SARIPA Insolvency Law Update 2 of 2018.

The views expressed in this update are those of the writer, Martinus (Tienie) Cronje.

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Because business rescue remains operative until set aside by a court, there should not be a blanket rule that the setting aside of a section 129 resolution and termination of business rescue operate retrospectively with effect from the date of the section 129 resolution.

The discretion of the court in section 130(5)(c) to grant "any further necessary and appropriate order" equips the court to deal equitably with various circumstances which require regulation following the termination of business rescue. The discretion must be exercised judicially and the only limit on the further order is that it must be both necessary and appropriate.

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Section 367 of the Companies Act 61 of 1973 Act confers on the Master, exclusively, the power to appoint a liquidator in the winding-up of a company. Paragraph 3 of the July order, which appointed the liquidators of four of the applicants as liquidators of the single entity, and the December order, which ordered the Master to comply with the July order, in its entirety, are nullities.

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BUSINESS RESCUE

South African Bank of Athens Limited and another v Zennies Fresh Fruit CC and others

[2018] JOL 39519 (WCC)

Business rescue plan not approved.

If a business rescue plan has not been approved, section 153 of the Companies Act 71 of 2008 (failure to approve business rescue plan) does not apply.

Section 153 of the Companies Act 71 of 2008 provides as follows:

153. Failure to adopt business rescue plan

(1) (a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may-

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

(b) If the practitioner does not take any action contemplated in paragraph (a)-

(i) any affected person present at the meeting may-

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

…

(5) If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings.

Business Rescue ends in terms of section 132 (2)(a)(i) of the Act when the court sets aside the resolution or order that began those proceedings or has converted the

proceedings to liquidation proceedings in terms of section 132(2)(ii) of the Act. (Par [23])

Both Applicants placed reliance on section 152 (3)(a) of the Act on the proposition that because the business rescue plan was not approved on a preliminary basis as envisaged in section 152(1)(e) and 152(1)(d)(ii) of the Act, that it was automatically rejected. This argument presupposes that there was a vote on a preliminary basis of the business rescue plan as contemplated in subsection 2. There is no evidence to suggest that this happened and accordingly the reliance by both the Applicants on section 152 (3)(a) and 132(2)(c)(1) is misplaced. Since there is no evidence to suggest that the business rescue plan was approved, there is no need to deal with section 153 as it does not find application here. (Par [33])

It is clear from the relevant sections contained in Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings. [**Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees Sas and Others** (72522/2011) [2012] GNP (6 June 2012) par [27].]

A situation where an extraordinary amount of time is taken to achieve business rescue would be at the expense of the rights of creditors. The balancing of these rights should always be paramount in the ambit of fairness. (Par [38])

In the absence of specific information received to finalize an amended plan for consideration, a Business Rescue Practitioner is under a statutory duty to file a Notice of Termination. There has been an extraordinary long period of time since the Business Rescue Proceedings were initiated. The second meeting of creditors occurred on 23 March 2017 and the reason for the adjournment was to obtain information, inter alia regarding the sale of certain assets and these included the sale of certain trucks, properties and the raising of working capital. There was also an averment that the practitioner had entered into an Agreement in principle and was awaiting signature of the signed sale agreement which would ostensibly have been finalized on 20 May 2017. Notably absent from the opposing affidavit, which was commissioned on 29 May 2017 was any evidence that the sale agreement had in fact been concluded. Neither was any evidence produced regarding the purported sale of the trucks which would have been sold in the region of R4million. In the

absence of this vital information, the court was unable to ascertain how far the practitioner was in securing the agreements. (Par [42])

The mechanisms of Business Rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. The delay in the finalization of the business rescue proceedings is unreasonable in the circumstances and an order is justified terminating the proceedings. (Par [43])

Extracts

[1] This dispute concerns two applications, being case numbers 24618/2016 and 7681/2017, which were consolidated as they both relate to a common Respondent, Zennies Fresh Fruit CC, ("Zennies"). Both Applicants are seeking a declaratory order that the Business Rescue Proceedings in respect of Zennies have ended or lapsed in terms of section 132(2)(c)(1) of the Companies Act No 71 of 2008 ("the Act"). Zennies on the other hand refutes that the business rescue proceedings have been terminated and aver that the Applicants are not entitled to proceed against it in terms of Section 133 of the Act which places a general moratorium on legal proceedings against a company.

[12] According to Business Partners, the second meeting which took place was adjourned in order to prepare and publish a revised plan. According to the Minutes of that meeting under the topic of *'Business Rescue Plan'*, it was recorded, *inter alia* that the plan had been timeously circulated, that in order to comply with the prescribed time frames, there were certain information that Mr Schneider had been unable to confirm at the time of compiling the plan and that as such, it was suggested that the second meeting and the voting on the plan be adjourned until certain information and facts were more firmly established. The Minutes also recorded that the '*period for the voting of the plan can be extended with the permission of the major creditors*.'

[13] In its affidavit, Business Partners relies on this recordal to claim that in terms of section 153(3)(a)(ii) of the Act, Mr Schneider was required to prepare and publish a new or revised plan within ten business days from the date of the second creditors' meeting, that period so it was stated, having lapsed on 6 April 2017 and neither it nor the Bank had agreed to extend the time period for him to prepare and publish a new or revised plan. It therefore seeks a declaratory order that the Business Rescue of Zennies has ended and/or lapsed in terms of section 132(2)(c)(i) of the Act.

[19] The Plan was therefore not rejected, rather the parties agreed that it be amended as contemplated in Section 152(1)(d)(ii) and therefore section 153 does not apply and even were it to be held that the Plan was rejected *(*and that Section 153 does apply), in light of the instruction that Mr Schneider had to amend the Plan, the business rescue proceedings did not terminate (as Section 153(1)(a)(i) would apply).

[21] The crisp question is whether the fact that no vote was taken to approve the plan at the second meeting justifies a conclusion that the plan was rejected as envisaged by section 152(3)(a) of the Act. This section provides that if a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153. It states as follows:

> "152 Consideration of business rescue plan
> …
> (3) If a proposed business rescue plan –
> (a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153…"

[23] Business Rescue ends in terms of section 132 (2)(a)(i) of the Act when the court sets aside the resolution or order that began those proceedings or has converted the proceedings to liquidation proceedings in terms of section 132(2)(ii) of the Act.

[24] Another manner in which Business Proceedings comes to an end is in terms of section 132(2)(b) where the practitioner has filed with the Commissioner a notice of termination of business rescue proceedings. It is common cause that this has not been done. Finally, business rescue proceedings also ends in terms of section 132(2)(c)(i) or (ii) of the Act which provides for the termination of business rescue when a business rescue plan has been proposed and rejected in terms of Part D and no affected person has acted to extend the proceedings in any manner contemplated in section 153.

[25] In my view, this provision should be read in conjunction with section 152(3)(a) which reiterates that if a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected and may only be considered further in terms of section 153 of the Act.

[26] Section 153 of the Act therefore only kicks in when a business rescue plan has not been approved and subsequently rejected. Section 153 provides for remedies in the event that a business rescue plan has not been adopted. These include seeking a vote of approval by the practitioner from the holders of voting interests to prepare and publish a revised plan or apply to court to set aide the result of the vote.

[27] Section 153(3)(a)(i) and (ii) furthermore provides that if, on the request of the practitioner in terms of subsection (1)(a)(i), or a call by an affected person in terms of subsection (1)(b)(i)(aa), the meeting directs the practitioner to prepare and publish a revised business rescue plan –

> *"(a) the practitioner must '*
> *(i) conclude the meeting after that vote; and*
> *(ii) prepare and publish a new or revised business rescue plan within 10 business days;…"*

[28] In terms of section 153(5), if no person takes any action contemplated in subsection (1), the practitioner "*must promptly file a notice of the termination of the business rescue proceedings*."

[31] It is apparent from the wording of subsection 152(1)(d)(ii) that it <u>has</u> to be read in conjunction with section 152(1)(e) by the inclusion of the word '*and'* at the end of the sentence. This means that in the event that a practitioner is directed to adjourn the meeting in order to revise the plan for further consideration, one of two things can occur in terms of subsection (e). First, the practitioner would have to call for a vote for preliminary approval of the proposed plan, as amended if applicable <u>unless</u> (my emphasis) the meeting has first been adjourned in accordance with paragraphs (d)(ii).

[32] The Respondent argued that there was no evidence that a vote had been taken. This contention would be correct if the meeting was postponed in order for the practitioner to obtain further information that he required for the amended business plan.

[33] Both Applicants placed reliance on section 152 (3)(a) of the Act on the proposition that because the business rescue plan was not approved on a preliminary basis as envisaged in section 152(1)(e) and 152(1)(d)(ii) of the Act, that it was automatically rejected. This argument presupposes that there was a vote on a preliminary basis of the business rescue plan as contemplated in subsection 2. There is no evidence to suggest that this happened and accordingly I find that the both the Applicants reliance on section 152 (3)(a) and 132(2)(c)(1) is misplaced. Since I have found that there is no evidence to suggest that the business rescue plan was not approved, there is no need for me to deal with section 153

as it does not find application here.[36] In **Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique *et* Technologies Embarquees Sas and Others** (GNP) Case No 72522/2011 [at par [27], judgment delivered on 6 June 2012, Fabricius J was asked to consider an application for the extension of the time limits stated in ss 129(3) and (4) after these had expired. He was of the view that it was clear from the relevant sections contained in Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings.

[37] With regard to argument that the sole purpose of the business rescue is to avoid liquidation proceedings the following was said in the matter of **Absa Bank Limited v Caine NO and Another;** in re Absa Bank Limited v Caine N.O. and Another (38123/2013; 3915/2013) [2014] ZAFSHC 46 (2 APRIL 2014) where it was stated as follows at para 40:

> "Business rescue proceedings are much more flexible and financially distressed company friendly than judicial management. The potential business rescue plan provided for in ss 128(1)(b)(iii) has two objects in mind, the primary object being to facilitate the continued existence of the company in a state of solvency and secondly and in the alternative, in the event that the primary objective cannot be achieved or appears not to be viable, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. Consequently the Supreme Court of Appeal found in **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539** (SCA) at para [26] as follows:
>
> > "It follows, as I see it, that the achievement of any one of the two goals referred to in section 128(1)(b) would qualify as "business rescue" in terms of section 131(4)."

As further stated by the Supreme Court of Appeal in para [27]:

> "… business rescue proceedings are not limited to the return of the company to solvency…"

[38] While the sentiments expressed are noble, it cannot lead to a situation that where an extraordinary amount of time is taken to achieve this result, this should be at the expense of the rights of creditors. The balancing of these rights should always be paramount in the ambit of fairness.

[39] In **Commissioner, South African Revenue Service v Beginsel NO and Others** 2013 (1) SA 307 (WCC), where the Commissioner challenged the validity of a decision taken at a meeting of creditors to adopt a business plan and sought a conversion of the business rescue into winding-up proceedings, the court found that the implementation of the business plan was far advanced - there was already planning for the sale of some of the respondent's operations and the business rescue plan was supported by 87% of the value of creditors present at the meeting of creditors whilst only SARS took an opposite view. Consequently the court found that nothing would be achieved if the business rescue proceedings would be converted into liquidation, bearing in mind the extra costs to be incurred. The court was also satisfied that the continuation of the business rescue proceedings would result in a better return for the company's creditors as a whole than would result from the reintroduction of the liquidation process. [See para 40 of **Absa v Caine NO** supra.]

[40] This, however, is not the case in this instance. From the minutes of the second meeting, it is apparent that what Mr Schneider envisages for Zennies is an informal liquidation process, by selling the assets of Zennies in order to settle its indebtedness in full to the Bank and Business Partners. This matter is distinguishable from the **Beginsel** matter as the majority of the creditors in *casu* were not satisfied with the initial plan – hence the call for additional information and there seems no indication that Mr Schneider

obtained the additional information that he required in order to finalise an amended plan.

[41] In **Oakdene Square Properties**, *supra*, the court, remarked as follows in para [33]:

> "My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution……. *A fortiori*, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve."

[42] In the absence of specific information received to finalize an amended plan for consideration, a Business Rescue Practitioner is under a statutory duty to file a Notice of Termination. There has been an extraordinary long period of time since the Business Rescue Proceedings were initiated. The second meeting of creditors occurred on 23 March 2017 and according to the affidavit of Mr Schneider, the reason for the adjournment was for him to obtain information, *inter alia* regarding the sale of certain assets of Zennies and these included the sale of certain trucks, properties and the raising of working capital. There was also an averment that he had entered into an Agreement in principle and was awaiting signature of the signed sale agreement which would ostensibly have been finalized on 20 May 2017. Notably absent from the opposing affidavit, which was commissioned on 29 May 2017 was any evidence that the sale agreement had in fact been concluded. Neither was any evidence produced regarding the purported sale of the trucks which would have been sold in the region of R4million. In the absence of this vital information, this court was therefore unable to ascertain how far Mr Scheider was in securing these agreements. I mention these considerations in passing as it would in any event not have assisted Zennies since this was not part of the implementation of a plan as was consideration in **Beginsel**.

[43] In my view, the mechanisms of Business Rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. The delay in the finalization of the business rescue proceedings are unreasonable in the circumstances and I am satisfied that an order is justified terminating the proceedings.

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Standard Bank of South Africa Limited v Midnight Feast Properties 4 (Pty) Limited

[2017] JOL 39365 (GJ)

Suspension of application for liquidation by application for business rescue

An application for liquidation is not in terms of section 131(6) of the Companies Act 71 of 2008 suspended by an application for business rescue which has not been served as required by the Act.

The papers filed reveal a persistent, systematic attempt by both respondents to delay and frustrate the inevitable, which is their final liquidation. (Par [5])

In **The Standard Bank of South Africa Limited v Gas2Liquids (Pty) Limited, Case No. 45543 / 2012, unreported,** Satchwell J dismissed the contention that applications for liquidation could not proceed as they were suspended in terms of section 131(6) of the Companies Act 71 of 2008 for want of compliance, as to the requirement in respect of service by the Sheriff on the respondent, or the Companies and Intellectual Property Commission or notice to all affected persons, in particular the shareholder, as is provided for in section 131. (Par [6])

The requirements for a business rescue application were dealt with by Boruchowitz J, in ***Engen Petroleum Limited v Multi Waste (Pty) Limited and others*** 2012 (5) SA 596 (GSJ) at paragraphs [15]–[24], in respect of which the learned Judge held that an applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them in accordance with regulation 7. Counsel for the respondents in the present matter conceded that the requirements of section 131 have indeed not been complied with. The court agreed with the conclusion arrived at by Satchwell in the **Gas2Liquids** matter that the liquidation application was not suspended by the application for business rescue.

In the almost 15 months since the granting of the provisional liquidation orders, nothing of significance has occurred or been achieved which would indicate that any prospects of rescuing the respondents from financial distress and failure exist. As for the business rescue applications, nothing would be achieved in postponing the final determination of these applications to be heard in that court, in regard to which it must be remembered that the route of business rescue remains alive despite a final winding-up order having been granted (**Richter v Absa Bank Limited** 2015 (5) SA 57 (SCA)). (Par [11])

In each of the applications the rule nisi was confirmed and the companies placed under final winding up. (Par [14])

Extracts

[5] The papers filed reveal a persistent, systematic attempt by both respondents to delay and frustrate the inevitable, which is their final liquidation. I do not consider it necessary to

traverse the many procedural steps that were taken and resultant paper trail to achieve this result. Suffice to mention that, firstly and most importantly, no answering affidavit to the applicant's founding affidavit was filed. Secondly, business rescue proceedings have been instituted and are pending in the Gauteng High Court. The contention once again advanced by the respondents, which was the sole issue addressed in argument before me, is that the liquidation proceedings are suspended by the business rescue proceedings. The business rescue proceedings

[6] Before dealing with the issue it is necessary to briefly refer to the hearing before Satchwell J, on 29 February 2016, of the extended return day of the provisional liquidation orders, in respect of all three applications. The learned Judge further extended the provisional orders in the two present applications but proceeded to hear the Gas2Liquids application. At the hearing of these matters, counsel for the respondents handed up to the court the applications for the business rescue of all three entities, issued by Leverage Asset Managers (Pty) Limited ("Leverage"), in support of the contention that the matters could not proceed as they were suspended in terms of section 131(6) of the Act. In her judgment in the Gas2Liquids application **(*The Standard Bank of South Africa Limited v Gas2Liquids* (*Pty*) *Limited*, Case No. 45543 / 2012, unreported)**, Satchwell J dismissed the contention advanced for want of compliance, as to the requirement in respect of service by the Sheriff on the respondent, or the Companies and Intellectual Property Commission or notice to all affected persons, in particular the shareholder, as is provided for in section 131.

[8] Against this backdrop I now turn to the issue whether the present proceedings are suspended by the business rescue proceedings. It is common cause between the parties and I am satisfied that all formalities and statutory requirements for the granting of a final liquidation in both matters, have been complied with.

[9] The requirements for a business rescue application were dealt with by Boruchowitz J, in ***Engen Petroleum Limited v Multi Waste* (*Pty*) *Limited and others*** 2012 (5) SA 596 (GSJ) [also reported at [2011] JOL 27994 (GSJ) – Ed] at paragraphs [15]–[24], in respect of which the learned Judge held that an applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them in accordance with regulation 7. I do not consider it necessary to say anything more concerning this aspect as counsel for the respondents conceded that the requirements of section 131 have indeed not been complied with. In the light thereof the conclusion I have arrived at is the same than that of Satchwell J, with which I agree.

[11] In the almost 15 months since the granting of the provisional liquidation orders, nothing of significance has occurred or been achieved which would indicate that any prospects of rescuing the respondents from financial distress and failure exist. As for the business rescue applications, nothing would be achieved in postponing the final determination of these applications to be heard in that court, in regard to which it must be remembered that the route of business rescue remains alive despite a final winding-up order having been granted (***Richter v Absa Bank Limited*** 2015 (5) SA 57 (SCA) [also reported at [2015] JOL 33329 (SCA) – Ed]).

Order

[14] In the result I make the following order in each of the two applications:

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Alderbaran (Pty) Ltd and Another v Bouwer and Others

(19992/2017) [2018] ZAWCHC 38 (22 March 2018)

Setting aside of a resolution placing a company under business rescue and the termination of the business rescue in terms of section 130 of the Companies Act 71 of 2008

Even if a resolution for business rescue had lapsed and become a nullity in terms of section 129(5)(a) of the Act, the business rescue commenced thereby is only terminated when a court sets the resolution aside.

Because business rescue remains operative until set aside by a court, there should not be a blanket rule that the setting aside of the resolution and termination of business rescue operate retrospectively with effect from the date of the section 129 resolution.

The discretion of the court in section 130(5)(c) to grant "any further necessary and appropriate order" equips the court to deal equitably with various circumstances which require regulation following the termination of business rescue. The discretion must be exercised judicially and the only limit on the further order is that it must be both necessary and appropriate.

This matter aptly illustrates the potential for abuse of the remedy of business rescue. There are two related applications before the court:

1.1 The main application is one to interdict the transfer, pursuant to a sale in execution, of an immovable property belonging to the company, and to declare such transfer unlawful in terms of section 133 of the Companies Act 71 of 2008 ("the Act") on the grounds that the Company is in business rescue ("the main application").

1.2 The second application is a counter-application by the execution creditor in respect of the aforementioned sale in execution, for the setting aside of the resolution placing the company under business rescue and the termination of the business rescue in terms of section 130 of the Act. (Par 1)

The effect of the judgment in **Panamo Properties (Pty) Ltd and another v Nel NO and others** 2015 (5) SA 63 (SCA) was that, even if a resolution for business rescue had lapsed and become a nullity in terms of section 129(5)(a) of the Act, the

business rescue commenced thereby had not terminated and would only be terminated if and when a court set the resolution to commence business rescue aside. (Par 29 and 34)

On the view the court takes of the matter it is not necessary to decide whether the sale in execution of the property constitutes "*enforcement action"* for the purposes of section 133(1). If the court had to decide the question, it would hold that it does, since in **Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank** [[2012 (5) SA 596 (GSJ)], Fourie AJA commented, albeit o*biter*, that " '*enforcement action' relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment."* The court respectfully agrees with this view. It considers that an interpretation of section 131(1) which includes sales in execution within the notion of "*enforcement action"* is consonant with the overriding objectives of the remedy of business rescue. It would work against the efficacy of the remedy to hold that a sale in execution of property belonging to the company is not covered by the general moratorium, since that would permit a situation where assets essential to the production of company income, such as plant and machinery, could be sold in execution to satisfy prior judgment debts, thereby bringing the business of the company to a halt and scuppering any prospects of rescue. (Par 35)

Section 130(1) of the Companies Act 71 of 2008 provides as follows:

> "Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129(1), until the adoption of a business rescue plan in terms of section 152, an affected person may apply to court for an order –
>
> (a) setting aside the resolution, on the grounds that –
>
> (i) there is no reasonable basis for believing that the company is financially distressed;
>
> (ii) there is no reasonable prospect for rescuing the company; or
>
> (iii) the company failed to satisfy the procedural requirements set out in section 129."

Section 130(5)(a) of the Act provides as follows:

> "When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may –

(a) set aside the resolution –

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so; …"

Wallis JA made clear in **Panamo Properties (Pty) Ltd and another v Nel NO and others** 2015 (5) SA 63 (SCA) that the provisions in subsections 130(5)(a)(i) and (ii) must be read conjunctively, and the word "*or"* must be read as if it were "*and",* so that the just and equitable requirement referred to in section 130(5)(a)(ii) must not be understood an independent ground for setting aside a resolution in terms of section 130(1)(a), but as an additional requirement to be satisfied along with the need to establish one or more grounds for setting aside in terms of section 130(1)(a)(i), (ii) and (iii). (Par 39)

What is clear on the papers is that the procedural requirements set out in section 129 were not satisfied by the company in respect of the first resolution, for it is not disputed that:

44.1. no statement on oath was signed in support of the first resolution, as envisaged in section 129(3)(a)(i);

44.2. there was no publication of the first resolution to affected persons, as required in section 129(3)(a)(i);

44.3. there was no publication of notice of the appointment of the Business Rescue Practitioner to affected persons, as required in section 129(4)(b).

In the circumstances the court is satisfied that the first resolution falls to be set aside in terms of section 129(5)(a) read with section 130(1)(a)(iii). (Par 44 and 45)

As in the case of section 344(h) of the old Companies Act 61 of 1973, the conclusion that the termination of the business rescue would be just and equitable in terms of section 130(5)(a)(ii) of the new Companies Act 71 of 2008 involves the exercise, not of a discretion, but of a judgment on the relevant facts. Once that conclusion has been reached, the making of an order to set aside the resolution and terminate the

business rescue does involve the exercise of a discretion. (See *Henochsberg on the Companies Act*, commentary on section 344(h) of the old Act.) (Par 47)

The following facts and circumstances are relevant in relation to the question whether or not it would be just and equitable to set aside the first resolution and terminate the business rescue.

1. In the first instance, the timing of the first resolution is suspicious: it was passed on the same day the rescission application was dismissed, which suggests that it was motivated by the ulterior purpose of warding off execution of the default judgment. That suspicion is compounded when one considers that no steps were taken to comply with the procedural requirements of section 129 after the passing and filing of the first resolution. No business rescue plan was drafted let alone adopted pursuant to the first resolution. Indeed it appears that the Business Rescue Practitioner took no steps whatsoever to implement the business rescue after 13 September 2016.
2. Second, it emerges from correspondence attached to the supplementary affidavit that the Business Rescue Practitioner, although nominally in control as the BRP, was not truly in control of the affairs of the company, and that the real driving force behind the efforts to promote the subdivision and development of the property was a director of the company.
3. Third, the circumstances referred to in the two preceding paragraphs lead to the ineluctable conclusion that the first resolution was not passed in good faith in that there was no genuine intention to attain the objectives of the Act in regard to business rescue. The remedy of business rescue was used as a stratagem to defeat enforcement of the default judgment. (See **Griessel and another v Lizemore and others** [2015] 4 All SA 433 (GJ) at paras 83 and 84, where it was held that a resolution to commence business rescue must be passed in good faith, and that business rescue must not be used as a "*litigation strategy*" or to

prevent a creditor from enforcing a claim to the full extent.) The real reason for the resort to business rescue in this case is clear: The company is desperate to hold onto the property as it hopes to subdivide the property and make a handsome profit on the sale of the subdivided units. Its ambitions in this regard will be dashed if the property is transferred to pursuant to the sale in execution.

4. Fourth, the applicant has not been paid what he is owed for the property. If the business rescue if not set aside, the result will be that he is effectively compelled to act as the company's banker against his wishes inasmuch as he will be prevented from enforcing his right to payment in terms of the default judgment. It is significant in this regard that no indication is given in the supplementary affidavit as to whether the installation of services on the property has commenced, how this work is to be financed, when the approval of the subdivision is anticipated, and how long it will take for the plots to be sold and sufficient funds generated to pay the applicant - and other possible creditors of the company.

In view of these circumstances the court considers that justice and equity will best be served by setting aside the first resolution and terminating the resultant business rescue. (Par 48 and 49)

Section 130(5)(c) of the Companies Act provides that:

> "*If* [the Court] *makes an order* [setting aside a resolution in terms of section 129(1) [it] *may make <u>any</u> further necessary and appropriate order including –*
>
> *(i) an order placing the company under liquidation; or*
> *(ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith …"*

[Emphasis added.]

The court does not regard the specific orders contemplated in subsections (i) and (ii) as a *numerus clausus* [a closed number] of the orders which a Court may make when setting aside a resolution to commence business rescue and terminate

business rescue. Because business rescue, once validly initiated, remains operative until set aside by a Court - even if affected persons have not been notified thereof as required in section 129 - there should not be a blanket rule that the setting aside of a section 129 resolution and termination of business rescue operates retrospectively with effect from the date of the section 129 resolution. (Par 51 and 52)

The rationale for the wide discretion conferred on the Court in section 130(5)(c) to grant "*any further necessary and appropriate order"* is to equip the Court to deal equitably with the various circumstances which may arise and require regulation following the setting aside of a section 129 resolution and termination of business rescue. The discretion must be exercised judicially, and the only limit on the further order which may be made is that it must be both necessary and appropriate. (Par 54)

The court does not accept the submission that the sale in execution was a nullity which must be set aside. It is both necessary and appropriate, in all the circumstances of this case, to make an order confirming the validity of the sale in execution of the property and authorising the finalisation of transfer of the property in terms thereof. (Par 56 and 57)

In **Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening** [2011 (5) SA 600 (WCC)] Rogers AJ (as he then was) criticised Regulation 124 which he said "*[e]ffectively … requires service of the whole application on all affected parties"* and, in so doing, "*may well travel beyond what may lawfully be prescribed under s131(2)(b*)." [Id para [16].] This criticism was endorsed by Coppin J in **Kalahari Resources (Pty) Ltd v Arcelormittal S.A. and Others**. [[2012] 3 All SA 555 (GSJ) at para [60].] (Par 73)

The court agrees that regulation 124 might well be *ultra vires* what may lawfully be prescribed under section 131 (2)(b) (and 130(3)(a)) if, properly construed, it requires service of the whole application on all affected parties. However the court disagrees with this interpretation of regulation 124. It seems that regulation 124 requires delivery of a copy of the application in accordance with regulation 7 to all affected persons known to the applicant. Regulation 7 specifically refers to section 6(11) of the Act, which, in terms of section 6(11)(b)(ii), allows for a summary of the contents of the application to be delivered by email where the whole application

cannot be printed conveniently by the recipient, for instance because it is too voluminous to be printed quickly and cheaply. Furthermore regulation 7(1) permits delivery in any manner referred to in Table CR 3, which provides for a number of delivery options and includes any method of delivery authorised by the High Court. It therefore seems inaccurate to say that regulation 124 requires service of the whole application on all affected parties. The scope of regulation 124 is limited to affected persons known to the applicant, and delivery in accordance with one of the methods sanctioned in section 6(11) or Table CR 3, read with regulation 7(1), is what is required. (Par 74)

In this case the counter-application for the setting aside and termination of business rescue in terms of section 130 was served on the applicants' attorneys of record. That constitutes proper service in terms of rule 4(1)(aA) of the Uniform Rules, and there has been due compliance with section 130(3)(a) insofar as the Company is concerned. However the Companies and Intellectual Properties Commission ("the Commission") has not been joined as a party to the counter-application and there has been no service whatsoever of the application on the Commission. The requirements of section 130(3)(a) have therefore not been met. (Par 75)

The court cannot grant an order in terms of section 130(5) until it is satisfied that the Commission has been duly served with a copy of the counter-application and that it has waived its right to be joined as a party to the proceedings. In the circumstances the court issues a *Rule Nisi* with directions regarding service of the counter-application and the *Rule* on the Commission. (Par 76)

The requirements of section 130(3)(b) have also not been met inasmuch as a copy of the counter-application was not delivered in any manner or form to any affected persons as defined in section 128(1)(a) of the Act. In the nature of things the respondent cannot reasonably be expected to know the identity of the shareholders, creditors and employees of the company. However, an attempt could and should have been made to obtain the information from the company through its attorneys. At the very least the attorney ought to have furnished a copy of the counter-application to the alleged creditors of the company who were named in annexures to the answering affidavit. The court deals with this omission by directing that the applicants' attorney furnish the respondent's attorney with email and/or physical

addresses for these particular creditors and ordering that a copy of the counter-application and the *Rule Nisi* be delivered to these creditors by email or registered post, as permitted in Table CR 3. (Par 77)

The reason why the court has decided not to dismiss the application for the setting aside of the resolution for business rescue for non-compliance with the peremptory requirements of section 130(3) and to rather issue a *Rule Nisi* with directions as to service and notice, is that there is a good case on the merits for the relief sought in the counter-application. It would be just and equitable in all the circumstances to grant the relief, and it follows that it would not conducive to justice and equity to refuse the relief on the technical ground of defective service. The court is satisfied that the interests of all affected persons can satisfactorily be catered for by way of the service and notice directions issued by the court. (Par 78)

Given the particular circumstances that the business rescue practitioner, although nominally in control was not truly in control of the affairs of the company, it would not be right for the him to charge the company for remuneration as BRP. But since no relief was sought in this regard, and since the issue was not argued, fairness requires that the practitioner be given an opportunity to be heard before making any order in this regard in terms of section 130(5)(c) of the Act. He will be afforded such an opportunity on the return day of the *Rule Nisi* which the court issued. (Par 48.2 and 84)

Extracts

1. This matter aptly illustrates the potential for abuse of the remedy of business rescue. There are two related applications before me:
   1.1 The main application is one brought by Alderbaran (Pty) Ltd, the first applicant ("Alderbaran"), and Faizel Noor, the second applicant, in his capacity as the business rescue practitioner of Alderbaran ("Faizel Noor"), to interdict the transfer to the third respondent, Trade Off 118 (Pty) Ltd ("Trade Off"), pursuant to a sale in execution, of an immovable property belonging to Alderbaran, and to declare such transfer unlawful in terms of section 133 of the Companies Act 71 of 2008 ("the Act") on the grounds that Alderbaran is in business rescue ("the main application").
   1.2 The second application is a counter-application brought by the first respondent in the main application, Gideon Phillipus Bouwer ("Bouwer"), being the execution creditor in respect of the aforementioned sale in execution, for the setting aside of the resolution placing Alderbaran under business rescue and the termination of the business rescue in terms of section 130 of the Act ("the counter-application")

15 On 27 July 2017 Langenhoven reverted to Van Rensburg with the copies of the first resolution and the CoR 123.1 and CoR 123.2 Forms dated 13 September 2016 referred to above. No statement of facts relevant to the first resolution was furnished; nor was proof provided of publication to all affected persons of the notices of commencement of business rescue and appointment of a BRP, as required by sections 129(3)(a) and 129(4).

29. At the hearing on 5 December 2017, Mr Monzinger contended that Alderbaran could not rely on the second resolution since the effect of the judgment in *Panamo* was that, a) even if the first resolution had lapsed and become a nullity in terms of section 129(5)(a) of the Act, the business rescue commenced thereby had not terminated and would only be terminated if and when a court set the first resolution aside, and b), the second resolution was invalid and inoperative because it was purportedly passed during the operation of an existing business rescue. Mr Monzinger came prepared with written heads of argument and was ready to proceed with argument then and there.

34 At the hearing on 7 February 2018 Mr Khoza conceded in view of the *Panamo* decision that the business rescue initiated by the first resolution had not been terminated and was still operative, and that the second resolution was accordingly a nullity. This concession was correctly made in my view. He changed tack, however, and argued that the sale of the property in execution on 15 June 2017 was "*enforcement action"* which is prohibited in terms of section 133(1) of the Act, and that this Court should therefore declare the sale in execution null and void and prohibit any transfer of the property pursuant thereto.

THE ISSUES TO BE DETERMINED

35 On the view I take of the matter it is not necessary for me to decide whether the sale in execution of the property constitutes "*enforcement action"* for the purposes of section 133(1). If I had to decide the question, I would hold that it does, since in *Cloete* **Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank** [2012 (5) SA 596 (GSJ)], Fourie AJA commented, albeit *obiter*, that " '*enforcement action' relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment."* I respectfully agree with this view. I consider that an interpretation of section 131(1) which includes sales in execution within the notion of "*enforcement action"* is consonant with the overriding objectives of the remedy of business rescue. It would, in my view, work against the efficacy of the remedy to hold that a sale in execution of property belonging to the company is not covered by the general moratorium, since that would permit a situation where assets essential to the production of company income, such as plant and machinery, could be sold in execution to satisfy prior judgment debts, thereby bringing the business of the company to a halt and scuppering any prospects of rescue.

SHOULD THE FIRST RESOLUTION BE SET ASIDE AND THE BUSINESS RESCUE PROCEEDINGS TERMINATED

37. Section 130 (1) of the Act provides that:

> "*Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129(1), until the adoption of a business rescue plan in terms of section 152, an affected person may apply to court for an order –*
>
> *(a) setting aside the resolution, on the grounds that –*
>
> *(i) there is no reasonable basis for believing that the company is financially distressed;*

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company failed to satisfy the procedural requirements set out in section 129."

38. Section 130(5)(a) of the Act states that:

> "*When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may –*
>
> *(a) set aside the resolution –*
>
> *(i) on any grounds set out in subsection (1); or*
>
> *(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so; …"*

39. As Wallis JA made clear in **Panamo Properties (Pty) Ltd and another v Nel NO and others** [2015] 3 All SA 274 (SCA)] the provisions in subsections 130(5)(a)(i) and (ii) must be read conjunctively, and the word "*or"* must be read as if it were "*and",* so that the just and equitable requirement referred to in section 130(5)(a)(ii) must not be understood an independent ground for setting aside a resolution in terms of section 130(1)(a), but as an additional requirement to be satisfied along with the need to establish one or more grounds for setting aside in terms of section 130(1)(a)(i), (ii) and (iii).

40. I must therefore be satisfied that Bouwer has made out a case that a) there is no reasonable ground for believing that Alderbaran is financially distressed, or b) there is no reasonable prospect for rescuing Alderbaran, or c) Aldebaran failed to satisfy the procedural requirements of section 129, and that it would be just and equitable to set aside the resolution having regard to all the evidence in this particular case.

44. What is clear on the papers is that the procedural requirements set out in section 129 were not satisfied by Aldebaran in respect of the first resolution, for it is not disputed that:

> 44.1. no statement on oath was signed in support of the first resolution, as envisaged in section 129(3)(a)(i);
>
> 44.2. there was no publication of the first resolution to affected persons, as required in section 129(3)(a)(i);
>
> 44.3. there was no publication of notice of the appointment of Faizel Noor as business rescue practitioner to affected persons, as required in section 129(4)(b).

45. In the circumstances I am satisfied that the first resolution falls to be set aside in terms of section 129(5)(a) read with section 130(1)(a)(iii).

47. In my view the enquiry postulated in section 130(5)(a)(ii) is similar to that in section 344(h) of the Companies Act 61 of 1973 ("the old Act") which dealt with the liquidation of companies on the ground that it appeared just and equitable to the Court. As in the case of section 344(h) of the old Act, the conclusion that the termination of the business rescue would be just and equitable involves the exercise, not of a discretion, but of a judgment on the relevant facts, but once that conclusion has been reached, the making of an order to set aside the resolution and terminate the business rescue does involve the exercise of a

discretion. (See *Henochsberg on the Companies Act*, commentary on section 344(h) of the old Act.)

48. In my judgment the following facts and circumstances are relevant in relation to the question whether or not it would be just and equitable to set aside the first resolution and terminate the business rescue.

> 48.1. In the first instance, the timing of the first resolution is suspicious: it was passed on the same day the rescission application was dismissed, which suggests that it was motivated by the ulterior purpose of warding off execution of the default judgment. That suspicion is compounded when one considers that no steps were taken to comply with the procedural requirements of section 129 after the passing and filing of the first resolution. No business rescue plan was drafted let alone adopted pursuant to the first resolution. Indeed it appears that Faizel Noor took no steps whatsoever to implement the business rescue after 13 September 2016.
>
> 48.2. Second, it emerges from correspondence attached to the supplementary affidavit that Faizel Noor, although nominally in control as the BRP, was not truly in control of the affairs of Alderbaran, and that the real driving force behind the efforts to promote the subdivision and development of the property was Shaheed Noor, the director of Alderbaran.
>
> 48.3. Third, the circumstances referred to in the two preceding paragraphs lead me to the ineluctable conclusion that first resolution was not passed in good faith in that there was no genuine intention to attain the objectives of the Act in regard to business rescue. The remedy of business rescue was used as a stratagem to defeat Bouwer's enforcement of the default judgment. (See *Griessel and another v Lizemore and others* **[2015] 4 All SA 433** (GJ) at paras 83 and 84, where it was held that a resolution to commence business rescue must be passed in good faith, and that business rescue must not be used as a "*litigation strategy"* or to prevent a creditor from enforcing a claim to the full extent.) In my view the real reason for the resort to business rescue in this case is clear: Alderbaran is desperate to hold onto the property as it hopes to subdivide the property and make a handsome profit on the sale of the subdivided units. Its ambitions in this regard will be dashed if the property is transferred to Trade Off pursuant to the sale in execution, allowing Trade Off to pursue the development and reap the rewards.
>
> 48.4. Fourth, Bouwer has not been paid what he is owed for the property. If the business rescue if not set aside, the result will be that he is effectively compelled to act as Alderbaran's banker against his wishes inasmuch as he will be prevented from enforcing his right to payment in terms of the default judgment. And it is significant in this regard that no indication is given in the supplementary affidavit as to whether the installation of services on the property has commenced, how this work is to be financed, when the approval of the subdivision is anticipated, and how long it will take for the plots to be sold and sufficient funds generated to pay Bouwer - and other possible creditors of Alderbaran.

49. In view of these circumstances I consider that justice and equity will best be served by setting aside the first resolution and terminating the resultant business rescue.

51. Section 130(5)(c) provides that:

> "*If* [the Court] *makes an order* [setting aside a resolution in terms of section 129(1) [it] *may make any further necessary and appropriate order including –*

(i) an order placing the company under liquidation; or

(ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith …"

[Emphasis added.]

52. I do not regard the specific orders contemplated in subsections (i) and (ii) as a *numerus clausus* of the orders which a Court may make when setting aside a resolution to commence business rescue and terminate business rescue. Furthermore, because business rescue, once validly initiated, remains operative until set aside by a Court - even if affected persons have not been notified thereof as required in section 129 - I do not consider that there should be a blanket rule that the setting aside of a section 129 resolution and termination of business rescue operates *ex tunc*, i.e. retrospectively with effect from the date of the section 129 resolution.

54. To my mind the rationale for the wide discretion conferred on the Court in section 130(5)(c) to grant "*any further necessary and appropriate order"* is to equip the Court to deal equitably with the various circumstances which may arise and require regulation following the setting aside of a section 129 resolution and termination of business rescue. The discretion must be exercised judicially, and the only limit on the further order which may be made is that it must be both necessary and appropriate.

56. The Supreme Court of Appeal held in **Chetty t/a Nationwide Electrical v Hart NO and another "Chetty***"* [2015] 4 All SA 401 (SCA)] that there was no indication in section 133 that non-compliance carries with it the implication that the proceedings are a nullity [*Id* para 41], and that the failure to obtain the leave of the BRP or the Court to initiate or continue with legal proceedings does not, in and of itself, invalidate the proceedings. [*Id* para 42.] I therefore do not accept the submission that the sale in execution was a nullity which must be set aside.

57. To my mind it is both necessary and appropriate, in all the circumstances of this case, to make an order confirming the validity of the sale in execution of the property on 15 June 2017 and authorising the finalisation of transfer of the property in terms thereof.

61. Boruchowitz J accepted that service for purposes of section 131(2)(a) of the Act means service in terms of Rule 4(1)(a) of the Uniform Rules of Court ("the Uniform Rules"), which requires service by the Sheriff on both the company and the Commission. [***Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others*** 2012 (5) SA 596 (GSJ) para [18]]. This approach was endorsed by Hartzenberg AJ in **Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others**. [2013 (6) SA 141 (KZP) at para [10].]

66. In my view, therefore, the word "*service"* in section 130(3)(a) means service in terms of Rule 4, more particularly service in terms of Rule 4(1)(a) in the case of the company, that is service by sheriff in one of the manners referred to in Rule 4(1), and, in the case of the Commission, service in terms of Rule 4A (c) as read with practice note 9 of 2017, that is service by electronic mail at the dedicated email address provided by the Commission, namely corporatelegalservices@cipc.co.za.

72. Therefore this Court is empowered, in terms of regulation 124 as read with regulations 7(1) and 7(3) and Table CR 3, to determine the manner in which notice of the application is to be given to affected persons in terms of section 130(3)(b).

73. In **Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening** [2011 (5) SA 600 (WCC)] Rogers AJ (as he then was) criticised Regulation 124 which he said "*[e]ffectively … requires service of the whole application on all affected parties"* and, in so doing, "*may well travel beyond what may lawfully be prescribed under s131(2)(b*)." [Id para [16].] This criticism was endorsed by Coppin J in *Kalahari Resources (Pty) Ltd v Arcelormittal S.A. and Others.* [[2012] 3 All SA 555 (GSJ) at para [60].]

74. I respectfully agree that the regulation 124 might well be *ultra vires* what may lawfully be prescribed under section 131 (2)(b) (and 130(3)(a)) if, properly construed, it requires service of the whole application on all affected parties. However I humbly disagree with this interpretation of regulation 124. It seems to me that regulation 124 requires delivery of a copy of the application in accordance with regulation 7 to all affected persons known to the applicant. Regulation 7 specifically refers to section 6(11) of the Act, which, in terms of section 6(11)(b)(ii), allows for a summary of the contents of the application to be delivered by email where the whole application cannot be printed conveniently by the recipient, for instance because it is too voluminous to be printed quickly and cheaply. Furthermore regulation 7(1) permits delivery in any manner referred to in Table CR 3, which provides for a number of delivery options and includes any method of delivery authorised by the High Court. It therefore seems to me inaccurate to say that regulation 124 requires service of the whole application on all affected parties. The scope of regulation 124 is limited to affected persons known to the applicant, and delivery in accordance with one of the methods sanctioned in section 6(11) or Table CR 3, read with regulation 7(1), is what is required.

75. In this case the counter-application for the setting aside and termination of business rescue in terms of section 130 was served on the applicants' attorneys of record. That constitutes proper service in terms of rule 4(1)(aA) of the Uniform Rules, and I am therefore satisfied that there has been due compliance with section 130(3)(a) insofar as Alderbaran is concerned. However the Commission has not been joined as a party to the counter-application and there has been no service whatsoever of the application on the Commission. The requirements of section 130(3)(a) have therefore not been met.

76. I cannot grant an order in terms of section 130(5) until I am satisfied that the Commission has been duly served with a copy of the counter-application and that it has waived it right to be joined as a party to the proceedings. In the circumstances I intend to deal with this difficulty by issuing a *Rule Nisi* with directions regarding service of the counter-application and the *Rule* on the Commission.

77. The requirements of section 130(3)(b) have also not been met inasmuch as a copy of the counter-application was not delivered in any manner or form to any affected persons as defined in section 128 (1)(a) of the Act. In the nature of things Bouwer cannot reasonably be expected to know the identity of the shareholders, creditors and employees of Alderbaran. However, an attempt could and should have been made to obtain the information from Alderbaran through its attorneys. At the very least Bouwer's attorney ought to have furnished a copy of the counter-application to the alleged creditors of Alderbaran who were named in annexures "X" and "Y" to Bouwer's answering affidavit, namely Shaheed Noor, Zayd Noor, Faizel Begg and Sonnenberg & Associates. I intend to deal with this omission by directing that the applicants' attorney furnish Bouwer's attorney with email and/or physical addresses for these particular creditors and ordering that a copy of the counter-application and the *Rule Nisi* be delivered to these creditors by email or registered post, as permitted in Table CR 3.

78. The reason why I have decided not to dismiss the counter-application for non-compliance with the peremptory requirements of section 130(3) and to rather issue a *Rule*

Nisi with directions as to service and notice, is that there is a good case on the merits for the relief sought in the counter-application. I have found that it would be just and equitable in all the circumstances to grant the relief, and it follows that it would not conducive to justice and equity to refuse the relief on the technical ground of defective service. I am satisfied that the interests of all affected persons can satisfactorily be catered for by way of the service and notice directions which I intend to make.

84. There is another issue in relation to costs which I feel should be addressed. Given the particular circumstances of this case, I consider that it would not be right for Faizel Noor to charge Alderbaran for remuneration as BRP. But since no relief was sought in this regard, and since the issue was not argued, fairness requires that I give Faizel Noor an opportunity to be heard before making any order in this regard in terms of section 130(5)(c) of the Act. He will be afforded such an opportunity on the return day of the *Rule Nisi* which I intend to issue.

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Western Crown Properties 61 (Pty) Ltd v Able Walling Solutions (Pty) Ltd

(8073/16) [2017] WCC (13 November 2017)

Obligation by business rescue practitioner to apply for liquidation.

Where a business rescue practitioner gave notice of the termination of business rescue proceedings, the practitioner is under no obligation to apply for liquidation of the company. (Obiter dictum)

[21] (After dismissing the application for liquidation and therefore **obiter** and at most persuasive for later decisions) it was contended that the Business Rescue Practitioner (BRP) was obliged under section 141(2)(a)(ii) of the Companies Act 71 of 2008 to apply to court for the liquidation of the company having terminated business rescue. It is apparent from a reading of that provision that such an application for liquidation '*must'* be made where *'there is no reasonable prospect for the company to be rescued'* but that this is constrained by the words "at *any time during business rescue proceedings*"'. The effect is that having come to the view that there is no reasonable prospect of business rescue and before business rescue has been terminated, the liquidator must apply for the liquidation of the company in terms of section l42(2)(a)(ii). In this matter, business rescue proceedings ended in terms of section 132(2) when the BRP gave notice of such termination. It followed that he was thereafter under no obligation to apply for the liquidation of the company since business rescue proceedings no longer continued. (Par [21])

In light of the conflictual relationship which had developed the applicant would have been aware from the outset that its *locus standi* (standing) as a creditor of the company may be placed in issue in the matter. Liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed on reasonable grounds. [***Kalil* v *Decotex (Pty) Lid and Another* 1988 (1) SA 943 (A)**. See too ***Badenhorst* v *Northern Construction Enterprises (Pty) Ltd*** 1956 (2) SA 346 (T), at 347H-348.]

What was required of the applicant was that it placed all necessary material before the Court in order to indicate its locus standi. A referral to oral evidence is not intended to cure defects in the applicant's founding papers or close holes in it. Nor is there any purpose served in granting such an application when on the facts already before the court the factual position is evident. Having regard to the totality of the facts before the Court, and the submissions made by counsel, the grant of the application for the referral of issues to oral evidence is not warranted in the circumstances of this matter and that the application falls to be dismissed. (Par [19])

The main application was postponed until the date of hearing of the application for oral evidence. On the material before the court the applicant has failed to show that it holds the requisite *locus standi* to pursue the relief sought in the main application since it has not shown that it is a creditor of the company and when there are clear and *bona fide* disputes regarding whether debts are in fact owed. The fact that the BRP recorded claims against the company does not prove that such claims are *bona fide,* nor does it warrant a conclusion by the court that Western Crown as a result of that recordal constitutes a creditor with the requisite *locus standi* to seek an order of liquidation against the company. For all of these reasons, absent the requisite *locus standi,* the application for liquidation falls to be dismissed. (Par [20])

Extracts

[18] In light of these circumstances, and the conflictual relationship which had developed between Mr Krull and Mr Manojlovic, Western Crown would have been aware from the outset that its *locus standi* as a creditor of Able may be placed in issue in the matter, more so given that liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed on reasonable grounds. [**Kalil v Decotex (Pty) Lid and Another** 1988 (1) SA 943 (A). See too **Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T), at 347H-348.]

[19] What was required of Western Crown was that it place all necessary material before this Court in order to indicate its *locus standi. A* referral to oral evidence is not intended to cure defects in the applicant's founding papers or close holes in it. Nor is there any purpose served in granting such an application when on the facts already before the court the factual position is evident. Having regard to the totality of the facts before this Court, and the submissions made by counsel, I am of the view that the grant of the application for the referral of issues to oral evidence is not warranted in the circumstances of this matter and that the application falls to be dismissed.

[20] The main application was postponed until the date of hearing of the application for oral evidence. I am satisfied that, on the material before this Court, Western Crown has failed to show that it holds the requisite *locus standi* to pursue the relief sought in the main application since it has not shown that it is as a creditor of Able and when there are clear and *bona fide* disputes regarding whether debts which Western Crown alleges are owed to it are in fact so. The fact that the business rescue practitioner recorded claims raised by Western Crown against Able does not prove that such claims are *bona fide,* nor does it warrant a conclusion by this Court that Western Crown as a result of that recordal constitutes a creditor with the requisite *locus standi* to seek an order of liquidation against Able. For all of these reasons, absent the requisite *locus standi,* the application for liquidation launched by Western Crown falls to be dismissed. There is no reason as to why costs should not follow the result and, given the extent of the matter and the issues raised, such costs are to include those of two counsel.

[21] While it was contended by counsel for Western Crown that Mr Rey was obliged under s141(2)(a)(ii) to apply to Court for the liquidation of Able having terminated business rescue, it is apparent from a reading of that provision that such an application for liquidation '*must'* be made where *'there is no reasonable prospect for the company to be rescued'* but that this is constrained by the words " at *any time during business rescue proceedings*"". The effect is that having come to the view that there is no reasonable prospect of business rescue and before business rescue has been terminated, the liquidator must apply for the liquidation of the company in terms of sl42(2)(a)(ii). In this matter, business rescue proceedings ended in terms of s132(2) when Mr Rey gave notice of such termination on 31 August 2017. It followed that he was thereafter under no obligation to apply for the liquidation of Able since business rescue proceedings no longer continued.

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INSOLVENCY AND LIQUIDATION

Amendment of section 83 of the Insolvency Act 24 of 1936 by the Financial Sector Regulation Act 9 of 2017

Sale of security by entities defined in the Act

If property held as security is of a class ordinarily sold through an authorised user or an external authorised user, on an exchange or an external exchange or, where applicable, a person prescribed by the Minister of Finance as a regulated person the creditor may, subject to certain provisions, and applicable standards and rules immediately sell the property in the prescribed manner.

The amendments are technical to provide for amendments to the Financial Markets Act 19 of 2012. See below for the text of the amendments to the Financial Sector Act 9 of 2017 by the Insolvency Act.

Section 83(2) of the Insolvency Act reads as follows after the amendments:

> (2) If such property consists of securities as defined in section 1(1) of the Financial Markets Act, 2012 (Act No. 19 of 2012), a bill of exchange or a financial instrument or a foreign financial instrument as defined in section 1(1) of the Financial Sector Regulation Act, 2017, the creditor may, after giving the notice mentioned in subsection (1) and before the second meeting of creditors, realise the property in the manner and on the conditions mentioned in subsection (8).

Subsection (1) of section 83 provides as follows:

> 83 **Realization of securities for claims**
>
> (1) A creditor of an insolvent estate who holds as security for his claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has been appointed.

Subsection (8) of section 83, after the amendments, provides as follows:

> (8) The creditor may realize such property in the manner and on the conditions following, that is to say-
>
> (a) if it is any property of a class ordinarily sold through an authorised user or an external authorised user, on an exchange or an external exchange, each defined in section 1(1) of the Financial Markets Act, 2012 (Act No. 19 of 2012) or, where applicable, a person prescribed by the Minister of Finance as a regulated person in terms of section 5 of that Act, the creditor may, subject

to the provisions of that Act and applicable standards and rules in terms of that Act, immediately sell it through an authorised user, external authorised user or such regulated person, or if the creditor is an authorised user, external authorised user or regulated person, also to another authorised user, external authorised user or regulated person;

(b) if it is a bill of exchange, the creditor may realize it in any manner approved of by the trustee or by the Master;

(c) if it consists of a right of action, the creditor shall not realize it except with the approval of the trustee or of the Master;

(d) if it is any other property, the creditor may sell it by public auction after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as the trustee directed.

Amendments to the Insolvency Act 24 of 1936 by the Financial Sector Regulation Act 9 of 2017

Insertions are underlined

[Deletions are in bold between square brackets]

Provisions of the Insolvency Act referred to are reflected in small font.

FINANCIAL SECTOR REGULATION ACT 9 OF 2017
SCHEDULE 4
AMENDMENTS AND REPEALS
(Section 290)

Effective date of publication GN 169 GG 41549 on 29 March 2018

Act No. and year	Short Title	Extent of repeal or amendment
Act No. 24 of 1936	Insolvency Act, 1936	**1.** The addition in section 35A(1) in the definition of "market infrastructure" [35A(1) **'market infrastructure'** means- (a) an exchange as defined in section 1 and licensed under section 9 of the Financial Markets Act, 2012; and (b) a central securities depository as defined in section 1 and licensed under section 29 of that Act; or *(c)* a clearing house as defined in section 1 of that Act and licensed under section 49 of that Act;] of the following paragraphs: <u>(d) a central counterparty as defined in section 1 of that Act and licensed under section 49 of that Act; or</u> <u>(e) a licensed external central counterparty as defined in section 1 of that Act;</u>.
		2. The amendment of section 83- (a) by the substitution for subsection (2) of the following subsection:

		(2) If such property consists of **[a marketable security]** securities as defined in section 1(1) of the Financial Markets Act, 2012 (Act No. 19 of 2012), **[or]** a bill of exchange or a financial instrument or a foreign financial instrument as defined in section **[1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989)]** 1(1) of the Financial Sector Regulation Act, 2017, the creditor may, after giving the notice mentioned in subsection (1) [83 **Realization of securities for claims** (1) A creditor of an insolvent estate who holds as security for his claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has been appointed.] and before the second meeting of creditors, realise the property in the manner and on the conditions mentioned in subsection (8). [(8) The creditor may realize such property in the manner and on the conditions following, that is to say- (a) if it is any property of a class ordinarily sold through an authorised user or an external authorised user, on an exchange or an external exchange, each defined in section 1(1) of the Financial Markets Act, 2012 (Act No. 19 of 2012) or, where applicable, a person prescribed by the Minister of Finance as a regulated person in terms of section 5 of that Act, the creditor may, subject to the provisions of that Act and applicable standards and rules in terms of that Act, immediately sell it through an authorised user, external authorised user or such regulated person, or if the creditor is an authorised user, external authorised user or regulated person, also to another authorised user, external authorised user or regulated person; (b) if it is a bill of exchange, the creditor may realize it in any manner approved of by the trustee or by the Master; *(c)* if it consists of a right of action, the creditor shall not realize it except with the approval of the trustee or of the Master; *(d)* if it is any other property, the creditor may sell it by public auction after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as the trustee directed.
		(b) by the substitution for subsection (3) of the following subsection: (3) If such property does not consist of **[a marketable security]** securities or a bill of exchange, the trustee may, within seven days as from the receipt of the notice mentioned in subsection (1) or within seven days as from the date which the certificate of appointment issued by the Master in terms of subsection (1) of section eighteen or subsection (2) of section fifty six reached him, whichever be the later, take over the property from the creditor at a value agreed upon between the trustee and the creditor or at the full amount of the creditor's claim, and if the trustee does not so take over the property the creditor may, after the expiration of the said period but

		before the said meeting, realise the property in the manner and on the conditions mentioned in subsection (8); and
		(c) by the substitution in subsection (8) for paragraph (a) of the following paragraph: (a) if it is **[-** **(i)]** any property of a class ordinarily sold through **[a stockbroker as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985)]** an authorised user or an external authorised user, on an exchange or an external exchange, each defined in section 1(1) of the Financial Markets Act, 2012 (Act No. 19 of 2012) or, where applicable, a person prescribed by the Minister of Finance as a regulated person in terms of section 5 of that Act, the creditor may, subject to the provisions of **[the said]** that Act and **[(where]** applicable**[) the]**standards and rules **[referred to in section 12 thereof, forthwith]** in terms of that Act, immediately sell it through **[a stockbroker]** an authorised user, external authorised user or such regulated person, or if the creditor is **[a stockbroker]** an authorised user, external authorised user or regulated person, also to another **[stockbroker]** authorised user, external authorised user or regulated person; **[or** **(ii) a financial instrument referred to in subsection (2) the creditor may, subject to the provisions of the Financial Markets Control Act, 1989, and rules referred to in sections 17 thereof, forthwith sell it through a financial instrument trader as defined in section 1 of the said Act, or, if the creditor is a financial instrument trader or financial instrument principal as defined in section 1 of the said Act, also to another financial instrument trader or financial instrument principal; and]**

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Ex Parte Standard Bank of South Africa Ltd, In re Integrated Pipeline Solutions (Pty) Ltd v Bankuna Engineering & Construction (Pty) Ltd

(18406/2016) [2017] ZAGPJHC 52 (7 March 2017)

Two provisional liquidation orders cannot run together.

Where the applicant deferred to the intervening creditor, the court discharged the first order and granted a final order on the application of the intervening creditor.

The central argument for the respondent was straight-forward: that for so long as the applicant remained intent on seeking confirmation of the rule, it remained *dominus litis* (*master of the suit)*, and the intervening creditor had no place in the hearing; in fact, it had no right to be heard at all. For this proposition it relied on the judgment of Coetzee, J (as he then was) in **Fullard v Fullard**, 1979 (1) SA 369 (T) at 371 H – 372 B. The learned judge there held that an intervening creditor may obtain a fresh order in its own name if the applicant creditor does not proceed with the case, or drags its feet. He held too that the court takes a practical view of the matter and bears in mind the general body of creditors. (Par [7])

Cases have stressed that the intervening creditor who seeks its own order cannot do so on the back of the cause of the applicant; it must make out its own cause. Also, it seems accepted that two provisional orders cannot run in tandem. (Par [9])

The sole impediment to a winding-up order being granted at the instance of the intervening creditor, is the fact that before it in the queue stands the applicant; but the applicant has in these circumstances deferred to the intervening creditor. (Par [18])

The court discharged the prior provisional winding-up order and granted the application by the intervening creditor for the winding-up and issued a final winding-up order. (Par [19])

Extracts

[7] The central argument for the respondent was straight-forward: that for so long as the applicant remained intent on seeking confirmation of the rule, it remained dominus litis, and the intervening creditor had no place in the hearing; in fact, it had no right to be heard at all. For this proposition it relied on the judgment of Coetzee, J (as he then was) in **Fullard v Fullard**, 1979 (1) SA 369 (T) at 371 H – 372 B. The learned judge there held that an intervening creditor may obtain a fresh order in its own name if the applicant creditor does not proceed with the case, or drags its feet. He held too that the court takes a practical view of the matter and bears in mind the general body of creditors.

[8] **Fullard** has been followed often, and may be accepted as laying down the general practice in this division. [Compare **Nel and Others NNO v The Master and Others**, 2000(2) SA 728 (W); see too **FirstRand v Wallace Pienaar** 2002 (2) SA 758 (W); **Ex parte Standard Trading Co (Pty) Ltd: In re Perl v Simco Clothing Manufacturers (Pty) Ltd**, 1955 (3) SA 508 (W).]

[9] Other cases too have stressed that the intervening creditor who seeks its own order cannot do so on the back of the cause of the applicant; it must make out its own cause. Also, it seems accepted if it is not self-evident, that two provisional orders cannot run in tandem.

[10] In short, the practice is that for so long as an applicant creditor persists in seeking relief on its own, prior, application, a court cannot ignore that application and instead grant a fresh order at the instance of a subsequent, intervening creditor, even if the latter makes out a good case for it. The applicant as master of the litigation is entitled to have its case decided first. [Perhaps this is a manifestation of the maxim *prior in tempore potior in iure*, or of not jumping the queue; see the publication by Havard Professor Michael Sandel, What Money Can't Buy.]

[11] What is the attitude of this dominus litis here? In the penultimate paragraph of its heads of argument, the applicant says, under the rubric *"Applicant's Conditional Tender"*, the following: *"In the final instance, to the extent that this court upholds the point of law of the respondent and finds that the sole impediment to Standard Bank obtaining its final order is that the applicant must first pursue its liquidation application, then, under that circumstance, the applicant assents to the discharge of its provisional order in favour of the grant of a final order to Standard Bank."*

[12] The respondent submitted that the applicant has no right to make such a conditional tender; it has no right to bargain with the court. I have no doubt that the applicant has no right to bargain with the court; but what is really happening here? The following observations are in my view pertinent.

[18] These observations lead me to the conclusion that, as it happens, the sole impediment to a winding-up order being granted at the instance of the intervening creditor, is the fact that before it in the queue stands the applicant; but the applicant has in these circumstances deferred to the intervening creditor.

[19] In the result I make the following order:

(a) The provisional winding-up order issued on 16 August 2016 is discharged.

(b) The application by the intervening creditor for the winding-up of the respondent is granted, and a final winding-up order hereby issues.

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Thamae and others v Roering NO and others

[2017] JOL 39416 (GJ)

Locus standi to apply for winding up or business rescue

None of the applicants proved prior employment or employment when the company was placed under provisional liquidation. They do not have locus standi to apply for the discharge of the liquidation order and simultaneously placing the company under business rescue.

When motion proceedings are prepared in an orderly way it is usually possible for counsel to demonstrate in argument, quite quickly and clearly, the factual context in which the relief is sought; whether the question to be decided is one of fact or law; and, if the question is one of fact, whether or not it can be resolved in motion proceedings. It is when the matter is not prepared in such an orderly way that serious problems tend to arise which may, as in the present case, result in substantial delay. (Par [11])

The provisional liquidators allege that they could find no record of the 46 applicants' employment and take issue with the averment of former employment in the answering affidavit. This is a matter that has to be determined on the principles set out in the well-known ***Plascon Evans*** test (***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A))

It appears that the only response in reply to the denial of former employment is an averment that there is no proof either before the court that the applicants are *not* former employees. This answer misconceives the *onus* upon the applicants to allege and prove their *locus standi* (***Mars Incorporated v Candy World (Pty) Ltd*** 1991 (1) SA 567 (A)).(Par [16]) and [17])

An "affected person" for the purposes of an application for business rescue is defined in section 128(1)(a) of the Companies Act 71 of 2008 Act as (emphasis added):

(i) a shareholder or creditor of the company;
(ii) any registered trade union representing employees of the company; and
(iii) *if any of the employees of the company are not represented by a registered trade union*, *each of those employees* or their respective representatives. (Par [19])

Assuming for the moment that the definition would be wide enough to include former employees under section 128(1)(a)(iii), in the absence of proof of such employment, the applicants are not affected persons with *locus standi*. The applicants further do not allege that they are not represented by a trade union. The court makes no findings on any extended interpretation of the 2008 Act, as on the facts of the matter, the applicants have failed to prove that they are even former employees of the company. (Par [20])

Mr *Roux* SC urged the court to interpret section 131(1) of the 2008 Act to include in a purposive interpretation as an "affected person", members of the local community, such as the applicants. Leaving aside the dispute about the views of the local community (and if a community necessarily would have to speak with one voice), such an interpretation would be impermissible in the light of the definition provided in section 128(1)(a) of the 2008 Act that expressly defines "affected person" to apply to the chapter in which section 131 is contained. (Par [23])

There has been a hardening of attitudes in the courts about the admissibility of further affidavits in opposed motion proceedings. The further replying affidavit may be allowed only in limited circumstances. In **Gelyke Kanse and others v Chairman of the Senate of the Stellenbosch University and others** (17501 / 2016) [2017] ZAWCHC 119 (25 October 2017) [also reported at [2018] 1 All SA 46 (WCC)] Dlodlo J (Savage J concurring) dealt with the admissibility of further affidavits in an opposed application and collected the authorities. (Par [25])

In this case, the court refuses the admissibility of the further affidavit as:

(i) The applicants have not established *locus standi*;

(ii) The founding and initial replying papers make out no case of misconduct by the respondent and/or on prospects of success in business rescue proceedings. An applicant is not permitted to set up a skeleton case in its founding papers, and seek to flesh it out in later affidavits;

(iii) The applicants have failed to give notice to affected parties of the proceedings (the late notice to the CIPC amounted to no notice at all, it could not have known that the matter was proceeding before me a court day later);

(iv) Generally speaking, it is in the interests of the administration of justice that the number and sequence of affidavits should ordinarily be observed. This, generally speaking, ensures a fair, orderly hearing. There must be a degree of predictability on how judges will exercise discretions;

(v) The further affidavit is produced late in the day, and would have necessitated a postponement of the matter. (Par [26])

The court also refused the request for a postponement. The applicants should not seek to make out a case in yet further sets of affidavits to be produced. (Par [27])

Extracts

[1] This is an application in which the applicants seek the discharging of the provisional liquidation order granted by this Court in respect of Blyvooruitzicht Gold Mining Company Ltd ("the company"), and the simultaneous placing of the company in business rescue. I am told that the provisional liquidation order was granted in August 2013 and that it has been extended from time to time.

[11] Stegman J in *Reynolds NO v Mecklenberg* (*Pty*) *Ltd* 1996 (1) SA 75 (W) at 78 and further correctly complained about the failure by practitioners to apply a disciplined approach to litigation. If such an approach is followed, the learned Judge stated at 80E–F:

> "When motion proceedings are prepared in this orderly way it is usually possible for counsel to demonstrate in argument, quite quickly and clearly, the factual context in which the relief is sought; whether the question to be decided is one of fact or law; and, if the question is one of fact, whether or not it can be resolved in motion proceedings. It is when the matter is not prepared in such an orderly way that serious problems tend to arise which may, as in the present case, result in substantial delay."

[14] As reflected earlier, the applicants describe themselves as "members of the local community and former employees of" the company. This is in dispute. The averment in the founding affidavit is a bald averment. The confirmatory affidavits thereto by the remaining 45 applicants merely confirm the correctness of the founding affidavit and contain an averment in each case that the applicant is unemployed. No proof of prior employment in any form, no matter how incomplete, is provided. No periods of employment or positions held are alleged.

[15] The provisional liquidators allege that they could find no record of the 46 applicants' employment and take issue with the averment of former employment in the answering affidavit. This is a matter that has to be determined on the principles set out in the well-known ***Plascon Evans*** **test (*Plascon-Evans Paints Ltd v Van Riebeeck Paints* (*Pty*) *Ltd*** 1984 (3) SA 623 (A) [also reported at [1984] 2 All SA 366 (A) – Ed] at 634E–635C).

[16] The response in the replying affidavit to the denial in the answering affidavit of former employment, is difficult to read. The sentences are incomplete, and do not contain the customary heading "ad paragraph . . .". It appears that the only response in reply is an averment that there is no proof either before the court that the applicants are *not* former employees. It seems to me that this answer misconceives the *onus* upon the applicants to allege and prove their *locus standi* (*Mars Incorporated v Candy World* (*Pty*) *Ltd* 1991 (1) SA 567 (A) [also reported at [1991] 2 All SA 25 (A) – Ed] at 575H).

[17] Not only has former employment not been proven, but not one applicant avers that she/he was employed by the company when it was placed in provisional liquidation.

[19] An "affected person" for the purposes of an application for business rescue is defined in section 128(1)(a) of the 2008 Act as (emphasis added):

> "In this Chapter–
>
> (a) 'affected person', in relation to a company, means–
>
> (i) a shareholder or creditor of the company;
>
> (ii) any registered trade union representing employees of the company; and
>
> (iii) *if any of the employees of the company are not represented by a registered trade union*, *each of those employees* or their respective representatives."

[20] Assuming for the moment that the definition would be wide enough to include former employees under section 128(1)(a)(iii), in the absence of proof of such employment, the applicants are not affected persons with *locus standi*. The applicants further do not allege that they are not represented by a trade union. I make no findings on any extended interpretation of the 2008 Act, as on the facts of this matter, the applicants have failed to prove that they are even former employees of the company.

[23] Mr *Roux* SC urged me to interpret section 131(1) of the 2008 Act to include in a purposive interpretation as an "affected person", members of the local community, such as the applicants. Leaving aside the dispute about the views of the local community (and if a community necessarily would have to speak with one voice), in my view, such an interpretation would be impermissible in the light of the definition provided in section 128(1)(a) of the 2008 Act that expressly defines "affected person" to apply to the chapter in which section 131 is contained.

[25] There has been a hardening of attitudes in the courts about the admissibility of further affidavits in opposed motion proceedings. The further replying affidavit served on Wednesday, 8 November 2017 may be allowed only in limited circumstances. In **Gelyke Kanse and others v Chairman of the Senate of the Stellenbosch University and others** (17501 / 2016) [2017] ZAWCHC 119 (25 October 2017) [also reported at [2018] 1 All SA 46 (WCC) – Ed] Dlodlo J (Savage J concurring) dealt withthe admissibility of further affidavits in an opposed application and collected the authorities.

[26] In this case, I refuse the admissibility of the further affidavit as:

26.1The applicants have not established *locus standi*;

26.2The founding and initial replying papers make out no case of misconduct by the respondent and/or on prospects of success in business rescue proceedings. An applicant is not permitted to set up a skeleton case in its founding papers, and seek to flesh it out in later affidavits;

26.3The applicants have failed to give notice to affected parties of the proceedings (the late notice to the CIPC amounted to no notice at all, it could not have known that the matter was proceeding before me a court day later);

26.4Generally speaking, it is in the interests of the administration of justice that the number and sequence of affidavits should ordinarily be observed. This, generally speaking, ensures a fair, orderly hearing. There must be a degree of predictability on how judges will exercise discretions;

26.5The further affidavit is produced late in the day, and would have necessitated a postponement of the matter.

[27] I also refuse the request for a postponement. The applicants should not seek to make out a case in yet further sets of affidavits to be produced.

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Kaniah v WPC Logistics (Joburg) CC (In Liquidation) and Others

(4973/2014) [2017] ZAFSHC 209 (2 November 2017)

Application in terms of section 387 of the Companies Act 61 of 1973 that the court should order the liquidator to pursue an action against the holder of a member's interest.

The actions of a liquidator cannot be set aside unless the conduct of the liquidator was mala fide or the liquidator acted in a way in which no reasonable liquidator would have acted.

Section 387 of the Companies Act 61 of 1973 provides as follows:

> **387. Exercise of liquidator's powers in winding-up by Court**
>
> (1) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court, shall, in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting. ...
>
> (4) Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.

A resolution terminating the action against the fourth respondent and his spouse was passed at a special general meeting. As a consequence of the failure of the liquidators to institute the application for directions from the court, and the legal advice they received indicating they were bound by the resolutions passed at the meeting, the applicant applied for an order directing the liquidators to pursue an action instituted against the one of the members, in terms of section 66 of the Close Corporations Act 68 of 1984, read with section 387(4) of the Companies Act 61 of 1973. (Par 12 and 13)

What is meant by an "aggrieved person" has been the subject matter of a number of decisions. The parties agree that the applicant has standing as a minority member to seek relief in terms of section 387. (Par 20 and 22)

In **Van Zyl NO v Commissioner for Inland Revenue** [1997 (1) SA 883 (C) at 891C-E] Hodes AJ said:

> 'It should be remembered that a company in liquidation is administered not only for the benefit of creditors, but that the liquidator is obliged to take the interest of members into account. In terms of s 342(1) of the Companies Act, if there is surplus after payment to creditors, this goes to members. The interest of members in the proper winding-up of the company is recognised in ss 360(1), 386(3)(a) and 387(1) of the Companies Act.' (Par 24)

The question to be decided in this matter is whether the second and third respondents by following the resolution taken at the meeting of creditors and members acted in a way that no reasonable liquidator could have acted requiring interference by the court. In *Concord Leasing* [**Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood, NO and Another** 1975 (4) SA 231 (R) at 234-235] Beadle ACJ considered what is or is not reasonable in any given circumstance and quoted a passage from the judgment of **Watermeyer CJ in Vanderbijl Park Health Committee and Others v Wilson and Others** [1950 (1) SA 447 (AD) at p 458]:

> 'A reasonable man can of course come to an unreasonable conclusion that the test is not merely the decision of a reasonable man but of a reasonable man "applying his mind to the condition of affairs". I think that means considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide.' (Par 26)

The court aligns itself with the sentiments expressed by Beadle ACJ. The liquidators acted *bona fide* throughout. A reasonable liquidator must not only consider the

interests of members but also creditors. The conduct of the liquidators cannot be said to be *mala fide* or that they acted in a way in which no reasonable liquidator would have acted. (Par [27])

The liquidators have indicated that they have no difficulty with the applicant proceeding with the action provided a suitable indemnity for costs is put up. The court is of the view that the applicant can proceed with the action. (Par 28)

The appropriate course to follow is that which is set out in a line of authorities [**Fargro Ltd v Godfroy and Others** [1986] 3 All ER 279 and **Re: Edennote Ltd Tottenham Hotspur PLC and others v Ryman and another** [1995] 2 BCLC 248 at 257-258] which make provision for the applicant to provide a suitable indemnity for costs.

Extracts

[1] The applicant seeks an order *inter alia* directing the liquidators (the second and third respondents) to pursue an action instituted against the fourth respondent, in terms of *inter alia* s 66 of the Close Corporations Act, read with s 387(4) of the Companies Act 61 of 1973 (the Act).

[12] The special general meeting did not take place as same was not properly constituted. In the interim, the second and third respondents through their attorneys of record, indicated, they were obtaining a legal opinion. Subsequently, on 15 April 2016 a special general meeting was convened. A resolution was tabled terminating the action against the fourth respondent and his spouse. The applicant acting on behalf of WPC Logistics (SA) CC voted against the resolution. Nichola Cronje acting for the second and third respondents, who also had a power of attorney for the fourth respondent voted on behalf of creditors, in favour of the resolution. As a consequence, given the holding of members' interests in the close corporation, the resolution was passed by the majority of members.

[13] As a consequence of the second and third respondents' failure to institute the application for directions from the court, and the legal advice they received indicating they were bound by the resolutions passed at the meeting, the applicant instituted this application.

[20] Section 387 of the Act provides for an aggrieved person to approach the court for relief in circumstances where the liquidator refuses to follow directions or where the liquidator acts unreasonably given the circumstances. What is meant by an aggrieved person has been the subject matter of a number of decisions. In *Gore NO v Shaff* [2014 JDR 1755 (WCC) para 17] Binns-Ward J considered this term:

> 'The term '*any person aggrieved*' employed in s 387(4) is somewhat imprecise, and it is thus perhaps not surprising that its import has been the subject of debate; cf. *Francis George Hill Family Trust v South African Reserve Bankand Others* 1992 (3) SA 91 (A), at 98I – 102E, *Strauss and Others v The Master and Others NNO* 2001 (1) SA 649 (T), at 659H-661G, and *LL Mining Corporation Ltd v Namco (Pty) Ltd (In Liquidation) and Others* 2004 (3) SA 407 (C), at 414A-G. As Beadle ACJ observed in *Concorde Leasing Corporation (Rhodesia) Ltd v*

> *Pringle-Wood NO and Another* 1975 (4) SA 231 (R), a person who is able to show that he should be afforded a remedy in terms of s 387(4) (or its equivalent in other statutory regimes) obviously qualifies as a 'person aggrieved' for the purposes of the provision; approached in that manner, attempting to define the term is to beg the question. I shall therefore proceed directly to consider whether Mrs Wolpe has established an entitlement to the remedy.

[23] Subsection 4 empowers the court to make whatever order 'as it thinks' just. Such discretion is not restricted. [**Cohen NO and Another v Ruskin and Smith NNO and Another** 1981 (1) SA 421 (W) at 425.] The authorities have held that a court will not lightly interfere with a *bona fide* act or a decision *bona fide* taken by a liquidator. [**Leon v York-O-Matic Ltd and Others** [1966] 3 All ER 277 at 280-281; **Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood, NO and Another** 1975 (4) SA 231 (R) at 234-235.] In circumstances where there is no lack of *bona fides* by the liquidator, then the question to be asked is whether in the circumstances the liquidator has acted in a way in which no reasonable liquidator could have acted, having regard to the objects of winding-up and a liquidator's duty in general. In *Re: Edennote Ltd* the court of appeal in applying the comparable provisions of s 167(5) of the English Insolvency Act 1986 held the following as constituting the correct test to follow:

> '(fraud and bad faith apart) … the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it.'

[24] It must at all times be borne in mind that a liquidator in the winding-up of a company owes a duty both to the company and to creditors. In *Van Zyl NO v Commissioner for Inland Revenue* [1997 (1) SA 883 (C) at 891C-E] Hodes AJ said:

> 'It should be remembered that a company in liquidation is administered not only for the benefit of creditors, but that the liquidator is obliged to take the interest of members into account. In terms of s 342(1) of the Companies Act, if there is surplus after payment to creditors, this goes to members. The interest of members in the proper winding-up of the company is recognised in ss 360(1), 386(3)(a) and 387(1) of the Companies Act.'

[26] The question to be decided in this matter is whether the second and third respondents by following the resolution taken at the meeting of creditors and members acted in a way that no reasonable liquidator could have acted requiring interference by the court. In *Concord Leasing supra* [Beadle ACJ considered what is or is not reasonable in any given circumstance and quoted a passage from the judgment of Watermeyer CJ in *Vanderbijl Park Health Committee and Others v Wilson and Others* [1950 (1) SA 447 (AD) at p 458]:

> 'A reasonable man can of course come to an unreasonable conclusion that the test is not merely the decision of a reasonable man but of a reasonable man "applying his mind to the condition of affairs". I think that means considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide.'

[27] Beadle ACJ was of the view that that is the way a court should approach an issue like this. I align myself with the sentiments expressed. I am of the view that the second and third respondents acted *bona fide* throughout. A reasonable liquidator must not only consider the interests of members but also creditors. I do not believe that the conduct of the liquidators, can be said to be *mala fide* or that they acted in a way in which no reasonable liquidator would have acted.

[28] The difficulty which the second and third respondents have in this matter is that, given the make-up of the membership the first respondent, the fourth and fifth respondents together with the creditors, may have been in a position to always vote against proceeding

with the action instituted. The remedy available to a minority member like the applicant would have been to approach the court to direct that it makes such order as it thinks just. I have come to the conclusion that the second and third respondents did not act unreasonably and acted *bone fides* and also in a way that a reasonable liquidator would have acted. The next question to be answered is the appropriate order given the circumstances. The second and third respondents have indicated that they have no difficulty with the applicant proceeding with the action provided a suitable indemnity for costs is put up. As already alluded to in this judgment, I am of the view that the applicant can proceed with the action.

[33] As the applicant wishes to proceed with the litigation, it seems to me that the appropriate course to follow is that which is set out in the line of authorities I have been referred to [**Fargro Ltd v Godfroy and Others** [1986] 3 All ER 279 and **Re: Edennote Ltd Tottenham Hotspur PLC and others v Ryman and another** [1995] 2 BCLC 248 at 257-258] which make provision for the applicant to provide a suitable indemnity for costs. It is for this reason that I propose to grant the order proposed by the second and third respondents and not that proposed by the applicant.

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Fourie NO and another v Smith and another

[2017] JOL 38868 (GP)

Discretion not to grant sequestration order when requirements complied with. When an applicant has proved a claim in excess of the statutory minimum (R100), that the respondent has committed an act of insolvency and that there is reason to believe that the sequestration will be to the advantage of the creditors, very special considerations are necessary to disentitle the applicant to a sequestration order.

Innes CJ said the following in **De Waardt v Andrew & Thienhaus** *Ltd* 1907 TS 727 at 733:

> 'Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him . . . of course; the court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. *Speaking for myself*, *I always look with great suspicion upon*, *and examine very narrowly*, *the position of a debtor who says* "*I am sorry that I cannot pay my creditor*, *but my assets far exceed my liabilities*". *To my mind the best proof of solvency is that a man should pay his debts*: *and therefore I always examine in a critical spirit the case of a man who does not pay what he owes*.' (The emphasis is that of the Dewrance AJ in **Fourie NO v Smith** 2015 JDR 1223 (GP) par [67]).) (Par [36])

It is clear, on the overwhelming probabilities, that the respondents are factually insolvent, quite apart from the fact that an act of insolvency was also committed. (Par

[51])

Advantage to creditors

This is a short summary of submissions made in this regard in the founding affidavit:

(i) even though the respondents do not own sufficient disposable movable assets or immovable property, the first respondent must have substantial assets hidden away (on the probabilities).

(ii) The WinDeed searches conducted confirmed that the trust is the registered owner of the property occupied by the respondents and their family. Investigations have indicated that this property is very valuable and worth between R4 and R5 million. Even taking into account the bonds registered over the property, the net value could be in the region of Rl,5 million. The respondents are beneficiaries of the trust. It is likely that the trust is nothing other than the first respondent's *alter ego*.

(iii) On the probabilities, the first respondent had sufficient funds to pay his counsel to represent him in the 424 action which lasted many days before it was ultimately settled.

(iv) The first respondent is known to maintain an exceptionally high standard of living and is also continuously engaged in unnecessary and extremely costly litigation which requires substantial funding.

(v) It is important for trustees to take control of the joint estate because the first respondent is not only wasting his estate on meritless and costly litigation, but there is a real concern that the first respondent is attempting to conceal assets.

(vi) The machinery to be found in the relevant insolvency legislation, will allow the trustees to search for hidden assets and bring them within the ambit of the respondents' estate to be realised in favour of the creditors. (Par [52])

Dewrance AJ, when considering submissions made by counsel for the applicants, found that there was reason to believe that the sequestration will be to the

advantage of the creditors. The court does not consider it necessary to repeat the observations made in this regard by the learned Judge. (Par [53])

The court's discretion to grant a sequestration order

[54] Dewrance AJ referred to the following passage in Smith *Law of Insolvency* (3 ed) at 65:

> "If the court, in the case of a provisional order, is *prima facie* of the opinion *and in the case of a final order*, is satisfied that there are three *facta probanda*, and enumerated in sections 10 and 12 respectively of the Act, have been established, it is empowered but not obliged to provide either a provisional *or final order* of sequestration as the case may be. The court has an overriding discretion to be exercised judicially upon consideration of all the facts and circumstances of the particular case. The discretion has been referred to as 'large' or 'wide' but be that as it may, the discretion is not to be exercised lightly. Accordingly, to paraphrase the words of Broom J, *when a sequestrating creditor has proved an act of insolvency and there is reason to believe that the sequestration will be to the advantage of the creditors*, *very special considerations are necessary to disentitle him to his order*" (emphasis added). (Par [54])

If the court understood counsel correctly, it would be in the interests of justice to stay the sequestration proceedings pending the outcome of a host of claims, which the respondents allegedly have against other parties. **Truter v Degenaar** 1990 (1) SA 206 (T), relied on by counsel, has nothing to do with a sequestration application. A sequestration application is based on a construction provided by statute. The facts required to be proved are a claim in excess of the statutory minimum (R100), that the respondent has committed an act of insolvency and that there is reason to believe that the sequestration will be to the advantage of the creditors. As emphasised by the learned author Smith, when these have been established, "very special considerations are necessary to disentitle (the applicant) to his order". (Par [57])

Extracts

[36] In his comprehensive judgment of only about six months ago [**Fourie NO v Smith** 2015 JDR 1223 (GP)**]**, Dewrance AJ, under the heading "Act of insolvency and insolvency", says the following:

> "[63] As previously indicated, the Sheriff could not obtain sufficient assets to satisfy the BMW judgment. ...

[67] However, one thing stands out as a sore thumb. He cannot and is not in a position to satisfy the BMW judgment and the surety judgment. In this regard, Mr Terblanche referred me to a passage by Innes CJ in the matter of *De Waardt v Andrew & Thienhaus Ltd* 1907 TS 727 at 733 where the following was said:

> 'Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him . . . of course; the court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. *Speaking for myself*, *I always look with great suspicion upon*, *and examine very narrowly*, *the position of a debtor who says* "*I am sorry that I cannot pay my creditor*, *but my assets far exceed my liabilities*". *To my mind the best proof of solvency is that a man should pay his debts*: *and therefore I always examine in a critical spirit the case of a man who does not pay what he owes*.' (The emphasis is that of the learned Judge.)

[68] I agree with the aforementioned passage. The first respondent, however much he protests that he is solvent, cannot pay what he owes. Any promise that he will eventually pay rings hollow. This is simply not good enough.

[69] Accordingly, I am satisfied that the first respondent committed an act of insolvency as contemplated by section 8(b) of the Insolvency Act and that the respondents are insolvent."

[37] I find myself in respectful agreement with the findings and conclusions of the learned Judge.

[51] Against this background, it is clear, on the overwhelming probabilities, that the respondents are factually insolvent, quite apart from the fact that an act of insolvency was also committed.

[52] This is a short summary of submissions made in this regard in the founding affidavit:

(i) even though the respondents do not own sufficient disposable movable assets or immovable property, the first respondent must have substantial assets hidden away (on the probabilities). He stood at the helm of Corpfin and was, as such, involved in transactions that amounted to many millions of rands.

(ii) The WinDeed searches conducted confirmed that the trust is the registered owner of the property occupied by the respondents and their family. Investigations have indicated that this property is very valuable and worth between R4 and R5 million. Even taking into account the bonds registered over the property, the net value could be in the region of Rl,5 million. The respondents are beneficiaries of the trust. It is likely that the trust is nothing other than the first respondent's *alter ego*.

(iii) On the probabilities, the first respondent had sufficient funds to pay his counsel to represent him in the 424 action which lasted many days before it was ultimately settled. There was no costs order in favour of the first respondent following the settlement, which I have described.

(iv) The first respondent is known to maintain an exceptionally high standard of living and is also continuously engaged in unnecessary and extremely costly litigation which requires substantial funding.

(v) It is important for trustees to take control of the joint estate because the first respondent is not only wasting his estate on meritless and costly litigation, but there is a real concern that the first respondent is attempting to conceal assets. Because of his astuteness and experience in investment and financial matters, there is a real danger that he has the ability to dispose of assets to the disadvantage of creditors.

(vi) The machinery to be found in the relevant insolvency legislation, will allow the trustees to search for hidden assets and bring them within the ambit of the respondents' estate to be realised in favour of the creditors.

[53] Dewrance AJ, when considering these submissions made by counsel for the applicants, also found that there was reason to believe that the sequestration will be to the advantage of the creditors. I do not consider it necessary to repeat the observations made in this regard by the learned Judge.

The court's discretion to grant a sequestration order

[54] Dewrance AJ referred to the following passage in Smith *Law of Insolvency* (3 ed) at 65:

> "If the court, in the case of a provisional order, is *prima facie* of the opinion *and in the case of a final order*, is satisfied that there are three *facta probanda*, and enumerated in sections 10 and 12 respectively of the Act, have been established, it is empowered but not obliged to provide either a provisional *or final order* of sequestration as the case may be. The court has an overriding discretion to be exercised judicially upon consideration of all the facts and circumstances of the particular case. The discretion has been referred to as 'large' or 'wide' but be that as it may, the discretion is not to be exercised lightly. Accordingly, to paraphrase the words of Broom J, *when a sequestrating creditor has proved an act of insolvency and there is reason to believe that the sequestration will be to the advantage of the creditors*, *very special considerations are necessary to disentitle him to his order*" (emphasis added).

[56] In his address before me, counsel for the respondents, Mr *Meyer*, indicated that the scope of his argument was very narrow, and it was solely to ask me in the spirit of justice and truth to consider my discretion and exercise thereof (clearly in favour of the respondents).

Mr *Meyer* asked me to consider only one authority, namely, the case of *Truter v Degenaar* 1990 (1) SA 206 (T).

The principle there considered had to do with the provisions of rule 22(4) of the Uniform Rules of Court (which provide for the suspension of judgment on a claim pending the decision of the counterclaim in the case of actions). The court held that although these provisions are limited to actions only, it did not amend the existing law which was applicable to both actions and motions. For the sake of brevity, I refer only to the concise summary in the English headnote, relating to the judgment which was reported in Afrikaans. The learned Judge held that in terms of the aforesaid existing law, the premise was that claim and counterclaim (application and counter-application) should be adjudicated *pari passu* and that where the claim/application was unopposed judgment thereon was suspended pending finalisation of the unliquidated counterclaim/counter-application. The court has a discretion to depart from the Rule. The discretion is not limited to cases where the counterclaim/counter-application is frivolous or vexatious and instituted merely to delay judgment on the claim/application. The discretion is wider and the good reasons which would move a court to exercise it in favour of a plaintiff/applicant are not capable of pre-definition.

[57] If I understood counsel correctly, it would be in the interests of justice to stay the sequestration proceedings pending the outcome of a host of claims, which I already referred to and attempted briefly to summarise, which the respondents allegedly have against other parties. They have no claim against Zeta. The claim of Zeta (enforced by the applicant liquidators) is unassailable.

Truter v Degenaar has nothing to do with a sequestration application. A sequestration application is based on a construction provided by statute. The applicant only has to establish the three required *facta probanda* namely, a claim in excess of the statutory minimum (R100 in this case), that the respondent has committed an act of insolvency and that there is reason to believe that the sequestration will be to the advantage of the creditors. As emphasised by the learned author Smith, when these have been established, "very special considerations are necessary to disentitle (the applicant) to his order".

[58] In all the circumstances, and for the reasons mentioned, I am satisfied that a proper case has been made out for the provisional order to be confirmed and for a final sequestration order to be granted against the joint estate of the respondents.

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FirstRand Bank Ltd t/a Wesbank v Enroute Traders 30 CC

[2018] JOL 39500 (ECG)

An unpaid creditor has a right to a winding-up order against a company that has not paid its debt.

If there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under section 344(f) of the Companies Act 61 of 1973 has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under section 344(f).

The respondent does not dispute being indebted to the applicant in the manner alleged by the applicant, or being in default of paying the amounts due to the applicant. The application is resisted on the basis that the respondent is commercially solvent and is able to meet its day-to-day liabilities in the ordinary course of business. Furthermore on the basis that the respondent has liquid assets or readily realisable assets available out of which proceeds it is able to pay its debts. That however, due to non-payment or delayed payment by its clients, of invoices, it

is unable to pay its debts timeously. (Par [5])

It is trite that the unpaid creditor has a right, *ex debito justitiae* [as of right], to a winding-up order against the respondent's company that has not paid its debt. In this regard, the following was stated in the matter of **Standard Bank of South Africa v R-Bay Logistics** [2013 (2) SA 295 KZD at 300–301 para [27]:

> "[27] There has been judicial debate about whether, for the purposes of Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is "unable to pay its debts". Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f)." (Par [8])

As stated by Malan J (as he then was) in **Body Corporate of Fish Eagle v Group Twelve Investments** 2003 (5) SA 414 (W) at 428B-C:

> 'The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts… . If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.'

The following remarks made in **Absa Bank Ltd v Rhebokskloof (Pty) Ltd** [1993 (4) SA 436 at 440F] are instructive:

> "The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in **Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd** 1962 (4) SA 593 (D) at 59 7E-F:

> 'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'
>
> Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, *ex debito justitiae*, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; **Sammel and Others v President Brand Gold Mining Co Ltd** 1969 (3) SA 629 (A) at 662F)." (Par [8])

The opposing affidavit was deposed to in September 2017 wherein it was conceded on behalf of the respondent that it was unable to pay debts timeously. It is clear therefore that the respondent's contention that it is able to pay its debts is not supported by the evidence, which includes respondent's own admission. (Par [9])

The applicant has succeeded in making out a case for the winding-up of the respondent on the basis that the respondent is unable to pay its debts. (Par [10])

Extracts

[5] The respondent does not dispute being indebted to the applicant in the manner alleged by the applicant, or being in default of paying the amounts due to the applicant. The application is resisted on the basis that the respondent is commercially solvent and is able to meet its day-to-day liabilities in the ordinary course of business. Furthermore on the basis that the respondent has liquid assets or readily realisable assets available out of which proceeds it is able to pay its debts. That however, due to non-payment or delayed payment by its clients, of invoices, it is unable to pay its debts timeously. It is contended on behalf of the respondent that it is awaiting payment of R465 606,56 from Airports Company SA, R371 000 from Amatola Water as well as R112 000 for plant hire a total of R948 606,56. To bolster these allegations the respondent attaches three annexures, two of which are payment certificates from Airports Company SA and Amatola respectively.

[8] It is trite that the unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent's company/co-operation that has not paid its debt. In this regard, the following was stated in the matter of **Standard Bank of South Africa v R-Bay Logistics** [2013 (2) SA 295 at 300–301 para [27]:

> "[27] There has been judicial debate about whether, for the purposes of Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is "unable to pay its debts". Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f)."

See also **Lamprecht v Klipeiland (Pty) Ltd [**[2014] JOL 32350 (SCA)] at paragraph [16] where the following was stated:

> "[16] I have already found that the agreement [that] was made an order of Court by Kruger AJ was valid. This leads me to find that the respondent conceded that the appellant had *locus standi*, that he was a creditor for a sum no less than R100 and further that it was due and payable. There is no dispute that although the section 345(1)(a) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the appellant. To my mind, the jurisdictional requirements set out in section 345(1)(a) have been met. As stated by Malan J (as he then was) in *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W) at 428B-C:
>
> > 'The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (*Ter Beek*'s case *supra* at 331F). If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.'

The following remarks made in **Absa Bank Ltd v Rhebokskloof (Pty) Ltd** [1993 (4) SA 436 at 440F] are instructive:

> "The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in **Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd** 1962 (4) SA 593 (D) at 59 7E-F:
>
> > 'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'
>
> Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, *ex debito justitiae*, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; **Sammel and Others v President Brand Gold Mining Co Ltd** 1969 (3) SA 629 (A) at 662F)."

[9] As indicated in paragraph [5] above, it was contended on behalf of the respondent that the corporation is commercially solvent and is able to meet its day-to-day liabilities, that it has liquid assets or readily realisable assets out of the proceeds of which it is able to pay its debts. In the same vein however, the respondent concedes that it is not able to pay its debts

timeously. It is evident that the agreements were cancelled in April 2017 due to the fact that respondent had fallen into payment arrears in respect of the five (5) agreements. The present proceedings were instituted in July 2017. The opposing affidavit was deposed to in September 2017 wherein it was conceded on behalf of the respondent that it was unable to pay debts timeously. It is clear therefore that the respondent's contention that it is able to pay its debts is not supported by the evidence, which includes respondent's own admission.

[10] The applicant has, in my view, succeeded in making out a case for the winding-up of the respondent on the basis that the respondent is unable to pay its debts.

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Rich NO and others v Rich Properties (Pty Ltd) and others

[2017] JOL 38592 (GP)

(No paragraph numbers)

Application for liquidation in terms of section 344(h) of the Companies Act 61 of 1973 on the ground that it is just and equitable.

Court has a discretion to refuse a liquidation order even though the applicant may make out a case that it would be just and equitable to do so.There is no burden on the respondent to establish on a balance of probabilities that the applicant for liquidation had another remedy available and was unreasonable in seeking the liquidation of the company rather than pursuing that other remedy.

The court held that it retained a discretion to refuse a liquidation order even though the applicant may make out a case that it would be just and equitable to do so. The main and only ground of appeal of any substance is that the court erred in failing to find that there is an *onus* on the respondents to establish on a balance of probabilities that the appellants had another remedy available to them and were unreasonable in seeking the liquidation of the company rather than pursuing that other remedy. (Page 5)

Ponnan JA stated in **Apco Africa (Pty) Ltd an another v Apco Worldwide Inc**, 2008(5) SA 615 SCA that subsection 344(h) of the Act postulates not fact, but only a broad conclusion of law, justice and equity as a ground for winding-up. The learned judge of appeal continued:

> "It is well settled that the subsection giving power to the court to wind up a company on the just and equitable ground is not confined to cases in which there are grounds analogous to those mentioned in other parts of the section. . . . Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances that had to be borne in mind in considering whether a case comes within the phrase. . . . It must also be recognised that there is no necessary limit to the generality of the words 'just and equitable'."

The approach and reasoning of the court *a quo* cannot be faulted. The court was acutely aware of the depth of the rift in the family but as responsible adults they will just have to find a way to look past their personal resentments in order to manage the affairs of the companies to the best advantage of all concerned. (Page 6)

Extracts

The court *a quo* assumed without deciding that the applicants had made out a case for the winding up of the companies on the basis of the irregularities and mismanagement by Selma in the administration of the companies but added that it may be nothing more than a continuation of the way in which the companies had been managed by Maurice in the past. Unfortunately and despite the encouragement of the court *a quo*, the parties have been unable to settle their differences and find some equitable solution to the problem.

The court held that it retained a discretion to refuse a liquidation order even though the applicant may make out a case that it would be just and equitable to do so.

The main and only ground of appeal of any substance raised in the appellants' notice of appeal, is that the court erred in failing to find that there is an *onus* on the respondents to establish on a balance of probabilities that the appellants had another remedy available to them and were unreasonable in seeking the liquidation of the company rather than pursuing that other remedy. This point was further elaborated upon by Mr *Mundell* SC for the appellants in his written heads and in oral argument before us.

That approach is in accordance with the statement by Ponnan JA in Apco Africa (Pty) Ltd an another v Apco Worldwide Inc*,* 2008(5) SA 615 SCA [also reported at [2008] JOL 21804 (SCA) – Ed], that subsection 344(h) of the Act postulates not fact, but only a broad conclusion of law, justice and equity as a ground for winding-up. The learned judge of appeal continued:

> "It is well settled that the subsection giving power to the court to wind up a company on the just and equitable ground is not confined to cases in which there are grounds analogous to those mentioned in other parts of the section. . . . Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances that had to be borne in mind in considering whether a case comes within the phrase. . . . It must also be recognised that there is no necessary limit to the generality of the words 'just and equitable'."

In my view the approach and reasoning of the court *a quo* cannot be faulted. The court was acutely aware of the depth of the rift in the family but as responsible adults they will just have to find a way to look past their personal resentments in order to manage the affairs of the companies to the best advantage of all concerned.

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City Capital SA Property Holdings Limited v ChavonnesBadenhorst St Clair Cooper NO and Others

(85/2077) [2017] ZASCA 177 (1 December 2017)

Appointment of liquidator for companies declared a single entity in terms of section 20 of the Companies Act 71 of 2008.

Section 367 of the Companies Act 61 of 1973 Act confers on the Master, exclusively, the power to appoint a liquidator in the winding-up of a company. Paragraph 3 of the July order, which appointed the liquidators of four of the applicants as liquidators of the single entity, and the December order, which ordered the Master to comply with the July order, in its entirety, are nullities.

In July 2014 the Western Cape High Court made an order that five separate companies, all of which had been wound up, were declared 'a single entity as envisaged by sections 20(9), 22, 141(2)(c) and 141(3) of the Companies Act 71 of 2008 and that the respondents, who had already been appointed as liquidators in the winding-up of two of the five companies, would be the liquidators of the single entity. (Par [1])

Paragraph 3 of the order declared the appointed liquidators in the estates of four of the applicants to be the appointed liquidators of the combined company. (Par [14])

Section 20(9) of the 2008 Act provides:

> 'If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-
>
> (*a*) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
>
> (*b*) make any further order that the court considers appropriate to give effect to a declaration contemplated in paragraph (*a*).

Where the controllers of various companies within a group use those companies for a dishonest or improper purpose, and in that process treat the group in a way that

draws no distinction between the separate juristic personality of the members of the group, as happened in this case, this would constitute an unconscionable abuse of the juristic personalities of the constituent members, justifying an order in terms of section 20(9). [**Ex Parte Gore & others NNO** [2013] ZAWCHC 9; 2013 (3) SA 382 (WCC) para 33.] (Par [30])

The December order was founded on the relief sought in prayer 2 of the notice of motion in the application, which read:

> 'Ordering the Respondent [the Master] to immediately comply with an order of this Honourable Court, dated 8 July 2014 and which is attached hereto as annexure "A" and interpret the order as set out in paragraphs 14, 16 and 25 of the Founding Affidavit.' (Par [34])

The December order of court is vague. It does not tell the Master with any measure of certainty, let alone reasonable certainty, what he or she is required to do to comply with the order of July 2013 [**Minister of Water and Environmental Affairs v Kloof Conservancy** [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) par 13]]. The July order was never granted against the Master in the first place. It follows that the December order is both void for vagueness, and because it is inextricably linked to paragraph 3 of the July order, which declared that the appointed liquidators in four of the estates be the appointed liquidators of the combined company, which is a nullity. (Par [38])

It is trite that, as a general rule, what is done contrary to the prohibition of the law is of no effect and must be regarded as never having been done.[**Schierhout v Minister of Justice** 1926 AD 99 at 109; **Cool Ideas** [**Cool Ideas 1186 CC v Hubbard & another** 2014 (4) SA 474 (CC) para 90]. Whether non-compliance with a statutory prohibition nullifies an act must be determined according to the language of the relevant statute [**Cool Ideas** para 91]. Section 367 of the Companies Act 61 of 1973 Act confers on the Master, exclusively, the power to appoint a liquidator in the winding-up of a company. Inasmuch as paragraph 3 of the July order and the December order in its entirety, are nullities, a pronouncement to that effect is unnecessary. [***The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others***; 2012 (3) SA 325 (SCA).] Dividend Investment Scheme. (Par [39])

The Master's decision to appoint the respondents as liquidators of combined company constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000. [**Nel & another NNO v The Master (Absa bank Ltd & others intervening***)* 2005 (1) SA 276 (SCA) para 28.] As such, the decision by the Master is valid and stands until it is reviewed and set aside. [**Oudekraal Estates (Pty) Ltd v The City of Cape Town & others** 2004 (6) SA 222 (SCA) para 26.] The applicant has not sought to review the Master's decision appointing the respondents as liquidators; nor has it applied to set aside that certificate of appointment. Because the Master's appointment of the respondents as liquidators of the combined company remains unaffected, the finding that paragraph 3 of the July order and the December order in its entirety are nullities, would have no practical result as envisaged in section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013. For this reason the appeal falls to be dismissed. (Par [43] and [44])

Extracts

[1] On 8 July 2014 the Western Cape High Court made an order that five separate companies, all of which had been wound up, were declared 'a single entity as envisaged by ss 20(9), 22, 141(2)(c) and 141(3) of the Companies Act 2008'; that the five companies would henceforth be known as the Dividend Investment Scheme; and that the respondents, who had already been appointed as liquidators in the winding-up of two of the five companies, would be the liquidators of the Dividend Investment Scheme.

[2] The central issue in this appeal is whether the order appointing the existing liquidators of the two companies as liquidators of the Dividend Investment Scheme, was competent. The appellants say that it was not: they contend that only the Master of the High Court (the Master) has the power to appoint a liquidator and consequently, the order is a nullity.

[12] The grounds for the s 20(9) application were essentially the following. The five companies were part of an unsustainable syndication scheme which had engaged in reckless trading and defrauded members of the public. The use of the companies, or the acts by or on behalf of them, constituted an unconscionable abuse of their juristic personality, justifying an order that they should not be regarded as juristic persons as contemplated in s 20(9) of the 2008 Act. Members of the public had invested some R140 million into Zambezi Retail Park, whereas the property was worth only about R45 million, leaving investors with a loss of nearly R100 million. The syndication value of the property was about R125.5 million, its purchase price was some R107.3 million, and the promoter of the scheme had made a profit of more than R19 million, which immediately reduced the value of the investors' money. In addition, investors were liable for about R10 million raised through a mortgage bond. The only way they would recover anything in the liquidation proceedings was if the promoter and other companies in the scheme were held liable by holding the persons behind the promoter personally responsible for the losses incurred.

[13] Zambezi Business Park was run as a single indivisible commercial enterprise. The corporate identity of the five companies had not been maintained, their financial affairs were

not kept apart, and funds flowed to and from the various companies as investors were paid dividends promised to them. It was therefore contended that the five companies had to be treated as a single entity and the liquidators of Div-Prop 11 and Div-Prop 12 should be appointed as the liquidators of the Dividend Investment Scheme because they had extensive knowledge of the scheme, had already incurred costs, and their appointment was to the advantage of creditors.

[14] On 8 July 2014, Samela J made the following order in the section 20(9) application (the July order).

> ... 3. It is declared that the appointed liquidators in the estates of the 4th to 7th applicants to be the appointed liquidators of the combined company ("the Dividend Investment Scheme").

[23] Against the above background, the first issue is whether paragraph 3 of the July order, in terms of **which** the court ostensibly appointed the liquidators of the single entity, the Dividend Investment Scheme, was competent. Put differently, can a court order a person to act as the liquidator of a company when making an order under s 20(9) of the 2008 Act? If the answer to that question is 'no', then the second issue arises: whether, in the circumstances, that finding would have any practical effect as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013, given that the Master had on 10 December 2014 appointed the liquidators of the single entity.

[25] Section 20(9) of the 2008 Act provides:

> 'If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-
>
> (*a*) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
>
> (*b*) make any further order that the court considers appropriate to give effect to a declaration contemplated in paragraph (*a*).'

[30] Thus, where the controllers of various companies within a group use those companies for a dishonest or improper purpose, and in that process treat the group in a way that draws no distinction between the separate juristic personality of the members of the group, as happened in this case, this would constitute an unconscionable abuse of the juristic personalities of the constituent members, justifying an order in terms of s 20(9) of the 2008 Act. [**Ex Parte Gore & others NNO** [2013] ZAWCHC 9; 2013 (3) SA 382 (WCC) para 33.] This is not new. In **Ritz Hotel** [**Ritz Hotel Ltd v Charles of the Ritz Ltd & another** 1988 (3) SA 290 (A) at 315F.] this Court referred to English authority in which Lord Denning MR observed that, as regards piercing the corporate veil, there was a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group, especially where a parent company owns and controls the subsidiaries.[**DHN Food Distributors Ltd v Tower Hamlets London Burough Council** [1976] 1 WLR 852 (CA) at 860B; [1976] 3 All ER 462 at 467b-c.]

[34] This brings me to the December order. It was founded on the relief sought in prayer 2 of the notice of motion in that application, which read:

> ‘Ordering the Respondent [the Master] to immediately comply with an order of this Honourable Court, dated 8 July 2014 and which is attached hereto as annexure “A” and interpret the order as set out in paragraphs 14, 16 and 25 of the Founding Affidavit.’

[38] In the light of this, the December order is vague. It does not tell the Master with any measure of certainty, let alone reasonable certainty, what he or she is required to do to comply with the order of 8 July 2013 [**Minister of Water and Environmental Affairs v Kloof Conservancy** [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) par 13]]- which was never granted against him in the first place. It follows that the December order is both void for vagueness, and because it is inextricably linked to paragraph 3 of the July order, which is a nullity.

[39] It is trite that, as a general rule, what is done contrary to the prohibition of the law is of no effect and must be regarded as never having been done.[**Schierhout v Minister of Justice** 1926 AD 99 at 109; ***Cool Ideas*** [***Cool Ideas 1186 CC v Hubbard & another*** [2014] ZACC 16; 2014 (4) SA 474 (CC) para 90]. Whether non-compliance with a statutory prohibition nullifies an act must be determined according to the language of the relevant statute [Cool Ideas par para 91]. Section 367 of the 1973 Act confers on the Master, exclusively, the power to appoint a liquidator in the winding-up of a company. Inasmuch as paragraph 3 of the July order and the December order in its entirety, are nullities, a pronouncement to that effect is unnecessary. [***The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others*** 2011 ZASCA 238; 2012 (3) SA 325 (SCA).]

[43] The Master’s decision to appoint the respondents as liquidators of the Dividend Investment Scheme constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000. [**Nel & another NNO v The Master (Absa bank Ltd & others intervening***)* 2005 (1) SA 276 (SCA) para 28. As such, the decision by the Master is valid and stands until it is reviewed and set aside. [**Oudekraal Estates (Pty) Ltd v The City of Cape Town & others** 2004 (6) SA 222 (SCA) para 26.] City Capital has not sought to review the Master’s decision appointing the respondents as liquidators; nor has it applied to set aside that certificate of appointment.

[44] Consequently, because the Master’s appointment of the respondents as liquidators of the Dividend Investment Scheme remains unaffected, the finding that paragraph 3 of the July order and the December order in its entirety are nullities, would have no practical result as envisaged in s 16(2)*(a)*(i) of the Superior Courts Act. For this reason the appeal falls to be dismissed.

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Standard Bank of South Africa Limited v McCrae

[2018] JOL 39438 (GJ)

Act of Insolvency section 8(e) of the Insolvency Act 24 of 1936.

Where a party concedes insolvency, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion.

Section 8 of the Insolvency Act 24 of 1936 reads as follows:

> "A debtor commits an act of insolvency–
>
> . . .
>
> (e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts; . . ."

An advantage to creditors need not necessarily sound in money or a guaranteed dividend to each creditor. It may be established on other grounds; for example, the avoidance of an unfair distribution of a debtor's assets or an investigation of the debtor's affairs with a reasonable prospect that assets may be revealed as a result of the investigation. (Par 10)

The making of an offer by the debtor which entails release from his debts is an act of insolvency provided it involves, expressly or impliedly, an acknowledgment by the debtor that he is unable to pay such debts in full (see **Laeveldse Koöperasie Bpk v Joubert** 1980 (3) SA 1117 (T) at 1125–1126 and cases there cited). (Par [12])

The Legislature cannot have intended there to be a commission of an act of insolvency under section 8(e) where negotiations for the settlement of a dispute take place in a normal commercial context to "get a better or more satisfactory deal" on a transaction and there is no indication thereby that the party so entering into such negotiations is doing so because he is unable to pay his debts. The essence of each of the acts of insolvency is that, by the particular conduct, the debtor has intended to evade or delay the payment of his debts (see **Abell v Strauss** 1973 (2) SA 611 (W); **Berrange NO v Hassan and another** 2009 (2) SA 339 (N) – unaffected by this case on appeal in **Hassan and another v Berrange** *NO* 2012 (6) SA 329(SCA)). (Par [13])

The test in relation to the debtor's intention is a subjective one, however such intention is established "by a process of inferential reasoning and is not dependant on the mere *ipse dixit* [assertion without proof] of the debtor". In determining whether the requisite intention existed the court must:

> ". . . weigh up all the relevant facts and circumstances in order to determine what, on a balance of probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of the debtor" (see ***Hassan and another v Berrange NO*****,** *supra*, at paragraph [37]). (Par [14])

In **ABSA Bank Limited v Hammerle Group (Pty) Limited** 2015 (5) SA 215 (SCA) at paragraph [13] the Supreme Court of Appeal stated:

> "It is true that as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure . . . regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency . . . public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings is a matter which by its very nature involves the public interest. A *concursus creditorum* is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged." (Par [16])

Innes CJ in **De Waardt v Andrew & Thienhaus Limited** 1907 TS 727 at 733 stated the following:

> "Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him . . . Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes." (Par [24])

It has been established at least *prima facie* at this stage that the e-mail constitutes an offer to make an arrangement with the applicant to release him partially from his debt and that he has thus committed an act of insolvency; that there is a substantial sum owing to the applicant and, that it will be to the benefit of the respondents creditors that the respondent be sequestrated, at very least so that the true state of his affairs can be investigated and his estate protected by a trustee. (Par [29])}

Extracts

[8] The applicant relies on section 8 of the Insolvency Act 24 of 1936, which reads as follows:

> "A debtor commits an act of insolvency–
>
> . . .
>
> (e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts; . . ."

[10] An advantage to creditors need not necessarily sound in money or a guaranteed dividend to each creditor. In certain circumstances (often when the financial situation of a debtor is unknown to his creditor) an advantage to creditors may be established on other grounds; for example, the avoidance of an unfair distribution of a debtor's assets or an investigation of the debtor's affairs with a reasonable prospect that assets may be revealed as a result of the investigation.

[12] The making of an offer by the debtor which entails release from his debts is an act of insolvency provided it involves, expressly or impliedly, an acknowledgment by the debtor that he is unable to pay such debts in full (see **Laeveldse Koöperasie Bpk v Joubert** 1980 (3) SA 1117 (T) at 1125–1126 and cases there cited).

[13] The Legislature cannot have intended there to be a commission of an act of insolvency under section 8(e) where negotiations for the settlement of a dispute take place in a normal commercial context to "get a better or more satisfactory deal" on a transaction and there is no indication thereby that the party so entering into such negotiations is doing so because he is unable to pay his debts. The essence of each of the acts of insolvency is that, by the particular conduct, the debtor has intended to evade or delay the payment of his debts (see *Abell v Strauss* 1973 (2) SA 611 (W); *Berrange NO v Hassan and another* 2009 (2) SA 339 (N) – unaffected by this case on appeal in *Hassan and another v Berrange NO* 2012 (6) SA 329(SCA) [also reported at [2006] JOL 17346 (SCA) – Ed]).

[14] The test in relation to the debtor's intention is a subjective one, however such intention is established "by a process of inferential reasoning and is not dependant on the mere *ipse dixit* of the debtor". In determining whether the requisite intention existed the court must:

> ". . . weigh up all the relevant facts and circumstances in order to determine what, on a balance of probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of the debtor" (see *Hassan and another v Berrange NO*, *supra*, at paragraph [37]).

[15] An offer is one within the purview of section 8(e) of the Insolvency Act notwithstanding that it purports to have been made "without prejudice".

[16] In *ABSA Bank Limited v Hammerle Group* (*Pty*) *Limited* 2015 (5) SA 215 (SCA) [also reported at [2016] JOL 33570 (SCA) – Ed] at paragraph [13] the Supreme Court of Appeal stated:

> "It is true that as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure . . . regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency . . . public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings is a matter which by its very nature involves the public interest. A *concursus creditorum* is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged."

[24] As stated above, on 25 May 2017 a consent order was issued by this Court in terms of which, in essence, in full and final settlement of these proceedings, the respondent would make payment to the applicant of the sum of R3,5 million by no later than 15 July 2017.

The supplementary answering affidavit and the other new matter, is aimed, in the main, at demonstrating that the respondent's assets far exceed his liabilities, so that he is not insolvent. This notwithstanding, the respondent has failed to make payment to the applicant

of the settlement figure contained in the consent order or any portion thereof. This is not disputed. In the face of this glaring failure, the protestations of wealth ring somewhat hollow. It is worth repeating the oft-quoted *dictum* of Innes CJ in *De Waardt v Andrew & Thienhaus Limited* 1907 TS 727 at 733:

> "Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him . . . Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

[28] The respondent did not pay the debt notwithstanding that there does not appear to be any defence that the amount claimed is owing by him. He then made an offer which was substantially less than the amount owing. There was no indication of any attempt to engage in a negotiation process in the context of the offer. In fact, when there was eventually a negotiation process which occurred in the course of the application for sequestration which did result in settlement the amount was still not paid. The respondent furthermore, admits that he could not pay this agreed lesser amount. This inability to pay even the compromised debt is compelling evidence that the offer was made in the first place on the basis of inability to pay.

[29] In my view, it has been established at least *prima facie* at this stage that the e-mail of 5 May 2017 constitutes an offer by the respondent to make an arrangement with the applicant to release him partially from his debt and that he has thus committed an act of insolvency; that there is a substantial sum owing to the applicant and, that it will be to the benefit of the respondents creditors that the respondent be sequestrated, at very least so that the true state of his affairs can be investigated and his estate protected by a trustee.