REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-036576
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE
SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Applicant

and

DRS MKHABELE & INDUNAH DIAGNOSTIC RADIOLOGISTS INC AND THREE OTHERS 1st to 3rd Respondents

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10: 00 am on 30 May 2024.*

Summary: Urgent application. Delay in launching an application – the claimed urgency weans away. The Business Practitioner not implementing a rejected business plan. No palpable harm where the Business Practitioner is not acting unlawfully but only paying creditors of an entity under business rescue. Thus, no urgent relief is necessary. Preliminary objections for non-compliance with section 133(1) and 145(1)(a) of the Companies Act not upheld. The application having been prompted by miscommunication which could have been corrected to obviate it, the appropriate order as to costs is that of each party is

liable for its own costs. Held: (1) The application is struck off the roll due to lack of urgency. Held: (2) Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Drs Mkhabele & Indunah Diagnostic Radiologists Inc (Mkhabele) is an entity under business rescue. Mr Ralph Farrel Lutchmann (BRP) is the appointed business rescue practitioner. A business plan (BP) was prepared and presented by the BRP. The Commissioner for South African Revenue Services (CSARS), the applicant before me, is a creditor holding 65% voting power. In terms of section 152(2)(a) of the Companies Act, 2008 (CA) a BP will be approved on a preliminary basis if it was supported by the holders of more than 75% of the creditors' voting interests that were voted. In *casu*, the CSARS voted against the approval of the BP.

[2] Such voting prompted the BRP to invoke the provisions of section 153(1)(a)(ii) of the CA. BRP launched an application contemplated in the section. It is axiomatic that should this Court set aside the result of voting on the grounds of inappropriateness, certain consequences may follow. Having said that, what serves before me is an urgent application mainly seeking to interdict the BRP from implementing the rejected BP.

[3] Correspondences exchanged between the parties and allegations and counter-allegations made by the deponents created an impression that the BRP was implementing the rejected BP. Since the misconception was not cleared, the present application was begotten. In the present proceedings, it became apparent that the BRP disavowed any implementation of the rejected BP and contends that the process engaged in is for the payment of creditors and the CSARS is one of the creditors of Mkhabele.

[4] The present application is duly opposed by Mkhabele and BRP. In opposing the application, Mkhabele and BRP raised three preliminary objections to the application. The first relates to the failure to give notice to all affected parties as contemplated in section 145(1)(a) of the CA. The second relates to non-compliance with the provisions of section 133 of the CA. The third relates to lack of urgency.

Background facts pertinent to the application

[5] As indicated earlier, Mkhabele has been placed under business rescue. As a consequence of that a meeting of creditors took place on 14 April 2023. It was at this meeting that the BRP presented a BP for approval. All the creditors present barring the CSARS voted in favour of the BP. Resultantly, the BRP on 2 May 2023 launched proceedings contemplated in section 153 under case number 2023-064733 (the main application). The main application pends the decision of this Court.

[6] Mkhabele is indebted to the CSARS in the order of R62 million. The basis for CSARS objecting to the BP is that it omitted certain liabilities, which at the ultimate end will prejudice the huge debt owed to the CSARS. For the purposes of this judgment, it is obsolete to consider in any details all the reasons advanced by the CSARS in support of the objection to the BP.

[7] On or about 1 August 2023, the BRP testified that in order not to cause any creditors or employees any prejudice, he started implementing and making payments in terms of the revised business rescue plan. He further testified that any payments due to CSARS as a creditor was paid into a trust account of his attorneys, owing to the objection to the BP. Despite this testimony, which vaguely suggests that the BRP is busy implementing the rejected revised BP, CSARS laid supine.

[8] On 26 February 2024, attorneys for the BRP reminded CSARS of its awareness that the BRP has started implementing the BP and a certain amount was payable to CSARS. On 05 March 2024, the CSARS, through its attorneys of record, restated that the BRP was implementing the BP despite its objection. It rejected the amount offered to it by the BRP. On 13 March 2024, in reply, the BRP stated that it was making payments for historical debts, since Mkhabele was in a financial position

to do so. The BRP categorically stated that there was no prohibition from the CA for it to make such payments.

[9] The CSARS, in its letter of 5 March 2024, had taken a view that the implementation was unlawful and the BRP should provide an undertaking before end of business of 11 March 2024 not to continue implementing, failing which an interdict shall be launched. No such undertaking was provided by 11 March 2024, and no application for an interdict was launched. The CSARS interpreted a statement by the BRP to say that payment of historical debts is not prohibited by the CA to mean that implementation of the rejected BP is not prohibited by the CA.

[10] In response to the testimony delivered by the BP in August 2023, the CSARS restated its position that the implementation of the BP was unlawful. However, since then, for reasons that are not apparent anywhere, the CSARS *assumed* that the BRP accepted its position that the implementation is unlawful and shall not proceed with it. On its version, the assumption was contradicted by the conduct of the BRP on 26 February 2024. That notwithstanding, it took CSARS the whole month thereafter to launch the present urgent proceedings.

[11] From 26 February 2024 barring the request for an undertaking and a threat with an interdict on 5 March 2024, there is nothing to demonstrate that the CSARS was engaged in any settlement discussions. The correspondence exchanged in that period demonstrates nothing but alleged prevarications between the CSARS and the BRP. Having launched the application on or about 4 April 2024, for some inexplicable reasons, the CSARS appointed a date which is a month and couple of days away; namely; 28 May 2024.

Analysis

[12] This Court takes a view that the issue of lack of urgency is dispositive of the present application. As a result, it will be purely academic for this Court to decide the other two preliminary objections. Rule 6(12) of the Uniform Rules requires that a party seeking an urgent relief must (a) set forth explicitly the circumstances which is averred render the matter urgent and (b) the reasons why the applicant claims that the applicant could not be afforded a substantial redress at a hearing in due course.

[13] This application is premised on a wrong basis that the BRP is busy implementing the BP. An interdict is a special remedy available for an unlawful conduct. Counsel for Mkhabele and the BRP conceded that a rejected BP cannot be implemented in law. The reality of the situation is that the BRP is not implementing the BP. His testimony in August 2023 and the correspondence of February 2024 created an impression that he was implementing the BP.

[14] If indeed the present application was truly urgent, the unlawfulness which can be remedied by a special remedy of an interdict manifested itself in August 2023. Other than stating that the CSARS in opposition testified that the BRP acted unlawfully, the CSARS provides no explanation why it did not launch an application then. The CSARS, could even have launched a counter-application instead of simply testifying that the BRP was acting unlawfully. In the present proceedings, the CSARS explicitly states that the matter is now urgent because it assumed that its say so that the BRP is acting unlawfully by implementing would instantaneously lead to a stop on the part of the BRP. Sadly, this is far from being a convincing basis for urgency.

[15] On the contrary, it serves as evidence that indeed the application was never urgent. Even if the matter was urgent in August 2023, the fact that the CSARS waited for a period of about eight months before seeking an urgent relief, leads to the claimed urgency weaning away. Self-created urgency is nothing but an urgency claimed at convenient times. Clearly, from August 2023, the CSARS laid supine due to the undeclared and unconfirmed assumption that the BRP will magically stop, without an interdict, the declared implementation. Self-created urgency is not the urgency contemplated in rule 6(12). A Court must refuse to hear an application predicated on self-created urgency.[1]

[16] Nevertheless, in this Court's view, the BRP on 13 March 2024 was explicit when he stated the following:

---

[1] See *MM v NM and others* (15133/23P) [2023] ZAKZPHC 122 (18 October 2023).

> "That after careful consideration of the business's finances my client (BRP) was satisfied that the company could afford to make payment of its historical debts. There is no provision in the Act prohibiting him from doing so. It is to the benefit of the company to settle creditors when it is in the financial position to do so to stop accruing further interest."

[17] It cannot be clearer that the BRP was making payments of historical debts because the financial position was allowing and such will be beneficial to Mkhabele. Curiously, the CSARS did not respond to this missive. Instead it laid supine until 5 April 2024 when it launched the present application only to be heard weeks later. Accordingly, this Court is not satisfied that the first requirement in rule 6(12) has been met.

[18] Turning to the second requirement, the CSARS sparsely and tersely deal with this requirement in its founding papers. This requirement is not to be conflated with an irreparable harm requirement of an interdict. What is required are factual reasons as opposed to argument why an applicant claims that the applicant could not be, as opposed to surmising, afforded substantial redress at a hearing in due course. Instead of the CSARS considering the explicit response of 13 March 2024 in order to observe that the BRP was not in fact implementing the BP, the CSARS opted to seek a legal opinion on the contents of an explicit response. It would not have hurt the CSARS to once more seek confirmation from the BRP as to whether he is implementing the rejected BP before conceiving the present application.

[19] Not having taken such an elementary step, the CSARS, in my view, was manifestly reckless in conceiving the present application seeking to interdict nothingness. On proper consideration of the letter, it is crystal clear that the BRP in making payments, he was clearing historical debts and as correctly contended, there is nothing in the Act to prohibit such an action. In terms of section 140(1)(a) of the CA, the BRP has full management control of the company. Paying historical debts is part and parcel of full control of the company. There is no basis demonstrated why despite this clear letter did the CSARS proceed with this application. This in my view evinces nothing but recklessness.

[20] In the Court's view, it is not sufficient, in an attempt to satisfy the second requirement in rule 6(12) for a party to tersely testify as follows:

> "113 For reasons fully set out hereinabove, SARS will not be able to obtain substantial redress in a hearing in the ordinary course."

[21] In motion proceedings, a party stands and fall by a case made in its founding papers. In the founding affidavit, under the heading "urgency", in the 14 paragraphs, this Court scoured through those paragraphs and was unable to find reasons why a substantial redress at the hearing in due course may not be available. Even if the CSARS was correct in its contention that the BRP was implementing the BP, at the hearing of the main application, the CSARS would obtain a substantial redress when its vote against the BP is not found to be inappropriate.

[22] Having failed to meet the requirements of rule 6(12) it must follow that this application must be struck off the roll due to lack of urgency. What then remains is the issue of costs, which issue I now turn to.

The issue of costs

[23] In the ordinary course, since the BRP and Mkhabele has achieved success, on application of the ordinary rule of costs following the results, they will be entitled to their costs. Although this Court chose not to fully deal with the other two preliminary objections, on the binding authorities of *Kransfontein Belegings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd*[2] and *Timasani (Pty) Ltd (in business rescue) and another v Afrimat Iron Ore (Pty) Ltd*[3] those objections are bad in law. To that extend, CSARS achieved some success in rebuffing those objections. On application of the success rule, both parties were successful.

[24] However, in my view, the BRP is not completely innocent for the reckless launching manifested in this application. His letters and evidence created an impression that he is implementing the BP and not simply paying historical debts. It

[2] 2017 JDR 1577 (SCA) at para 18
[3] (91/2020) [2021] ZASCA 43 (13 April 2021) at paras 17, 19, 25 and 29

was within the powers of the BRP to make himself clear, particularly in an instance where the CSARS stated in unambiguous terms that it is acting unlawfully by implementing the BP, that he is not implementing the BP. Inasmuch as this Court takes a view that the CSARS was reckless in dealing with the contents of the letter of 13 March 2024, the actions of the BRP are not completely innocuous for the launching of this unnecessary application.

[25] For all the above reasons, the appropriate order to make in relation to costs is one where each party is liable for its own costs.

[26] For all the above reasons, I make the following order:

Order

1. The application is struck off the roll for want of urgency

2. Each party is liable for its own costs.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:	Mr J Motepe SC and Ms K Mogano
Instructed by:	Tshaya Mashabela Attorneys
For Respondent:	M Snyman SC and Ms A Mare
Instructed by:	Magda Kets Attorneys
Date of the hearing:	28 May 2024
Date of judgment:	30 May 2024