



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D1103/2024

In the matter between:

**MOHINI SINGARI NAIDOO
t/a POWERTRANS SALES AND SERVICES**

APPLICANT

and

**TONGAAT HULETT LIMITED
(IN BUSINESS RESCUE)**

FIRST RESPONDENT

TREVOR JOHN MURGATROYD N.O.

SECOND RESPONDENT

PETRUS FRANCOIS VAN DEN STEEN N.O

THIRD RESPONDENT

GEHARD CONRAD ALBERTYN N.O.

FOURTH RESPONDENT

TERRIS AGRIPRO (MAURITIUS)

FIFTH RESPONDENT

REMOGGO (MAURITIUS) PCC

SIXTH RESPONDENT

**GUMA AGRI AND FOOD SECURITY LTD
(MAURITIUS)**

SEVENTH RESPONDENT

ALMOIZ NA HOLDINGS LIMITED

EIGHTH RESPONDENT

**THE AFFECTED PERSONS IN THE FIRST
RESPONDENT'S BUSINESS RESCUE**

NINTH RESPONDENT

ORDER

In the premises the following order is made:

1. The applicant's application and the application of RGS Group Holdings Limited to intervene are struck off the roll for lack of urgency.
 2. The applicant shall pay the first to eighth and tenth respondents costs of the application.
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JUDGMENT

Mathenjwa J

Introduction

[1] The applicant is a creditor in the business rescue of the first respondent, Tongaat Hulett Limited (In Business Rescue). The second, third and fourth respondents are the joint business rescue practitioners (BRPs) of Tongaat Hulett Limited (THL). The fifth to eighth respondents are the Vision Group who submitted the Vision business rescue plan to the BRPs.

[2] The applicant has brought an urgent application in terms of Uniform rule 6(12) in which it seeks an interim interdict in Part A pending determination of Part B of this application. In Part A the applicant seeks an order interdicting the first to fourth respondents from implementing or taking any further steps relating to the implementation of the business rescue plan adopted in relation to the first respondent at the meeting of creditors held on 11 January 2024. In Part B the applicant seeks an order declaring the business rescue plan adopted on 11 January unlawful and set aside. The first to eighth respondents and Vision Investments 155 (Pty) Ltd oppose the application.

[3] Briefly the background to the application, is that on 27 October 2022 THL was placed under voluntary business rescue. The BRPs were appointed on the same date. On 31 May 2023 the BRPs published a proposed business rescue plan which described various processes that the BRPs intended to follow in facilitating the rescue of THL. On 29 November 2023 the BRPs published two business rescue plans; one titled “Vision Transactions” (the Vision plan) and the other titled “RGS Transactions” (the RGS plan). The Vision plan defines vision parties as being a group made up of the fifth to eighth respondents to this application. On 30 December 2023 the BRPs posted a notice on the THL business rescue website informing affected persons that the creditors meeting in terms of s 151 of the Companies Act¹ would be convened on 10 January 2024. On 2 January 2024 the BRPs circulated the amended Vision plan and amended RGS plan on the THL business rescue website. On 9 January, one day before the creditors meeting at which the amended Vision and RGS plans were to be put to vote, the RGS withdrew its bid and subsequently the RGS plan was withdrawn. The creditors meeting was convened on 10 January 2024. On 10 January 2024 there was disagreement at the meeting about some of the aspects of the Vision plan. Consequently, the meeting adjourned to 11 January, on which date the plan was tabled for vote and approved by the majority of creditors. The applicant contends that the adoption of the plan was unlawful, reason being that the BRPs allegedly failed to consult with the general body of creditors when the first proposed business rescue plan was published on 31 May 2023, when both the Vision and RGS plans were published on 29 November 2023 and the adopted amended plan.

[4] On 1 February 2024, in the afternoon, a day before the hearing of the application, RGS Group Holdings Limited filed an application seeking an order for leave to intervene as an applicant in the application; granting the relief sought in terms of Part A and leave to file a supplementary affidavit in relation to Part B of the application. Mr *Daniels* SC appeared for the intervening party. The first to eighth and tenth respondents oppose the application to intervene. At the hearing of the matter Mr *Kissoon-Singh* SC for the applicant submitted that the matter should be adjourned because it was not ripe for hearing. Mr *Shapiro* SC for the first to fourth

¹ Companies Act 71 of 2008.

respondents and Mr *Blou* for the fifth to eighth and tenth respondents (the Vision Group) oppose the postponement and submitted that the court should first hear and determine the urgency in this application. There was no objection for the joining in of the Vision Group as the tenth respondent in the main application, and it was joined as such. Thus, I heard the application on the issue of urgency only.

[5] Rule 6(12) grants the court in an urgent application a discretion to allow deviation from the ordinary forms and service provided for in the rules. The applicant seeking an order that the court should dispense with the forms and service provided for in terms of the rules must in its affidavit set out explicitly the circumstances which it avers render the matter urgent and the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course. It has been reaffirmed in case law that rule 6(12) “confers a general judicial discretion on a Court to hear a matter urgently”.² The remedy provided for in rule 6(12) is not for the taking, the applicant must not only show that the matter is urgent, but also that it will not be able to obtain substantial redress in the application in due course.³ In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁴ it was held that the rule requires absence of substantial redress, and substantial redress was not equivalent to, but it is less than irreparable harm that is required for the granting of interim relief. In *Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others*,⁵ the court held that in determining urgency the “primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course”. If it is established that the applicant will not be afforded substantial redress other factors taken in to consideration including whether the respondents can adequately present their cases in the time available between notice of the application and the actual hearing of the matter, the prejudice to the respondents and the administration of justice and any delay by the applicant in asserting its rights.

² *Mogalakwena Municipality v Provincial Executive Council Limpopo and Others* 2016 (4) SA 99 (GP) para 63.

³ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) para 6.

⁴ *Ibid* para 7.

⁵ *Mogalakwena Municipality* above fn 2 para 64.

[6] The applicant in its founding affidavit contends that the BRPs are in the process of implementing an unlawful business rescue plan to the detriment of the applicant, other creditors, THL employees and the sugar industry. If the implementation of the plan progresses the greater the likelihood that the steps taken in implementing the plan will become impossible to reverse. Thus, the applicant does not stand to receive substantial redress at a hearing in due course. The first to eighth and tenth respondents in their answering affidavits contend that the applicant has not made a case for urgency in this application reason being that the Vision plan was initially published on 29 November 2023, almost two months before this application was launched. The amended plan was published on 2 January 2024 almost three weeks before the launch of this application and the amended vision plan was adopted on 11 January 2024, almost two weeks before this application was launched. The applicant was not prevented, the argument went, from seeking an interdict against the meeting to vote the business rescue plan or attempt to have the plan prior to the meeting of the creditors set aside and declared unlawful. Furthermore, the respondents contend that there is no risk of the business plan being implemented immediately. As they submitted that the Companies Act provides that the business rescue proceedings end when the plan has been adopted and the BRPs have subsequently filed a notice of the substantial implementation of that plan. The business rescue plan sets out a statement of conditions to be satisfied before the plan can be substantially implemented. According to the time table provided by the business plan, the shareholders' approval process, to the extent required will commence in January 2024 and be completed around the end of March 2024. If competition approval is required from the competition authorities in South Africa, the Competition Commission will take 40 days to consider the notification and the matter will thereafter be heard by the Competition Tribunal. For these reasons the respondents contend that the application was premature and should be struck off the roll.

[7] In address before court the applicant's counsel submitted that he is of the view that all parties agree that the matter cannot be heard as an urgent application, however he submitted that the matter should not be struck from the roll, instead the matter should be adjourned with direction given by this court for the filing of affidavits and heads of argument. Since the BRPs contend that the plan will be implemented in

July 2024, the argument went, the parties should be directed to approach a senior civil judge for a preferential date for the hearing of the matter. In this regard Mr *Kissoo-Singh* handed into court a draft order that caters for further conduct of the matter. He further submitted that the issue of costs should be determined by the court hearing the main application. Mr *Daniels* for the intervening party submitted that RGS wants to join in the proceedings in Part A and B of the application and there is no basis for RGS to bear costs of the application because, it is in court on a matter that is already before court. RGS is not privy to the correspondence between the applicant and the first to eighth respondents about the issue of whether the matter was ripe for hearing. However, Mr *Daniels* also submitted that the matter was not ripe for hearing.

[8] The correspondence exchanged between the applicant's attorneys and the respondents' attorneys is very concerning on the urgency of this application. On 29 January 2024 the first to fourth respondents' attorneys addressed an email to the applicant's attorneys wherein they stated that the applicant's attorneys had informed respondents by email dated 25 January 2024 that they were instructed to launch an urgent application to interdict the implementation of the business rescue plan adopted in relation to THL, but the application was only served to the respondents on Friday 29 January at 15h59, whereas the application was issued on 25 January. In the same email the respondents' attorneys advised the applicant's attorneys that, the business rescue plan was adopted on 11 January, 11 days ago, and it is evident from the plan that there was no risk of it being implemented imminently, since the Vision Transaction was not yet completed. Thus, no irreparable harm can be anticipated and therefore the application was not urgent. For these reasons, they requested the applicant's attorneys to withdraw the application. In the event the applicant elected to persist with the application, respondents' attorneys requested them to agree that the application be removed from the urgent roll on 2 February 2024 and instead set down on 19 February 2024; the respondents be required to file their answering affidavits by 6 February; the applicant be required to file its replying affidavit by 13 February and the parties be required to file their heads of argument by 16 February 2024. On same date, the applicant's attorney advised that their client was intent on proceeding with the application and will not withdraw it. Applicant's attorneys further advised that their client was of the firm view that Part A of the

application warrants it being heard on an urgent basis and declined the proposal that the matter be removed from the roll.

[9] On 1 February 2024 the respondents' attorneys further addressed an email to the applicant's attorneys enquiring whether the applicant intends filing its replying affidavit, given that the matter was set down for hearing the following day, as parties required sufficient time to prepare for the hearing. Also on the same day the fifth to eighth and tenth respondents' attorneys addressed an email to the applicant's attorneys advising them that they noted that the applicant was not willing to entertain the first to fourth respondents' attorneys request to an adjournment of the matter, and that in the light of the position adopted by the applicant, no indulgence will be provided by the respondents for the applicant in relation to the filing of its replying affidavit and they will oppose any attempt by the applicant to postpone the matter for the filing of any further affidavit. On same date at 17h21 the applicant's attorneys addressed an email to the fifth to eighth and tenth respondents' attorneys and stated that in light of the fact that the first to fourth respondents have filed their preliminary answering affidavit and that the applicant has been served with an application for leave to intervene on 1 February 2024, the applicant will not file its replying affidavit in respect of the main application at that juncture, and their senior counsel have proposed that they attempt to agree on dates for the filing of all affidavits and that the senior civil judge be approached to allocate a date for hearing of the matter.

[10] The applicant does not dispute that before the business rescue plan could be implemented the Vision Transaction has to be completed first and it was not yet completed. It is not in dispute that the implementation of the business rescue plan will not take place at least until late in March 2024. It is appropriate to point out that urgency is a matter of degree. In light of the prevailing circumstances the matter could still be heard at a later date as initially suggested by the respondents. If the matter was heard at a later date the applicant would not suffer any prejudice since the plan would not have been implemented. Furthermore, it is not in dispute that the application is voluminous. I align myself with the judgment of *In re: Several Matters on the Urgent Court Roll*⁶ where it was held that:

⁶ *In re Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) para 15.

'Further, if a matter becomes opposed in the urgent motion court and the papers become voluminous, there must be exceptional reasons why the matter is not to be removed to the ordinary motion roll. "The urgent court is not geared to dealing with a matter which is not only voluminous but clearly includes some complexity and even some novel points of law" ...'

[11] It is evident from the exchange of correspondence between the parties that the respondents' attorneys attempted vigorously to persuade the applicant's attorneys to withdraw or even remove and reinstate the matter to the roll at a later date reason being that the application would not be ripe for hearing on 2 February 2024. The applicant's attorneys were opposed to any sensible suggestion about rescheduling and hearing of the application at an appropriate date. It is apparent that the applicant's counsel proposed a sensible solution to the matter, however, an almost similar solution proposed by the respondents was rejected by the applicant's attorneys. Consequently, the respondents were forced to instruct legal teams to work, compile affidavits and avail themselves for hearing of the matter within a short space of time.

[12] It is well known that the issue of THL in business rescue is a matter of national interest. As Mr *Kissoon- Singh* submitted, approximately 1 000 THL employees and the sugar industry is affected by the current situation in THL. Thus, by persisting and enrolling such a complex and voluminous matter of national interest on an urgent basis knowing fully well that the matter would not be adequately ventilated, will not only prejudice the parties, but the administration of justice, the employees of THL and the sugar industry. For these reasons the matter should be struck off the roll for lack of urgency. Regarding the RGS application to intervene, the court does not have sufficient information to determine the application because, the court has not considered the merits of the application. However, since the application is struck off the roll for lack of urgency, the RGS application is equally struck off the roll for lack of urgency.

[13] With regards to costs, there is no reason to deviate from the general rule that costs follow the cause. Therefore, the applicant should pay the respondents costs of the application. I am agreeable with counsel for RGS that it joined the matter when it was enrolled by the applicant and it was not aware of the correspondence between

the parties wherein the respondents pleaded with the applicant to withdraw or remove and reinstate the matter on the roll when it was ripe for hearing. For that reason, I am not convinced that RGS should bear the costs of the application.

Order

[14] In the premises the following order is made:

1. The applicant's application and the application of RGS Group Holdings Limited to intervene are struck off the roll for lack of urgency.
2. The applicant shall pay the first to eighth and tenth respondents costs of the application.

Mathenjwa J

Case information

Date of hearing:	2 February 2024
Date of judgment:	6 February 2024
Applicant's counsel:	Mr A K Kisoona- Singh SC
Assisted by:	Mr D W D Aldworth
Instructed by:	DMI Attorneys Durban
First to Fourth respondents' counsel:	Mr W N Shapiro SC
Instructed by:	Werksmans Attorneys Sandton
Locally represented by:	EVH Inc. Attorneys Umhlanga

Fifth to eighth and tenth respondents' counsel: Mr J Blou

Instructed by: Stein Scop Attorneys Inc.
Morningside Sandton

Locally represented by: Goodricke's Attorneys
La Lucia Ridge

Intervening party's counsel: Mr P Daniels SC

Assisted by: Mr R Kotze

Instructed by: White and Case Inc.
Johannesburg

Locally represented by: Warrick De Wet Redman Attorneys
Umhlanga