Swart v Beagles Run Investments 25 (Pty) Ltd and Others (2011 (5) *SA 422 (GNP)) [2011] ZAGPPHC 103; 26597/2011 (30 May 2011)*

The applicant brought this urgent application seeking an order that the respondent be placed under supervision in terms of the provisions of section 131(4)(a) of the Companies Act 71 of 2008 and commencing business rescue proceedings.

Subsequent to the filing of the application, the creditors intervened as creditors and were opposing the application for business rescue and also sought an order that a winding-up be granted.

The applicant was the sole director and the only shareholder of the respondent. As a result of various reasons the financial affairs of respondent deteriorated to such an extent that respondent was not in a financial position to meet its immediate financial obligations.

The applicant's case was that the respondent was financially distressed in that it lacked the necessary cash flow in order to be able to pay all debts as they become due and payable. That the respondent was financially distressed as envisaged in section 128(f) of the Companies Act 71 of 2008, as it was reasonably unlikely that the respondent were able to pay all its debts as they became due and payable within the immediate ensuing six months. The applicant submitted further that if respondent was not placed under supervision and the execution process of the second intervening creditor was to continue, there was no reasonable prospect that respondent would pay its debts as they became due.

The applicant further submitted that if the respondent was placed under supervision, the business rescue proceedings commence and a business plan was implemented in order to rescue the affairs of the respondent, all the creditors of respondent would be fully paid in due course and respondent would be granted the opportunity to proceed with its business.

The second and third intervening creditors opposed the application on the grounds that the application for business rescue was in itself an abuse of process and was a culmination of a number of attempts to avoid and postpone payment of the respondent's debts.

The opposing creditors submitted that the applicant had used this company (respondent) as if it were his alter-ego and has conducted the affairs of the company without paying due and proper attention as would be expected from a director of a company to ensure that creditors

were not prejudiced by his actions and in fact simply ignoring the rights of such creditors and the company's obligations to it.

From the definitions in sections 128 and 131 it was clear that the purpose of Chapter 6 of the Act with regard to business rescue, was to assist a financially distressed company by means of a business rescue plan as contemplated in section 150 of the Act, in order to maximise the possibility of the company continuing on a solvent basis, or to achieve a better return for the company's creditors or shareholders in comparison to a liquidation.

The requirements for the granting of an order sought by the applicant were contained in section 131(4)(a)(i) to (iii). It was quite clear that the respondent was insolvent and that the movable and immovable property belonging to it will be insufficient to make payment of its creditors. The court has a discretion as to whether to order supervision or business rescue even if it is found that the requirements therefor as set out in section 131(4)(a)(i) to (iii) of the Act have been made out in the application.

It was common cause that the respondent has been in financial distress for at least a year. While this was obvious to all involved, the applicant did nothing about it, refused to sell any assets, incurred further debts, making loans and refused to sell any assets to make payment to his creditors.

Where an application for business rescue, as was the case in applications for judicial management, entails the weighing-up of the interests of the creditors and the company (or the applicant in this case, they being the same) the interests of the creditors should carry the day.

Accordingly it was found that there was absolutely no basis for contending that the respondent will be able to carry on business on a solvent basis or that there is any prospect thereof. The application by the applicant was dismissed with costs .