Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 24850/11
(Eastern Cape PE Case No: 2448/11)

Before: The Hon Mr Justice Binns-Ward

In the matter between:

WILLIAM GEORGE KOEN	**1st Applicant**
YVONNE KOEN	**2nd Applicant**
and	
WEDGEWOOD VILLAGE GOLF & COUNTRY ESTATE (PTY) LTD (Registration No. 2002/026796/07)	**1st Respondent**
THE COMPANIES & INTELLECTUAL PROPERTY COMMISSION	**2nd Respondent**
NEDBANK LIMITED (Registration No. 1951/000009/09)	**3rd Respondent**
SIBAKHULU CONSTRUCTION (PTY) LTD	**4th Respondent**

JUDGMENT DELIVERED: 9 DECEMBER 2011

BINNS-WARD, J:

[1] On 16 November 2011, after hearing oral submissions from counsel on 24 October and considering written argument subsequently submitted by the parties pursuant to directions given and invitations extended by the court, I delivered a

judgment in the liquidation application (WCC case no. 27956/2010), in terms of which, amongst other matters, the winding up application against Wedgewood Village Golf Country Estate (Pty) Ltd ('the company') was postponed so as to enable the second and third intervening parties in that application, Mr and Mrs WG Koen, the opportunity, if so advised, to transfer the application which they had instituted in the Port Elizabeth High Court (under ECP case no. 2448/11) for an order placing the company under supervision for business rescue purposes to this court for adjudication. I indicated in that judgment that if the business rescue application was not so transferred to this court by 28 November 2011, being the date to which the winding up application was postponed, an order would be made placing the company into provisional liquidation. The business rescue application was thereafter indeed transferred to this court in terms of an order made by Tshiki J in chambers in the Port Elizabeth High Court. The transfer of the business rescue application to this court (in which it has been allocated WCC case no. 24850/11) had the effect of suspending proceedings in the winding up application - see s 131(6) of the Companies Act 71 of 2008. Thus, on 28 November, I issued directions to enable the business rescue application to be argued before this court on 6 December 2011.

[2] Pursuant to the directions given on 28 November, the applicants in the business rescue application delivered lengthy replying affidavits. It should be mentioned in this regard that the time for the filing of these affidavits in terms of the Uniform Rules had already long elapsed before 28 November. (The directions on the delivery of replying affidavits were given because I was advised that the applicants had previously indicated an intention to reply to the answering papers, but had not yet done so.) The replying affidavits introduced significant new material and also included allegations by the applicants of misconduct by the deponent of the

principal affidavits submitted in both the winding up and the business rescue proceedings by the first intervening party, Nedbank Ltd. The replying affidavit deposed to by Mr Koen furthermore included an express challenge to Nedbank to file responding affidavits.

[3] The most significant new matter contained in the replying affidavit was the description of the efforts of a Port Elizabeth estate agent, Ms Martin, to obtain an offer from an undisclosed third party which would enable the recapitalisation of the company's business so as to permit the completion of the golf course village development, which had comprised its sole business activity at all material times. The terms of such an offer, were it to eventuate, and depending on its content, might make out a cogent basis for a rescue of the company's business. It was clear from the evidence put up in the replying affidavits that Ms Martin, supported by certain of the suppliers of professional services to the company in respect of the development, had assembled quite detailed information as to the feasibility and costing of a rescue of the development in order to solicit the involvement of the unnamed investor. It was apparent that these efforts had been in train for at least several weeks before the hearing on 6 December. So, for example, a detailed costing sheet had been prepared on or about 11 September by the quantity surveyors who had been employed on the development. The costing was directed at showing (subject to some significant exclusions) the estimated cost as at 30 September 2011 of completing the project.

[4] Hardly surprisingly, in the context of what I have just described, Nedbank produced a fourth set of affidavits directed mainly at providing a response to the new matter introduced by the applicants in reply, and also at addressing the allegations of

improper non-disclosure which had been directed in the reply at the deponent to its principal affidavits. The applicants' counsel opposed the bank's application for the admission of the fourth set of affidavits. He also indicated that irrespective of the determination of the issue of the admission of these affidavits the applicants sought a postponement of the application to the first available date in the first term of 2012.

[5] Because it was apparent from counsel's intimation that the portended application for postponement would be predicated in part on the admission of the fourth set of affidavits I directed that the issue of the admission of the fourth set be argued and decided before consideration of any application for a postponement of the business rescue application.

[6] In my judgment Nedbank was well advised to file a fourth set of affidavits rather than to seek to address the new matter in the applicants' replying affidavits by way of striking out. It was apparent that the new matter introduced in reply had not been within the applicants' knowledge when they commenced proceedings. Assuming that a case had been made out for business rescue in the founding papers, it would obviously be in the interests of justice to allow the new matter in the circumstances. It was convenient to assume for the purposes of the application to introduce a fourth set of affidavits that a case for business rescue had been made out, albeit only prima facie, in the founding papers. Allowing, on that assumption, that it would be in the interests of justice to permit the applicants to rely on the new matter, it would be manifestly unjust to deny Nedbank the opportunity to deal with it. It similarly would have been unjust to deny the deponent to Nedbank's principal affidavits in the proceedings the opportunity to deal with the serious allegations of impropriety made against her. Moreover, the applicants could hardly be heard to

complain about the bank's acceptance of their express challenge addressed to it in the replying papers to file responding papers. Taking all of these factors into account, and being mindful that nothing in the content of the fourth set of affidavits appeared to me to be exceptionably prejudicial to the applicants, I made an order allowing the admission of the affidavits.

[7] The applicants thereupon moved, as their counsel had indicated their intention to do at the outset, for the postponement of the application. Counsel argued for the postponement on the basis of the papers filed of record in the business rescue application. The applicants did not deliver a formal application or any supporting affidavits in respect of the postponement. It was apparent that the reason for the postponement was to obtain time for the proposal which Ms Martin sought to elicit from an unnamed investor to be forthcoming so that its terms could be placed before the court in support of the business rescue application.

[8] I was not persuaded that this object afforded justifiable grounds for the grant of the indulgence sought. In my view if the applicants had made out a case for business rescue they did not need a postponement. On the other hand if they had not made out a case on the papers as they were, there was no good reason to delay matters for a further two months or more in the hope that a tenuously defined contingency might salvage their position. Apart from the fact that to grant an applicant in motion proceedings a postponement in order to make out its case after the exchange of four sets of affidavits has already occurred would be contrary to basic principle, it also weighed with me (i) that the winding up proceedings have been pending since December 2010, (ii) that any business activity by the company had ceased since 2009, (iii) that the interest debt of the company continued to

mount, to the prejudice of creditors, at a significant rate (the interest burden on Nedbank's capital claim alone is said to amount to about R450 000 per month) and (iv) that should the business rescue application not succeed on the papers as they are, that will not exclude the ability of the applicants or any other person who might have standing using any investment proposal that might eventuate between now and early next year to persuade the court to convert any winding up proceedings that might ensue on the failure of the current business rescue application into business rescue under s 131(7) of the Companies Act, 2008; alternatively, to achieve the same object by means of a fresh business rescue application.

[9] Mr *Pretorius*, who appeared for the applicants, contended that an ensuing liquidation would prejudice the likelihood of the investment proposal currently under consideration by the unnamed investor being forthcoming. He submitted that a liquidation order would do the company such reputational harm as to put off the investor. I was not persuaded by this argument. From what little one is able to glean about the investment proposal which it is hoped by the applicants will support the rescue of the development, it is likely to be directed at the business opportunity which the development land is said to present and unlikely to be affected by the reputation of the company which has already been demonstrated to have been unable to realise that opportunity.

[10] The other argument that the applicants advanced in support of their request for a postponement was that they should be afforded the time advantages that they would have had if the application had proceeded in the Port Elizabeth High Court, where the matter had originally been set down for hearing on 9 February 2012. There was no merit in this argument. It is axiomatic that business rescue

proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings - however dubious might be their prospects of success in a given case - materially affects the rights of third parties to enforce their rights against the subject company. Moreover it is relevant to observe that in the current case, in which business rescue proceedings were instituted as long ago as mid-August, it was the respondents, frustrated by the applicants' failure to do so, who took steps to obtain the earliest available hearing date on the Port Elizabeth High Court's calendar; this even before the applicants - the prescribed time therefor having elapsed - had filed replying papers. In all the circumstances the applicants have no right to any timetable advantage. On the contrary, I had indicated at the hearing on 28 October that it was important for this matter to be disposed of efficiently and quickly and made this court's intention to do so, if it became seized of the matter, very clear.

[11] The application for a postponement was refused, with costs stood over for determination in the application for business rescue.

[12] Turning then to the business rescue application itself. The expression '*business rescue*' is specially defined in s 128(1)(b) of the 2008 Companies Act:

> **'business rescue'** means 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 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 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.

[13] Business rescue is a remedy which was not available under the 1973 Companies Act (Act 61 of 1973). It is thus a new concept in South African company law. Although novel in this country, the concept is essentially the same as that which has existed for many years under the statutory regimes in a number of other jurisdictions. So, for example, chapter 11 bankruptcy protection in the United States[1] is a similar remedy that has become widely known because of frequent references to it in the media. Less well publicised examples are the 'administration' provisions of the English Insolvency Act, 1986 (as amended), (at Schedule B1), and Part 5.3A (ss 435A – 451D) of the Australian Corporations Act, 2001.

[14] Locally, the remedy replaces that of judicial management which was originally introduced under the 1926 Companies Act, and retained in the 1973 Act.[2] The requirements for a supervision order for business rescue purposes are materially different from those which pertained to judicial management. It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with

[1] Chapter 11 of Title 11 of the US Code.

[2] Contrasting business rescue with judicial management, Eloff AJ described the latter as '*a rather cumbersome and ineffective procedure ... for reviving ailing companies*'; see *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks and another intervening)* WCC case no. 15155/2011 (25 November 2011) at para 20.

attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.

[15] A company in financial distress may itself (subject to certain limitations) resolve, by a decision of its directors, to place the company under supervision;[3] alternatively, application to put a company into business rescue can be made be made by an 'affected person'.[4]

[16] In terms of s 131(4) of the 2008 Companies Act a court having jurisdiction to which an application for business rescue is made by an affected person 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 any 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'.

[17] It is evident in the provisions of s 131(4) that a person making an application for business rescue in terms of s 131(1) of the 2008 Companies Act must satisfy the court that there is a *reasonable prospect* that the subject company can be rescued in

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[3] Section 129 of Act 71 of 2008.
[4] Section 131 of Act 71 of 2008.

the relevant sense by being placed under supervision. The information or evidence that will suffice to meet this requirement will depend on the object of the proposed business rescue; *viz.* whether it is to achieve the continued existence of the company on a solvent basis, alternatively, to allow the company's business to be managed for an interim period to allow for a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. Whatever the object of the proposed business rescue, however, in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved. While it is the function of the business rescue practitioner, if appointed, to draw up a business rescue plan to be considered by the 'affected persons', the founding papers in a business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or, at the very least, make out a case for the court to hold that an investigation by a business rescue practitioner to that end, in terms of s 141(1) of the Act, appears to be justified.

[18] In respect of what will, in general, be required of an applicant seeking a supervision order to put a company into business rescue to return it to solvent operation, I agree with the remarks made by Eloff AJ in *Southern Palace* supra,[5] at para 24. The learned judge considered that at least '*some concrete and objectively ascertainable details* [should be given] *going beyond mere speculation in the case of a trading or prospective trading company, of:*

[5] See fn. 2, above.

(i) *the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;*

(ii) *the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;*

(iii) *the availability of any other necessary resource, such as raw materials and human capital;*

(iv) *the reasons why it is suggested that the proposed business* [rescue] *will have a reasonable prospect of success*

[17] In an application in which the object of the proposed business rescue is to secure a better return than would be obtained under immediate liquidation the applicant would be required to set out in the founding papers a reasoned factual basis for the alternative scenarios that the court will have to consider and lay a cogent foundation to enable the court to determine that there a reasonable prospect that the better return evident on one of those scenarios can be achieved.

[18] Vague and speculative averments in the founding papers will not suffice to provide a proper basis for a court to make the required determination that there is a reasonable prospect, if the company were to be placed under supervision, that the contemplated business rescue objective could be achieved.

[19] In the current matter the applicants were the purchasers of a vacant plot which is a subdivisional unit on the area of land which the company was engaged in

developing as a golf course estate. They appear to have taken transfer of the erf in either 2007 or 2008. The plot was acquired at a price which appears to have been determined on the assumption that it would lie within a fully developed golf estate. The deed of sale in terms of which it was purchased included an undertaking, expressed in broad and undefined terms, by the company to complete the phased development of the golf course estate within a reasonable time.

[20] It is clear from the papers, not only in the current application, but also in the winding up application, that the company's expenditure in the development of the estate outpaced the receipts received in respect of the sale of plots to such an extent that, even with considerable borrowing, it was unable to sustain its development operations. The result was that the principal external funder of the business, Nedbank, refused to extend its exposure, and work on the development site consequently ground to a halt. Thus by 2009 only 14 of the 18 holes on the planned 18 hole course had been completed. Thereafter, the infrastructure which had been constructed was left to deteriorate, and effectively abandoned. Photographic evidence in the papers shows how the golf course has become overgrown and reverted to scrub, and roads encroached upon by vegetation and strewn with rubble. Electrical reticulation that had been installed has been plundered or vandalised. The last sale of a residential plot in the development was effected in 2008 and the last transfer effected occurred in 2009.

[21] Having ceased all operations, the company is currently indebted to Nedbank in an amount, including interest, exceeding R60 million, and to its holding company (currently in liquidation) in a sum exceeding R118 million. Nedbank's claim against the company is secured by a mortgage over the land on which the company was

undertaking the development. That land appears to be the company's only asset worthy of mention. It has been variously valued by professional valuers and estate agents at between R42 million and R65 million. There are conflicting opinions given by witnesses familiar with the Port Elizabeth property market on the feasibility of the completion of a golf course development on the land in current economic conditions. A number of other golf course developments in the adjacent Southern Cape region are also reported to be experiencing commercial difficulty. According to calculations made by the quantity surveyor who had been engaged by the company on the development it will require approximately R81,5 million to complete the development work. That estimation excludes any estimation of material considerations such as the repair and replacement of the electrical installations and, indeed, the cost of undertaking certain parts of the originally contemplated development at all.

[22] Ms Martin has an optimistic view of the prospect of the development being successfully completed within the short-term future. She considers that the Port Elizabeth property market is undergoing a marked recovery. That no doubt explains why she has been actively seeking to persuade an investor to come to the rescue of the project. The difficulty is that little weight can be attached to Ms Martins' opinion in the absence of any meaningful particularity on the papers about the identity of the potential investor, its means, or the terms and content of any investment proposal with which it might be forthcoming. There is also no explanation as to why these obviously important particulars cannot be disclosed. Without such particularity being provided this court is being invited to buy into Ms Martin's optimistic assessment on a manifestly uninformed basis. Any such approach to the matter by the court would be entirely inconsistent with the basic requirements for the exercise of judicial discretion.

[23] It is not clear which of the two possible objects of business rescue the applicants seek to achieve by having the company placed under supervision. In their founding papers it appeared to be to restore it to solvency, while in their reply it appeared that a better return for creditors than would be achieved on immediate liquidation was the intended objective. It does not really matter, however, because on either approach the applicants have fallen woefully short of furnishing the court with the material required to make the assessment of whether a reasonable prospect of business rescue succeeding exists. Their case is manifestly dependent on the provision by the mystery potential investor of the means to enable a business rescue practitioner to draw up a feasible rescue plan. What those means might be, or on what terms and conditions they might become available are as much a mystery as the identity of the party which might provide them.

[24] I have been impelled on the substance of the case that the applicants have tried to make out to find that the application for business rescue cannot succeed. It is therefore unnecessary to determine whether the remedy was in any event to be had at their instance. Suffice it to say in this regard that I have reservations about whether they qualify as 'affected persons'. In the circumstances the application could be disposed of assuming, without deciding, in their favour that they are. For the same reason it has also proven unnecessary to determine whether the applicants had complied adequately with the notification provisions in terms of s 131(2)(b) of Act 71 of 2008.

[25] In the result the application is dismissed with costs; including in the case of the third respondent the costs of two counsel where such were employed. To the

extent that any additional costs might have been occasioned thereby, the applicants shall also be liable for the costs of the application for postponement.

A.G. BINNS-WARD
Judge of the High Court