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

(1) REPORTABLE: ~~YES~~/[✓ NO]
(2) OF INTEREST TO OTHER JUDGES: YES/[✓ NO]
(3) REVISED.

13/12/19
DATE

SIGNATURE

Case No: 77792/2018

In the matter between:

T J CHAUKE	First Applicant
51 OTHER EMPLOYEES OF FIRST RESPONDENT	Second to Fifty Second Applicants

and

KOEDOESKOP RIVER FARMS ALFA CC	First Respondent
FIRST NATIONAL BANK LIMITED	Second Respondent
AGRON MOOSRIVIER (PTY) LTD	Third Respondent
CHICUNDO PROPERTIES (PTY) LTD	Fourth Respondent

JUDGMENT

D S FOURIE, J:

[1] This is an application for an order placing the first respondent under supervision and commencing business rescue proceedings as contemplated in section 131(4)(a) of the Companies Act, No 71 of 2008. The application is

opposed by the second and third respondents and supported by the fourth respondent. This is the fifth attempt to begin business rescue proceedings in respect of the first respondent.

[2] According to the founding affidavit the first applicant acts in his personal capacity as well as in his representative capacity on behalf of the other applicants who are all employees of the first respondent. According to him the fourth respondent is assisting them to register a Workers Trust to enable them to *"have a voice in our future and our financial survival"*.

[3] The first respondent is a close corporation which was finally liquidated by an order of this Court on 5 May 2016. This notwithstanding, the liquidators have not been placed in a position where they can carry out their duties as liquidators, due to the liquidation process being stayed by the continuous launching of business rescue applications.

[4] The second and third respondents are secured creditors of the first respondent. The second respondent's security takes the form of a mortgage bond over the immovable property of the first respondent. The third respondent's security consists of a cession of the first respondent's debtors.

[5] The fourth respondent has been joined in this application purportedly due to the fact that *"the De Beer Group on the one hand and FNB and Agron on the other hand are at loggerheads with each other"*. The fourth respondent has also filed an affidavit in support of the application. The deponent to this affidavit

is L N de Beer, a member of the de Beer family and the only director of the fourth respondent.

BACKGROUND

[6] On 21 July 2014 the first respondent signed an acknowledgment of debt in favour of the third respondent for payment of R6 823 345.99 together with interest. Due to the first respondent's failure to comply with the terms of the acknowledgement of debt, the third respondent issued an application for the winding-up of the first respondent on 11 December 2014. This prompted Sandstone Projects Trust, the only member of the first respondent, to launch an urgent application to place the first respondent under business rescue. G J de Beer and L N de Beer are the joint trustees of this entity. On 10 February 2015 this application was struck from the roll with costs whereafter Sandstone also withdrew the first business rescue application with a tender to pay the wasted costs.

[7] Shortly thereafter, on 20 February 2015 Sandstone again launched another urgent application to place the first respondent under business rescue. By agreement between the first respondent, Sandstone and the second respondent, the second business rescue application was postponed *sine die* and the first respondent was placed under provisional winding-up. On the second return date an order was granted by agreement between the same parties in terms whereof Sandstone withdrew the second business rescue application with a tender to pay costs. A final winding-up order was granted against the first respondent on 5 May 2016.

[8] On 26 May 2016 the fourth respondent launched the third business rescue application. The fourth respondent contended that it was a creditor of the first respondent who had paid expenses on behalf of the first respondent. Both the second and third respondents intervened in the third business rescue application. The fourth respondent failed to file any papers in answer to the intervention applications. The fourth respondent then belatedly sought a postponement. On 30 March 2017 this Court granted an order in terms whereof the postponement was refused and the third business rescue application was dismissed with costs.

[9] Subsequent to the dismissal of the third business rescue application, the fourth respondent filed an application for leave to appeal on 3 April 2017. This application was abandoned when the fourth respondent proceeded to file the fourth business rescue application on 31 May 2017. Both the second and third respondents filed answering affidavits followed by a replying affidavit of the fourth respondent. On 22 October 2018 the fourth respondent withdrew the fourth business rescue application and tendered costs.

[10] Prior to withdrawing the fourth business rescue application, the fourth respondent concluded a production agreement with Griekwaland Wes Korporatief (GWK) on 14 June 2018 to plant and harvest 5 000 ton of cotton on the first respondent's property for the production season of 1 April 2019 to 31 August 2019. A draft business rescue plan was then prepared for the first respondent *"on the request of Chicundo (fourth respondent)"*. On 9 October 2018 a resolution was adopted by the applicants to proceed with another

business rescue application for the first respondent. This is the fifth application of this nature which is now before me for consideration.

THE MAIN ISSUE

[11] The main issue to be decided is whether there is a reasonable prospect for rescuing the first respondent. In this regard the applicants rely on the draft business rescue plan prepared for the first respondent. According to the applicants the first and fourth respondents *"are entities within the De Beer Group of entities"* and they holistically conduct joint farming operations. They also allege that the effect of a liquidation of the first respondent would leave the De Beer Group *"without their farming activities"* and would also be disastrous, not only for the individuals and their families, but also for the community as a whole in this area.

[12] The applicants also contend that a business rescue plan will balance the rights of all stakeholders. It will provide the opportunity, not only for the creditors to receive *"all their money over a period of time"*, but also for the employees of the first respondent to retain their employment and to receive an income. In this regard they rely on the proposed business rescue plan attached to the application.

[13] In order to justify the proposed business rescue plan the applicants rely on the production agreement between the fourth respondent and GWK. According to them the fourth respondent has already successfully harvested the first cotton yield. They explain that only about 10% of this yield has been fluffed

and the remaining 90% *"still has to be fluffed in the near future"*. According to the first applicant this contract to produce 5 000 tons of cotton is renewable on a yearly basis. He explains it as follows:

> *"I am being told that this marketing agreement is renewable on a yearly basis and I attach hereto a copy of the current marketing form of Chicundo Properties."*

[14] According to the proposed business rescue plan all the creditors of the first respondent will be paid in full over a period of four years. This will amount to approximately R40 million. The second and third respondents dispute the viability of this plan. According to them it amounts to no more than a one-sided sharecropping agreement in favour of the fourth respondent. According to them all of the creditors are in favour of the winding-up of the first respondent.

DISCUSSION

[15] Section 131(4) of the Act provides as follows:

> *"After considering an application in terms of sub-section (1), the court may -*
>
> *(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that -*
>
> *(i) the company is financially distressed;*

> *(ii) the company has failed to pay over an amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; 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 under liquidation."*

[16] Chapter 6 of this Act does not define or explain what is meant by the term *"reasonable prospect of rescuing the company"*. In Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) the Court stated the following in this regard (par [24]):

> *"Whilst every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefore that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company ...".*

[17] In Oakdene Square Properties v Farm Bothasfontein (Kyalami) (Pty) Ltd 2013 (4) SA 539 (SCA) the Supreme Court of Appeal held as follows with regard to the meaning of *"a reasonable prospect"* as it appears in section 131(4)(a) of the Act (par [29]):

> *"This leads me to the next debate which revolved around the meaning of 'a reasonable prospect'. As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427(1) of the 1973 Companies Act ... On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect - with the emphasis on 'reasonable' - which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers."*

[18] In this case it was also pointed out (par [30]) that it will be neither practical nor prudent to be prescriptive about the way in which the applicant must show a reasonable prospect in every case. I also have to bear in mind that it is not a requirement of section 131(4) of the Act that the applicant must already at this stage of the proceedings present a business rescue plan as contemplated in section 150 of the Act. There may be many other ways of demonstrating a reasonable prospect of rescuing the company concerned. (Henochsberg on the Companies Act 71 of 2008 (Service Issue 17) p 482(3) in the commentary on s 131).

[19] According to the wording of section 131(4) it appears that the Court has a discretion to either make an order to begin business rescue proceedings or to dismiss the application. In the Oakdene case (*supra*) it was concluded (par [18] and [21]) that the nature of the Court's discretion is that of a value judgment, i.e. a discretion in the loose sense as opposed to the exercise of a discretion in the strict sense. It was also pointed out (in par [20]) that *"with hindsight it would perhaps be better not to refer to these instances of a discretion in the loose sense as the exercise of a discretion at all, but as the exercise of a value judgment"*.

[20] To enable a Court to exercise a value judgment, I am of the view that to succeed in an application for business rescue, the applicant must present evidence based on facts from which it can be inferred that there is a reasonable prospect that the entity concerned can be rescued by being placed under supervision. Put differently, without a factual foundation indicating the existence of a reasonable prospect for rescuing the entity concerned, the Court will be unable to exercise a value judgment in favour of an applicant (*cf.* also Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd 2013 (1) SA 542 (FSB) par [11]). In exercising this value judgment one should be careful not to stretch the imagination too far, i.e. beyond the limits of what is being regarded as reasonable, taking into account the facts of the matter concerned.

[21] I now turn to consider the evidence presented by the applicants in support of their application. According to the founding affidavit it appears that the applicants rely mainly on the production agreement with GWK and the draft business rescue plan which was prepared for the first respondent. The