of the appointment of a practitioner within two business days after making the appointment and publish a copy of notice of appointment to each affected person within five business days after the notice was filed.

[27] As I have said earlier, the applicant has reservations about the validity of the business rescue proceedings. It has a right to know whether they are alive or not. I am satisfied that the applicant was and remains an affected person contemplated in section 128(1)(a) of the Companies Act or is a person with sufficient interest to approach a court for relief. In my view, the proper relief would be for a declaratory order that the resolution has lapsed and is a nullity. Section 130 (1) (b) perhaps inadvertently envisages a resolution that is extant. I have dealt with this in paragraphs 22 and 23 of this judgement.

[28] If the company failed to comply with any provision of section 129 (3) and/or (4) the resolution placing the company under business rescue is null *ex tunc.* With the resolution to begin business rescue proceedings and placing the company under supervision, being a nullity nothing following upon the resolution is valid. Hence, there can be no validly convened meeting of creditors, no business rescue plan to adopt and any purported "adoption" of the purported business plan is ineffectual and inconsequential.

[29] The applicant is therefore entitled to an order in terms of prayer 1.1.

[30] Section 150 of the Companies Act obliges the business rescue practitioner to prepare a business rescue plan, which must contain at least the information listed in section 150(2), (3), and (4). The business plan is the blueprint for the rescue. This is the document, which will show whether there is a reasonable

prospect of the company being rescued. Section 150 (5) enjoins the business rescue practitioner to publish the business rescue plan within 25 days of the having been appointed. This shows that the business rescue process cannot endure indefinitely. It again recognises that creditors must know in a restricted time whether the company under business rescue has a reasonable prospect of meeting its financial commitments to its creditors. A creditor has a right to enforce payment of a debt against a debtor when the debt falls due for payment. Business rescue proceedings limit this right. The legislature intended for this limitation to be restricted in time. If a business plan cannot promptly, be prepared and presented to creditors for decision then the creditor's right becomes indefinitely suspended. I am in agreement with Gorven J that the consequence of the failure to publish the business plan timeously terminates the business rescue proceedings.[6] This is compatible with the desire that the creditors must know in a very short time whether there is a reasonable prospect of rescuing the company.

[31] If a plan does not comply with the provisions of section 150, including section 150(5) it cannot be one that is contemplated in that section. It, therefore, follows that, even if the creditors adopted this plan, it is not binding on the company, on the creditors and on the holders of the company's securities. An order in terms of paragraph 1.3 of the notice of motion is warranted.

[32] All affected persons must, at least five business days before the meeting, receive a notice setting out:

(i) the date, time and place of the meeting;

(ii) the agenda of the meeting; and

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6 D H Brothers Industries (Pty) Ltd Gribnitz NO and others [2014] 1 All SA 174 (KNP) para [30] and [31].

(iii) summary of the rights of affected persons to participate in and vote at the meeting.

[33] A "*business rescue plan*" is defined as meaning "*a plan contemplated in section 150*". Section 151 requires the business rescue practitioner to convene and preside over a meeting of creditors within 10 days after publishing the business plan in terms of section 150 and on notice of not less than five days.

[34] A business rescue plan complying with section 150 must be adopted at a meeting duly convened in terms of section 151. If creditors have not received proper notice the meeting cannot be duly convened and cannot qualify as one "convened in terms of section 151".

[35] A business rescue plan is only binding on the company and its creditors as well as every holder of the company's securities if the requisite majority[7] required by the Companies Act at a duly constituted meeting approved it. If either section 151(1) or 151(2) are not complied with, then the meeting will not be one convened in terms of section 152. The business rescue plan is then not one, which has been adopted in terms of section 152, and it cannot have the consequence referred to in section 152(4), namely, its binding nature on the company, on the creditors of the company and holders of the company's securities. Orders sought in terms of paragraphs 1.5 and 1.6 are justified.

[36] The applicant alleges that the business plan in its possession records 30 November 2012 as the date of its signature. It then also records 30 January 2013 as the date on which it was amended. I understand it to suggest that there is something sinister in a business plan, which was signed in November 2012 being amended in January 2013. The BRP admits that a revised business plan was published. He alleges that the applicant has been given a copy of the "original" business plan. However, he does not explain how the original

7 An order in terms 1.7 must follow.

business plan (signed on 30 November 2013) records amendments made on 30 January 2013. The applicant has a right to the business plan. I am satisfied that the applicant is entitled to an order in terms of paragraph 1.2 of the notice of motion.

[37] The respondents' argue that the applicant has not passed the "need to know threshold" and is therefore not entitled to access to the records sought. As I understand it, the argument is based on the decision in M&G Media v FIFA World Cup Organising Committee 2011 (5) SA 163 para [354]. The respondents contend that the decision of the Supreme Court of Appeal in Unitas Hospital v Van Wyk 2006 (4) SA 436 (SCA) at para [6] non-suits the applicant. I do not believe that the decision has a bearing on this case. The plaintiff (Mrs Van Wyk) the appellant did not require the record she sought to formulate her claim [8]for purposes of instituting an action. This is evident from the dictum at para 19 where Brand JA stated:

> "*[19] With regard to the facts of this case, it can be accepted with confidence that Mrs Van Wyk did not require the Naude report to formulate a claim for the purposes of instituting an action.* [underlining inserted]
>
> *What must also accepted is that, once she instituted her action, and provided that the Naude report turns out to be relevant to the issues on the pleadings, Unitas will be obliged to make it available under the provisions for discovery in terms of Uniform Rule 35...*
>
> *[22] I hasten to add that I am not suggesting that reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule; that it must be available only to a requester who has shown the 'element of need' or 'substantial advantage' of access to the requested information, referred to in Clutchco, at the pre-action stage. An example of such a case is, in my view, to be found in Van Niekerk v Pretoria City Council [1997 (3) SA 839 (T)] ...the facts of that case were materially different. Van Niekerk had a report by experts who did not identify who was responsible for the damage to his equipment (at 848C). The City*

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8 Unitas Hospital *supra* par. 19.

Council, on the other hand, relied on a report, which apparently exonerated it from responsibility (at 848F-G). Quite understandably, in the circumstances, Van Niekerk's allegation was that, without the report relied upon by the City Council, he was unable to establish whether it would be liable (at 848H-I).

...

[23] Mrs van Wyk is not in the same category as Van Niekerk. On her own showing, she had a number of alternative sources of information available to her,... In the circumstances, she should, in my view, have explained from the outset what more knowledge she hoped to gather and what benefit she hoped to obtain by gaining access, to the Naude report... In the answering affidavits both Unitas and Dr Naude made the positive statements that she already had access to all the information her experts needed to advise her, and that the Naude report would add nothing to her case.

[25] In the circumstances, I conclude that Mrs van Wyk had failed to substantiate the claim that the Naude report would be of assistance to her in her case against Unitas..."

[38] Van Niekerk v Pretoria City Council, dealing with the report to which the applicant sought access found that the report ": *would assist the applicant in either proceeding with or abandoning his claim* against *the respondent"* and that the applicant could be said reasonably to "*require"* the report.

[39] In this case, the applicant does require the information to formulate a claim for the purposes of instituting an application.[9] The records would assist the applicant in either proceeding with or abandoning his claim action and I therefore find that the applicant reasonably requires the records.[10]

[40] In the result I make the following order:

1. The Respondents are directed to furnish the Applicant with the following information, within a period of 30 days from the date of this order:

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9 *Cf* .Unitas Hospital v Van Wyk at para [9].

10 *Cf.* Van Niekerk v Pretoria City Council at p. 848 F-G.

1.1 Proof that the notice of appointment of Jorge Rainier Frese as business rescue practitioner was published to each affected person within five days after same was filed, on 24 September 2012;

1.2 The original business rescue plan prepared by the First Respondent, as contemplated in section 150 of the Companies Act, Act 71 of 2008;

1.3 Proof of the fact that a business plan was published by the Second Respondent within 25 (twenty-five) business days after the business rescue practitioner was appointed;

1.4 Proof of the fact of delivery of the notice to all affected persons, at least 5 (five) business days prior to the meeting of 13 December 2012 (being the meeting where the business rescue plan was tabled for the first time), as contemplated in Section 151(2) of the Act, including:

1.4.1 the agenda for the meeting; and

1.4.2 The required summary of the rights of the affected persons to participate and vote at the meeting.

1.5 The notice delivered to all affected persons at least 5 (five) business days prior to the meeting of 13 February 2013, as well as proof of the fact that same was delivered to all affected persons;

1.6 All records relating to the following, in respect of the meeting of 13 February 2013:

1.6.1 the creditors that attended ~~the~~ meeting;

1.6.2 the names of the representatives that voted on behalf of each of the creditors; and

1.6.3 the ballot forms completed on behalf of creditors (in the format forwarded to [the applicant] under cover of your electronic message dated 12 February 2013).

2. The costs of the application to be paid jointly and severally by the first and second respondents.

S K HASSIM

Acting Judge: Gauteng North High Court

29 January 2015

Date of Hearing:	19 August 2014
Date of Judgment:	29 January 2015
For applicant:	Adv D Prinsloo
For respondent:	Adv IA Currie