Court supports business rescue:

Creditors' votes against the adoption of a Business Rescue Plan set aside by the High Court.

In a recent application brought in the High Court is Polokwane, (unreported case number 365/2014), in the matter between *Copper Sunset Trading 220 (Pty) Ltd, t/a Build It Lephalale (under Business Rescue) vs Spar Group Ltd and another)*, the Court granted a application brought by the Business Rescue Practitioner of the Applicant, to have the votes of two creditors, against the adoption of a business rescue plan, set aside in terms of the provisions of Section 153(1)(a)(ii) of the Companies Act, (Act 71 of 2008), (hereinafter referred to as "the Act").

Facts:

In this case, the Second Respondent had voted against the First Business Rescue Plan and due to its voting interest, the first plan was rejected.

The Business Rescue Practitioner then prepared and published a revised plan.

At the meeting to consider the revised plan, both the Respondents voted against the plan, resulting in the revised plan being rejected as well. Accordingly, the Business Rescue Practitioner brought the Court application, to have the Respondents' votes, set aside and the plan to be declared adopted.

Applicable Statutory Provisions:

Section 152(1)(a)(ii) of the Act allows a Business Rescue Practitioner, to bring a Court application, to have votes against the Business Rescue Plan, set aside, on the grounds that "it was inappropriate".

Section 153(F) of the Act then provides that a Court may set aside these votes, "*if the Court is satisfied that it is reasonable and just to do so*".

The Court, in considering the application, must have regard to –

(a) the interests represented by the creditors who voted against the prepared Business Rescue Plan;

(b) the provision, if any, made in the proposed Business Rescue Plan, with respect to the interests of that creditor;

(c) A fair and reasonable return to that creditor, if the company were to be liquidated.

No previous authority could be found of a Court having to entertain an application of this kind, which makes this case a precedent – setting decision.

Urgency of the application:

The Business Rescue Practitioner had brought the application on a semi-urgent basis, stating that the financial situation of the Company was deteriorating on a daily basis, towards liquidation.

The Court agreed that the application was urgent and found that "*the real urgency lies in the fact that the Applicant does not have the luxury of time on its side: every day that passes in anticipation for the plan to be approved, it becomes more difficult for the Applicant to turn itself around*". (At paragraph 17).

The Court also referred to *Koen v Wedgewood Village Golf Estate 2012(2) SA 378 (WCC)* were the following was said at 381 G-H:

> "*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 those prospects of effective rescue.*"

The inappropriateness of the two Respondents' votes:

The Court looked at the purpose of business rescue and referred to Section 7(K) of the Act, which reads that one of the purposes of the Act is to "*provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.*"

The Court then stated that the "*shareholders, creditors and employees and/or registered trade unions representing employees are stakeholders in terms of the Act*".

With reference to *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC)* the Court stated that "*the aim of business rescue is to save a business, rather that destroy it. Business rescue is preferred to liquidation*." (At paragraph 29).

The Court again referred to *Koen v Wedgewood Village Golf Estate 2012(2) SA 378 (WCC)* whereat paragraph 14 it was said:

> "*The aim of business rescue is to save a business, rather than destroy it. Business rescue is preferred to liquidation*."

The Court also pointed out that fact that it is a valid goal of business rescue, "*just to ensure a better return for creditors than would be achieved*" if the company were immediately liquidated.

The Court referred to the affidavit by the Business Rescue Practitioner, that it was, (without an adopted Business Rescue Plan), impossible for the company to obtain post-commencement finance in terms of Section 135 of the Act. Creditors and suppliers were not prepared to provide stock on account or credit, given the fact that the business rescue plan had not been adopted.

The Court pointed out that it had to not only look at the interests of the creditors, but also the interests of the employees who would lose their jobs if the company were liquidated.

The Court stated that it was it was worth to embark on the Business Rescue Plan, rather than "*resort to a more devastating process of liquidation of the company*". (At paragraph 36.)

The Court referred to the fact that the First Respondent was the only creditor of the Company likely to receive a dividend on liquidation (as it had a notarial bond over certain of the Company's property). The Court then found that the "*attitude of the First Respondent in gunning for liquidation is self-serving and, with respect, unreasonable regard being had to the fact that it is the only creditor to probably gain*" a dividend. (At paragraph 37.)

Regarding the Second Respondent, who was likely to receive no dividend on liquidation of the Applicant, the Court, found its vote against the Business Rescue Plan to be "*irrational*". (Also at paragraph 37.)

The Court therefor found that the conducts of the Respondents "*in rejecting the revised business rescue plan….was inappropriate.*" (At paragraph 38.)

The votes were accordingly set aside and the proposed business rescue plan was declared to be adopted.

The Court also, as suggested by the Business Rescue Practitioner, ordered that the post-commencement finance as required in terms of the business rescue plan, be obtained by the Applicant within 30 days, failing, which the Business Rescue Practitioner was to terminate the business rescue proceedings.

Lessons learnt:

(i) Creditors cannot willy-willy vote against a Business Rescue Plan, especially where such a creditor has nothing to gain if the company is liquidated.

(ii) A creditor can also not vote against the adoption of a Business Rescue Plan, if such conduct by the creditor is "*self-serving*". This stresses the fact that with business rescue, the Court will ensure that, (as required by section 7(K) of the Act), the rights and interests of all relevant stakeholders in the Company, should be balanced.

Article submitted by:

Benno de Klerk

(B.Iur; L.LB; MBL; Adv Dip (Labour Law); Cert in Human Rights; Adv Short Course in Business Rescue Practice)

DDKK Attorneys Inc, Polokwane

Tel: (015) 297 3310