REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

27/9/13

CASE NO: 35201/2013

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

28/09/2013
DATE

SIGNATURE

In the matter between:

HOMEZ TRAILERS AND BODIES (PTY) (under supervision) Applicant

and

STANDARD BANK OF SOUTH AFRICA LTD Respondent

J U D G M E N T

MNGQIBISA-THUSI J:

1. The applicant is seeking the following relief:

1.1 an order declaring:

1.1.1 that the applicant's obligations in terms of an overdraft facility the respondent granted to the applicant, are suspended for the duration of the business rescue proceedings;

1.1.2 that all the respondent's obligations in terms of the overdraft facility are not suspended for the duration of the business rescue proceedings.

1.2 that the respondent be ordered to restore full use of account number 60698209, held at Hillcrest Branch, to applicant for the duration of the business rescue proceedings; and

1.3 a cost order against the respondent.

[2] During May 2009 the respondent granted the applicant an overdraft facility in terms of an agreement concluded between the parties. The agreement made provision, *inter alia*, for the following:

2.1 that the applicant's initial credit limit would be R50 000.00, which could be increased at the request of the applicant (clause 1.1.1 of Part A of the agreement). During January 2012 the credit limit on the overdraft facility was increased to R470 000.00.

2.2 that the respondent would be entitled, *inter alia*, to suspend or reduce the credit limit in the event of a deterioration in the applicant's financial position or if there is a change in the control or ownership of the

applicant, (clause 10.1.4 read with clause 10.1.11 and clause 10.2.2 Part B of the agreement).

2.3 that the applicant was obliged to inform the respondent in writing of any change in the control or ownership of the applicant (clause 15.5 of Part A of the agreement).

[3] On 15 May 2013 the applicant's board of directors adopted a resolution in terms of section 129 (1) of the **Companies Act** 71, 2008 ("the Act"), initiating business rescue proceedings. On 22 May 2013 the applicant filed a notice beginning business rescue proceedings together with a copy of the resolution adopted on 15 May 2013 and a supporting affidavit, with the Companies and Intellectual Property Commission ("the Commission").

[4] As appears from the applicant's replying affidavit, on 28 May 2013 it sent a notice to its creditors informing them about the business rescue proceedings in accordance with section 129(3) of the Act.

[5] On 29 May 2013, Mr Marius Hamel ("Hamel"), the deponent to the applicant's founding affidavit, was appointed as the applicant's business rescue practitioner ("the practitioner") in terms section 129(4); and a notice of his appointment as practitioner was filed with the Commission on 30 May 2013.

[6] As appears from the respondent's answering affidavit, the respondent got knowledge of the applicant's business rescue proceedings on 30 May 2013 through an email sent by the Commission informing the banking sector that

the applicant was placed under business rescue proceedings. As a result, on 30 May 2013 the respondent loaded a "stop all debits" and "lock-up" status on the applicant's account and informed the applicant that:

6.1 its account is suspended; and

6.2 should the applicant need to use its suspended overdraft facility, the practitioner should confirm how the debt would be repaid by publishing a business rescue plan.

[7] On 4 June 2013, Hamel purported to invoke the provisions of section 136(2)(a) of the Act, by making a ruling that for the duration of the business rescue proceedings the applicant's obligations towards, among others, the respondent, were suspended. It is the applicant's contention that the ruling made by Hamel has the effect that the respondent's obligations towards the applicant under the credit facility agreement were not suspended.

[8] Despite Hamel's ruling, the applicant's overdraft facility remains suspended. The refusal by the respondent to lift the suspension of the applicant's overdraft facility, led to the applicant launching these proceedings.

[9] The respondent raised as a point *in limine* the issue as to whether the failure by the applicant to notify the respondent, as an affected person, about the resolution within 5 (five) days of its adoption and filing in terms of section 129(3) of the Act, results in the resolution lapsing and being a nullity.

[10] A further issue to be determined is whether the ruling made by the practitioner in terms of section 136(2)(a) of the Act empowers the practitioner to enforce obligations in favour of a company to be effective even though the company is under business rescue.

Point in limine

[11] Section 129 (3) of the Act reads as follows:

> "(3) Within five business days after a company had adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must –
>
> (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded: and
>
> (b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment."

[12] It is common cause that the respondent is an affected person in terms of the Act. Furthermore, it is common cause that the notice sent to the applicant's creditors on 28 May 2013 was never sent to the respondent.

[13] Section 129(5) of the Act provides that:

> "(5) If a company fails to comply with any provision of subsection (3) or (4)-
>
> (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
>
> (b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which

the lapsed resolution was adopted, unless a court, on good case shown on an *ex parte* application, approves the company filing a further resolution."

[14] It is the respondent's view that as an affected person, the applicant was obliged to inform it of its resolution to begin business rescue proceedings. That since the applicant failed to comply with the provisions of section 129(3) the resolution taken on 15 May 2013 and filed with the Commission on 22 May 2013 had therefore lapsed and was a nullity in terms of section 129(5).

[15] It was conceded on behalf of the applicant that even though notices were sent to other creditors of the applicant, such notice was not sent to the respondent. However, counsel for the applicant argued that the applicant has substantially complied with the provisions of section 129(3) in view of the fact that the respondent did get knowledge of the business rescue proceedings by 29 May 2013 through the Commission. However, even though the respondent does not dispute having knowledge of the resolution, it contends that it only became aware of the resolution on 30 May 2013 and not on 29 May 2013 as contended by the applicant. Furthermore, applicant argued that the respondent, having had knowledge of the applicant's resolution, had waived its rights which it could have exercised in terms of section 130. Section 130(1) of the Act reads as follows:

"(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a 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 has failed to satisfy the procedural requirements set out in section129."

[16] In support of its contention that it has substantially complied with the provisions of section 129(3), counsel for the applicant referred the court to three decisions, two from this division and the third from the Gauteng High Court, Johannesburg Division, dealing with what amounts to compliance with the provisions of s129(3) and (4) of the Act. The unreported judgements of (i) *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique Et Technologies Embarquees SAS and three others*, Case number 72522/11, delivered on 6 June 2012 and (ii) *Madodza (Pty) Ltd (in business rescue) v ABSA Bank Limited and five others*, Case number 3890-6/12, delivered on 15 August 2012 dealt with the failure by a company, after having taken a resolution, to appoint a business rescue practitioner within the stipulated time period. In both these matters the court held that the provisions of section 129(3) and (4) were held to be peremptory and that non-compliance leads to the resolution lapsing and being a nullity. In the *Advanced Technology* matter (supra), Judge Fabricius held at paragraph 26 that:

> "The purpose of s129(5) is plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to "substantial compliance". The requirements contained in the relevant sub-sections were either complied with or they were not."

[17] In *Credit Suisse Group AG and Another v Petrus Francois van Steen NO and Another*, Case number 3624/2013, delivered on 27 February 2013, the Gauteng Johannesburg Division, the facts of which are similar to the facts in matter except that in the *Credit Suisse* matter (*supra*), although some creditors (referred to as note holders) were not notified about the resolution taken, they became aware of the resolution within the prescribed period as set out in section 129(3), whereas in this matter the respondent only knew about the resolution outside the prescribed time period.). In *Credit Suisse* matter the court placed reliance of its decision on section 6(9) of the Act which reads as follows:

> "(9) If a manner of delivery of a document, record, statement or notice is prescribed in terms of this Act for any purpose
>
> (a) it is sufficient if the person required to deliver such document, record, statement or notice does so in a manner that satisfies all of the substantive requirements as prescribed; and
>
> (b) any deviation from the prescribed manner does not invalidate the action taken by the person delivering that document, record, statement or notice unless the deviation
>
> (i) materially reduces the probability that the intended recipient will receive the document, record, statement or notice; or
>
> (ii) is such as would reasonably mislead a person to whom the document, record, statement or notice, or is to be, delivered."

[18] The court held stated at paragraph 19 that:

> "19. .... The section 6(9) and also from the definition of "publish a notice" in the Companies regulations 2010 recognise that what is of paramount importance in respect of the delivery of notices to

> persons entitled thereto is not whether or not delivery has taken place strictly in accordance with the prescribed manner, but whether or not, as a fact, the person to whom delivery ought to have been affected received the requisite notice."

[19] The court being of the view that the purpose of section 129 is "to protect the rights of affected persons so that they could not be bypassed in an attempt by a company to opt for the option of business recue without such affected party having had the opportunity of utilising the provisions of section 130 ... in order to set aside any such resolution opting for a business rescue", and the fact that the creditors who were not notified supported the resolution, the court came to the conclusion, in the context of the facts in that matter, that the company had substantially complied with the provisions of section 129 (3) of the Act.

[20] The *De Suisse* matter is distinguishable from the current matter in that the respondent got knowledge of the resolution outside the prescribed 5 days period. I am of the view that and_am in support of the *Advanced Technologies and Madodza* decisions that strict compliance with the provisions of section 129 is required. I am of the view that the applicant did not comply with the provisions of section 129 and therefore the resolution taken on 15 may 2013 has lapsed and is a nullity. The respondent's point *in limine* is upheld.

[21] Should I be wrong on the conclusion on the *point in limine*, the next issue to be determined is whether the ruling made by the practitioner in terms of section 136(2) of the Act empowers the practitioner to enforce obligations

against a company to be effective even though the company is under business rescue.

[22] It is the applicant's contention that the business rescue practitioner can, in terms of a ruling it made under the provisions of section 136(2)(a) of the **Companies Act** oblige the respondent to give the first applicant access to an overdraft facility it had suspended when the first applicant initiated business rescue proceedings.

[23] Section 136 (2)(a) of the Act provides that:

> "(2) Subject to section (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-
>
> (a) Entirely, partially or conditionally suspend for the duration of the business rescue proceedings, any obligations of the company that-
>
> (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
>
> (ii) would otherwise become due during those proceedings."

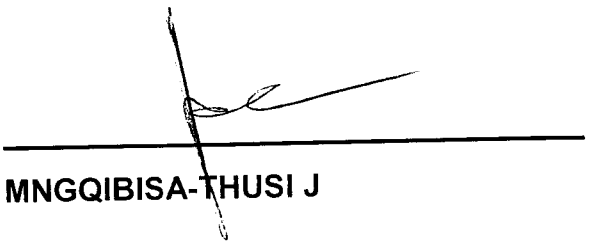
[24] It is the applicant's contention that the practitioner's ruling in terms of section 136(2)(a) on 4 June 2013, had the effect of suspending the respondent's right to apply set-off, *ex lege*. It was submitted on behalf of the applicant that by suspending the overdraft facility, the respondent had compromised the business rescue proceedings in that, as a result of the applicant's lack of cash-flow, it would be unable to process orders for trailers in the amount of R10m. Counsel argued that this was contrary to the spirit of business rescue

proceedings which was to give companies in financial distress some reprieve from being liquidated.

[25] From the reading of section 136(2)(a), it is clear, as correctly pointed out by counsel for the respondent that on a correct interpretation of the section, only the obligations of the company in distress are susceptible to be suspended by the practitioner. Furthermore, from reading of the agreement between the parties I am of the view that the respondent was within its rights to suspend the overdraft facility as the applicant's resolution amounted to an actual change in the management of the applicant and a deterioration in its financial position. I have also taken into account that the ruling made by Hamel was made after the applicant's had already suspended the overdraft facility and it cannot be said that a ruling in terms of the section was intended to have retrospective effect.

[26] Accordingly the following order is made:

'The application is dismissed with costs.



MNGQIBISA-THUSI J

Appearances:

For the Applicant	:	Adv G C MULLER SC
Instructed by	:	Hamel Attorney

For the Respondent	:	Adv K W LUDERITZ SC
Instructed by	:	Norton Rose Fulbright South Africa