

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023-051134

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 10 July 2023

E van der Schyff
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In the matter between:

THE MINISTER OF COMMUNICATIONS
AND DIGITAL TECHNOLOGIES

FIRST APPLICANT

POST OFFICE RETIREMENT FUND

INTERVENING PARTY / SECOND
APPLICANT

and

SOUTH AFRICAN POST OFFICE SOC LTD FIRST RESPONDENT
(In provisional liquidation)

ANTON BRETT SHABAN N.O.

SECOND RESPONDENT

HLANGANI JERRY MUSI N.O.

THIRD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicant (the Minister) approached the court on an urgent basis seeking an order to place the first respondent (SAPO) under supervision and in business rescue in terms of s 131(1) of the Companies Act 71 of 2008 (the Act / Companies Act). SAPO is currently under provisional liquidation, with the return date for the liquidation application extended to 30 October 2023.
- [2] A case is made out for the application to be heard on an urgent basis.

Miscellaneous Aspects

- [3] The application was not opposed. Notices to abide were filed by the Municipal Employees Pension Fund and Chrisal Investments (Pty) Ltd, two of SAPO's creditors, and SAPO's provisional liquidators, the second and third respondents (the provisional liquidators). Despite not opposing the business rescue application, the provisional liquidators filed what they coined a 'reporting affidavit'. This affidavit was delivered to inform the court of the provisional liquidator's compromise suggestion, their view on the prospects of a successful business rescue, and SAPO's current financial position. The provisional liquidators explained that they could no longer progress the compromise offer and therefore abide by the outcome of the application. It is apposite to state that the provisional liquidator's position is brought about by the Minister's unwavering stance that Government would only advance a cash injection of R 2.4 billion if SAPO is placed under business rescue, the withdrawal of Postbank's initial support for the compromise suggestion, and the Post Office Retirement Fund's support for the business rescue application. Postbank and the Post Office Retirement Fund (the Fund) are SAPO's largest creditors.

- [4] Four of SAPO's creditors, to wit, Fleet Africa, Twin City Developments (Pty) Ltd, Manvest Proprietary Limited, and Doornhoek Ontwikkelings BK, filed affidavits in support of the provisional liquidators' compromise suggestion. These parties, however, did not enter the fray. Although their views are noted, it is, with respect, of no consequence considering the provisional liquidators' position regarding the compromise proposal as set out above.
- [5] Although the Municipal Employees Pension Fund and Chrisal Investments (Pty) Ltd abide by the decision of the court, they proposed the appointment of two other individuals as interim business rescue practitioners. Despite these entities having an interest in the proceedings, and are affected persons,¹ s 131(5) provides that 'the court may make a further order appointing as interim practitioner a person who satisfies the requirements of s 138, *and who has been nominated by the affected person who applied in terms of subsection (1) ...*' (my emphasis). Neither the Municipal Employees Pension Fund nor Chrisal Investments (Pty) Ltd are cited as applicants in the business rescue application. No objection was raised against the appointment of the interim business rescue practitioners proposed by the applicant in the event that the application is successful. As a result, no reason exists to appoint the interim business rescue practitioners proposed by these two entities if the business rescue application is successful.
- [6] The Fund sought leave to intervene as the second applicant in this application. The Fund, one of SAPO's largest creditors, supports the Minister in the business rescue application. There was no opposition to the intervention application, and the Fund has a substantial interest in the proceedings. As a result, it is allowed to join the proceedings as a second applicant.
- [7] The absence of any opposition to this application compelled me to consider whether all affected and interested parties were appropriately informed of and aware of the proceedings - particularly Postbank, a large creditor whose continued existence seems to be intricately intertwined with SAPO's fate, and who voiced its support for a compromise solution slightly more than a month ago in the liquidation proceedings,

¹ S 128(1)(a) of the Companies Act.

and SAPO's employees and the relevant Trade Unions. After having considered the service affidavits filed by both the Minister and the Fund, I am at ease that Postbank and other affected and interested parties were suitably notified of the application and that their absence is the consequence of a deliberate decision not to participate in the proceedings. The Supreme Court of Appeal, in *Road Accident Fund v Taylor*,² restated the principle that the law constrains a court to decide only the issues that the parties have raised for decision. Where parties refrain from entering the fray and raising issues, it is not for the court to speculate about their reasons.

- [8] An aspect I initially found somewhat disturbing is Government's unwavering stance, as communicated through the Minister's affidavits, that it is only willing to provide capital if SAPO is placed in business rescue. While emphasising the dire effect that final liquidation will, *inter alia*, have on the nation's international responsibilities and the role that SAPO plays in the country's socio-economic structure, it seems as if Government wants to force the court's decision and the outcome of this application by bluntly stating that the R 2.4 billion that has already been earmarked to fund SAPO's turnaround, will now only be available for business rescue proceedings. SAPO is not empowered to borrow money without the prior written approval of the Minister, granted after consultation with the Minister of Finance,³ and thus unable to obtain capital from another source. The Minister did not deem it necessary to engage with the provisional liquidators to discuss the feasibility of their compromise proposal. The compromise proposal, developed on the assumption that the earmarked R2.4 billion would be available, envisages SAPO exiting provisional liquidation intact. After that, the provisional liquidators submitted, Government could pursue an operational restructuring of SAPO, using the additional R3.8 billion, which the Government is allegedly willing to invest in SAPO. This begged the question as to whether it would not be appropriate and in the public interest to postpone the business rescue application and request the Minister to purposively engage with the provisional liquidators, and file a supplementary affidavit, whereafter the application could be finally considered.

² [2023] ZASCA 64 (8 May 2023) at par [31].

³ S 7(4)(a) of the South African Post Office Soc Ltd Act 22 of 2011.

[9] The Minister's concern regarding SAPO's future viability as an institution, if a financial bailout is provided without an accompanying operational restructuring driven by independent business rescue practitioners who functions in a specific statutory fiduciary matrix, is one of the main reasons for the Minister, and Government, disposing of a s 155 compromise as a solution to SAPO's financial predicament. The Minister's counsel emphasised that any solution that solely focuses on a compromise with SAPO's creditors, without addressing SAPO's ability to increase its service offering and decrease costs, is not viable as it does not resolve the structural problems SAPO faces. Since the Minister confirmed that a compromise was considered an option but discarded, I am of the view that a postponement to allow for a discussion between the Minister and the provisional liquidators will only delay the proceedings and not bear fruit.

Applicable legal principles

[10] The threshold requirements for business rescue applications to succeed are trite and will not be dealt with in detail. Section 131 (4) of the Companies Act provides the court with a discretion to place a company under business rescue.⁴ An applicant must satisfy the court of two factors. The first is that the company is, factually, in a distressed financial position. The second is that there is a reasonable prospect of 'rescuing the company'. Rescuing the company means achieving one of two objectives. The primary objective is to restructure the company in a way that maximizes the likelihood of its continued existence on a solvent basis. If this is not possible, the secondary goal of business rescue is to achieve a better return for creditors than the company's immediate liquidation. A company may be placed in business rescue if it achieves either of these objectives.

Discussion

⁴ S 131 (4) of the Companies act.

- [11] Although the provisional liquidators did not formally oppose the application, it is evident from the content of their 'reporting affidavit' that they hold the view that SAPO cannot be rescued through business rescue proceedings. It is almost paradoxical that they propose that SAPO can survive provisional liquidation if their compromise solution is accepted, with the earmarked R 2.4 billion being utilised for this purpose.
- [12] The Minister believes that there is a reasonable prospect that either of the objects of business rescue proceedings can be achieved. It is gleaned from the Minister's papers, and no objective reason exists to doubt the correctness of the evidence provided under oath, that Cabinet has not only pledged to provide SAPO with the initially earmarked R2.4 billion, but also indicated its intention to support SAPO's application for an additional R3.8 billion in the October budget. The fact that there are conditions attached to the R2.4 billion is a consequence of SAPO being a state-owned entity. The undertaking, however, illustrates Government's commitment to providing SAPO with capital and post-commencement finance to facilitate the institution's turnaround. Since I am of the view that any possibility of SAPO being rescued depends mainly on the political will to bring about a turnaround, Government's communicated commitment to support any business rescue proceedings by providing capital weighs heavily in support of the application.
- [13] Rogers J, as he then was, held in *Tyre Corporation Cape Town (Pty) and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)*⁵ that a proposed business rescue plan may include elements of a compromise with creditors. In dealing with this issue, Rogers J explained:⁶

'In the case of a s 155 compromise, creditors vote according to classes. The compromise must be approved by at least 75% in value of each class. In the case of business rescue, by contrast, the only requirement for approval is that the plan is supported by the holders of more than 75% of the creditors' voting interests actually voted and by at least 50% of the independent creditors' voting interests actually voted (s 152(2)).'

⁵ 2017 (3) SA 74 (WCC).

⁶ At par [36].

- [14] The upshot of the principle set in *Tyre Corporation* in favour of business rescue proceedings is that if the business rescue practitioners ultimately opine that a compromise must be negotiated, the possibility of a compromise solution amidst business rescue proceedings still exists.
- [15] The papers filed of record indicate that several reasons for SAPO's dire financial situation have been identified. The three interrelated structural problems that the Minister's counsel highlighted are the following:
- i. SAPO has been slow to modernise its service offering;
 - ii. SAPO has neither reduced its operating costs, nor aligned them with the requirement of a modern post office;
 - iii. SAPO has not been competitive in the courier and parcel market.
- [16] The Minister of Finance's letter, dated 26 June 2023, attached to the Minister's replying affidavit, points to yet another reason for SAPO's predicament: financial misconduct. The first condition for making available the earmarked R2.4 billion that was appropriated to support the SAPO's turnaround strategy, 'the Post Office of Tomorrow' to be used as part of the business rescue process, is that SAPO submits to National Treasury and DCDT all the reports that have been produced in relation to financial misconduct. SAPO is also to submit reports from 1 April 2019 to 'Q3 2022/2023' on how the people identified as responsible for such misconduct have been dealt with by 31 December 2023.
- [17] Although not yet implemented, a turnaround strategy was recently developed. The institution recognised the need for proactive action because it found itself in dire straits. The introduction of the South African Post Office Amendment Bill (B11-2013) before Parliament illustrates that the Minister attempts to address the problem proactively.⁷ This, coupled with the Minister of Finance's additional condition that SAPO must explain why the previous turnaround plans have failed to be successfully

⁷ I took cognisance of the provisional liquidators' concern that the legislature must still pass the Bill, and that the Bill is not without its problems. The context of an SOE in financial distress renders itself to unique challenges as stated in the judgment, and this is but one of those unique challenges that the business rescue practitioners must consider when investigating whether SAPO can be rescued.

implemented, might prove invaluable to business rescue practitioners in devising a business rescue plan.

- [18] The Minister pointed out that SAPO's most significant cost driver is its employee-related costs, which outstrip its revenue. The existing turnaround plan, as contained in the strategy documents, seeks to reduce SAPO's headcount while maintaining service delivery. The plan currently contemplates reducing SAPO's headcount by approximately 7000 persons, which, if achieved during the 23/24 financial year, will result in an R1.327 billion cost reduction during the 24/25 financial year. A business rescue plan can provide for retrenchments if the business rescue practitioners hold the same view. It is widely acknowledged that business rescue proceedings can allow a financially distressed SOE to exit solvent on the other side of the process, with jobs (albeit rationalised) being preserved.⁸ The harsh reality is that the facts point to it that SAPO's workforce needs to be extensively curtailed for SAPO to survive, but business rescue proceedings are prone to have a less severe impact on the workforce than final liquidation.
- [19] One of the few things that the Minister and the provisional liquidators agree on is that SAPO's final liquidation is undesirable. The role that SAPO fulfils, or is supposed to fulfil, not only in the national but also international context, is, in my view, the factor that lends credibility to Cabinet's reported undertaking to support SAPO's application for an additional R3.8 billion in the October budget if business rescue proceedings commence.
- [20] Nationally, SAPO, a vital government service platform, amongst others, renders an essential service, particularly in rural and remote areas, that impacts the socio-economic well-being of the inhabitants of such areas. In the international context, the interruption of SAPO's international obligations might have dire consequences for all South Africans who utilise the postal services of other countries. The failure to provide free transit of postage items from countries that are members of the Universal Postal Convention, to which South Africa is a signatory, entitles other

⁸ E. Levenstein. 'South Africa's state-owned enterprises – prime candidates for business rescue?' (2018) Without Prejudice 6,8 at 8.

member states to stop providing postal services to South Africa. This illustrates that the effects of liquidating a state-owned company are not limited to the insolvent company's and its creditors' private interests. It has a domino effect, and the economy as a whole may suffer.⁹ To hold a view that the taxpayer's losses must be cut and that SAPO must be finally liquidated is simplistic and does not account for the intricate relationships and responsibilities that exist.

- [21] In this unique context, governments' undertaking to provide capital or post-commencement finance, together with the existence of a seemingly plausible strategy and corporate plan directed at SAPO's restructuring, and the reasons that led to the institution's predicament to a great extent being identified, collectively provides the objective basis on which an expectation, or reasonable possibility,¹⁰ is founded that SAPO might indeed be rescued.
- [22] SAPO is a state-owned entity (SOE) that is undeniably insolvent. This brings unique challenges to business rescue proceedings. That this process will not be without challenges, is an aspect highlighted in a qualitative study conducted by Kesieman and Thakhathi. The aim of the study was to obtain insights from professional business rescue practitioners regarding the feasibility of making use of business rescue to assist South African state-owned enterprises in avoiding them going into insolvency and indefinitely stopping operations.¹¹ Thakhathi and Kesieman's study reveals that it is a common concern among the study's participants that many state-owned enterprises' financial information is not in order. This is an aspect that has been highlighted by counsel representing the provisional liquidators, who informed the court that SAPO's affairs are in such disarray that the Auditor General has been unable to complete her audit for the 2022 financial year and delivered a report that

⁹ M.F. Cassim. 'South African Airways Makes an Emergency Landing into Business Rescue: Some Burning Issues.' 137(2) *South African Law Journal* (2020), 201-214 at 201.

¹⁰ *Propspec Investment (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) at par [11] as approved in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Other* 2013 (4) SA 539 (SCA).

¹¹ B.S. Kesieman & A. Thakhathi. 'Preserving State-Owned Enterprises in South-Africa: Views and Insights from Business Rescue Practitioners', in A. Thakhathi (ed), *The Commercial Field of Action* in *Transcendent Development: The Ethics of Universal Dignity* Vol 25 Emerald Group Publishing, 2022, Chapter 4.

is replete with concerns, criticisms, and qualifications. According to the provisional liquidators, any portrayal of SAPO's financial status at present is a matter of some guesswork. The study conducted by Thakhathi indicates that although this reality creates challenges in that it makes it more difficult for the business rescue practitioner to develop a clear and concise rescue plan in the shortest possible time frame, it is not, without more, a bar to business rescue proceedings.¹²

[23] A critical element of the business rescue process is that an independent restructuring professional, the business rescue practitioner, is appointed and tasked with developing and implementing a business rescue plan in the best interest of all affected parties.¹³ Shareholders, in the case of SOE's, Government, have minimal decision-making power in the process. Business rescue practitioners of SOEs must balance their duties with the Public Finance Management Act 1 of 1999 (the PFMA) and find a way to move within the different accountability and responsibility matrixes of the PFMA and the Companies Act. Another challenge the business rescue practitioners might face is a tension between the need to retrench employees and the Government's objective to create and maintain employment.¹⁴

[24] *In casu*, it will be for the appointed business rescue practitioners to determine whether the expectation and reasonable possibility that business rescue proceedings may bear positive fruits that this court found to exist, lends itself to developing a viable business rescue plan. As stated above, the success of any plan depends predominantly on the political will to continue SAPO's legacy. If the business rescue practitioners conclude, after an investigation of SAPO's affairs, business property, and financial situation, that SAPO has moved beyond the point of being successfully rescued, business rescue proceedings enable them to meet the second possibility of business rescue, i.e., to obtain a better return for creditors than would be the case if the company was to be liquidated summarily. This can be achieved through an orderly winding down of operations. Considering South Africa's

¹² Thakhathi, *supra*, par 4.1.2.

¹³ L. Kahn, 2021. 'Business rescue process proves problematic for South Africa's state-owned entities' <https://events.debtwire.com/emerging-market-restructuring-series/business-rescue-process-proves-problematic-for-south-africas-state-owned-entities> accessed on 7 July 2023.

¹⁴ *Ibid.*

international obligations in terms of the Universal Postal Convention, the orderly winding down of SAPO's operations may include putting the necessary measures in place to ensure that the country's international obligations are met.

The provisional liquidators' belated request

[25] It has been stated above that the provisional liquidators filed a notice to abide and a reporting affidavit. They did not indicate in the notice to abide that they would seek any costs order in these proceedings. In a practice note subsequently filed, they indicate, however, that in the event that the business rescue order is granted, they will seek the insertion of an additional paragraph to the order that reads as follows:

'The provisional liquidators shall be entitled to recover their fees and expenses in their administration of SAPO from SAPO, as being costs in the business rescue of SAPO, which will include the costs associated with their application to extend the rule nisi, attending the hearing on 1 June 2023 to extend the Rule Nisi, and delivering the reporting affidavit and attending the hearing of this application, including the costs of senior counsel, as well as their fees and costs, as calculated in terms of Tariff B of the Insolvency Act 24 of 1936, as taxed or agreed.'

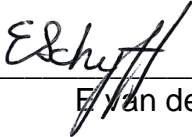
[26] Counsel acting for the Minister submitted that the court should refrain from dealing with the provisional liquidators' request relating to a costs order. He pointed out, and correctly so in my view, that the applicant was not granted the opportunity to address the request. As a result, this issue needs to be determined at a later stage.

[27] However, I am pressed to indicate that I am of the view that the provisional liquidators, were correct to file the reporting affidavit wherein they provided important context and information regarding SAPO's financial position. Their recognition of the undesirability to finally liquidate SAPO is commendable, and their efforts to keep SAPO operational despite it being placed under provisional liquidation are indicative of the exercise of a fiduciary responsibility.

ORDER

In the result, the following order is granted:

1. The applicant and intervening party's non-compliance with the Rules of Court in respect of periods and manner of service are condoned to the extent that is necessary, and the main application and intervention application are heard as urgent applications and enrolled as such;
2. Leave is granted to the intervening applicant, the Post Office Retirement Fund, to intervene as the second applicant in the main application;
3. The intervening applicant's founding affidavit in the intervention application is considered as its founding affidavit in the main application;
4. The first respondent, the South African Post Office Soc Ltd ('SAPO'), is hereby placed under supervision and in business rescue, and business rescue proceedings are to commence with immediate effect;
5. Mr. Anooshkumar Rooplal and Mr. Juanito Martin Damons are hereby appointed as joint interim business rescue practitioners in respect of the business rescue proceedings contemplated in paragraph 4, subject to –
 - 5.1. The Registrar of Financial Services approving the interim appointment to the extent that it is necessary in terms of section 38A(3)(b) of the Financial Advisory and Intermediary Services Act, 37 of 2002; and
 - 5.2. Ratification by the holders of a majority of the independent creditors' voting interest in the business rescue proceedings at the first meeting of SAPO's creditors, as contemplated in section 147 of the Companies Act, 71 of 2008.
6. The costs of the main application and the intervention application are to be costs in the business rescue proceedings.



E. van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the first applicant:	Adv. A.E. Bham SC
With:	Adv. M. Sibanda
Instructed by:	Norton Rose Fulbright Inc.
For the intervening applicant:	Adv. C. Vetter
Instructed by:	Cliff Dekker Hofmeyr
For the second and third respondents:	Adv. J. Blou SC
Instructed by:	Werkmans Attorneys
Date of the hearing:	7 July 2023
Date of judgment:	10 July 2023