BIZCOMMUNITY

Court clamps down on the abuse of business rescue proceedings to avoid winding-up proceedings

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Business rescue proceedings are a mechanism to facilitate the rehabilitation of a company that is financially distressed. Such proceedings are primarily aimed at restoring a company to solvency that should not be abused by a company with no prospects of being rescued to avoid a winding-up or to obtain some respite from creditors.

On 21 July 2023, the SCA handed down judgment in the matters of *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others* (Case no 543/21) and *Brita De Robillard NO and Another v PFC properties (Pty) Ltd and Others* (Case No 409/22) [2023] ZASCA 111 (21 July 2023).

In *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others* (Case No 543/21), the SCA had to consider an appeal against a final order of liquidation granted by the Pretoria High Court against PFC Properties (Pty) Ltd ("PFC") in favour or the South African Revenue Service ("SARS").

In *Brita De Robillard NO and Another v PFC properties (Pty) Ltd and Others* (Case No 409/22), the SCA had to consider an appeal against an order granted by the Pietermaritzburg High Court in terms of which it dismissed a business rescue application, as well as a postponement application for the business rescue application.

Background

The facts of the matter are briefly as follows. SARS issued a liquidation application in the Pretoria High Court against PFC as a result of PFC's failure to pay SARS VAT and income tax to the combined value of approximately R57 million. The trustees of the insolvent estate of Mr De Robillard successfully applied to intervene in the winding-up application.

Shortly after the winding-up application was launched, PFC changed its registered address from an address in Gauteng to an address in KwaZulu-Natal.

PFC failed to file an answering affidavit in the winding-up application and a few days prior to the hearing of the winding-up application, the trustees of the De Robillard Family Trust ("the DRFT"), as the sole shareholder of PFC, launched a business rescue application in the Pietermaritzburg High Court to place PFC into business rescue.

One court day prior to the hearing of the winding-up application, PFC's attorney filed an affidavit contending that, in terms of section 131(6) of the Companies Act, 2008 ("the Act") SARS was precluded from proceeding with the winding-up application until the business rescue application was adjudicated upon, on the basis that section 131(6) of the Act suspended the liquidation application, because business rescue proceedings only begin once the court makes an order to that effect in terms of section 131(1) of the Act. The affidavit failed to address the allegations in the founding affidavit in the winding-up application.

SARS sought leave, in terms of section 133(1)(b) of the Act to proceed with the winding-up application, submitting that the Court had a discretion in terms of that section of the Act to proceed with the application. A final winding-up order was granted by the Pretoria High Court on 13 April 2021.

Both SARS and the trustees of the insolvent estate of Mr De Robillard opposed the business rescue application and filed detailed answering affidavits. The trustees of the DRFT failed to deliver a replying affidavit and failed to enrol the business rescue application for hearing. SARS accordingly applied for the application to be heard, and it was enrolled for hearing on 8 October 2021.

One month prior to the hearing of the opposed business rescue application, the DRFT trustees filed an application to postpone the hearing thereof, on the basis that an appeal was pending against the final winding-up order, which rendered the business rescue application moot, alternatively, not ripe for hearing.

The Pietermaritzburg High Court held that the pending appeal against the final winding-up order did not preclude it from determining the business rescue application, taking into account the timing of the business rescue application, and that the affidavits filed by SARS and the trustees of the insolvent estate of Mr De Robillard, to which there was no response, were a 'reliable and useful indication to assess the bona fides' of the DRFT trustees and the prejudice to other parties. In light of the prejudice that PFC's creditors would suffer on account of a delay, the lack of prospects of success of the business rescue application and the authorities, the application for postponement of the business rescue application was refused with costs. PFC's counsel then informed the court that they had no instructions to argue the business rescue application and left the court room. The business rescue application itself was then heard (and dismissed) in their absence.

Findings by the SCA

The appeals against the final winding-up order and the dismissal of the business rescue application were heard jointly by the SCA as they related to one another. The main issue before the SCA was whether the conduct on the part of PFC and the DRFT trustees in launching the business rescue application constituted an abuse of court process.

The SCA held that the business rescue application, whilst properly dismissed by the Pietermaritzburg High Court, should not even have been considered by reason of its use in a scheme of abuse, and that the launching of the business rescue application was a stratagem. The registered address of PFC had suddenly been changed to an address in KwaZulu-Natal to enable the DRFT trustees to launch the business rescue application out of the Pietermaritzburg High Court. Further, the DRFT trustees had failed to file a replying affidavit in their own application or enrol the matter for hearing, which was indicative of the fact that they had no intention of prosecuting the application to conclusion. This was further emphasised by the fact that at the hearing of the business rescue application, counsel for the applicants left the court room once the postponement application was refused. Over and above that, the DRFT trustees failed to make out a case that there was any reasonable prospect of rescuing PFC.

In considering the conduct of the DRFT trustees and PFC, the Court referred to the recent decision by the Constitutional Court in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC), which dealt with the fate of proceedings launched by a party with an ulterior motive, in which the Constitutional Court held, *inter alia*, that *"The behaviour of the litigant may be so tainted with turpitude that the court will not come to such a litigant's aid."* …and *"It is the abusive conduct of the litigant that, in a proper case, may warrant the exercise of the court's power to non-suit such a litigant."*

The SCA held that the conduct of the DRFT trustees and PFC was so tainted with impropriety that the Court must use the power it has to safeguard the integrity of its process. The applicants in the business rescue application were therefore non-suited. Consequently, the SCA held that the business rescue application could not have suspended the liquidation application because the former was tainted by abuse. As a result of the non-suiting of the applicants, the business rescue application was not "made" as envisaged in section 131(6) of the Act and thus, the moratorium never came into operation and did not suspend the winding-up proceedings.

The SCA held that the liquidation order granted by the Pretoria High Court was therefore unassailable and both appeals were dismissed with costs.

Conclusion

The decision by the SCA reflects that the abuse of business rescue proceedings in circumstances where there is no reasonable prospect of rescuing a company will not be tolerated, and the court, when faced with a situation where it is evident that the business rescue application is being used as a stratagem to delay or avoid winding-up, has the power to safeguard the integrity of its process by non-suiting the applicants in such an application.

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