IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 36777/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

15/6/2017

DATE SIGNATURE

In the matter between:

LAWRENCE MAROOS	1ST APPLICANT
ZETABOA TRADING	2ND APPLICANT
ALL OTHER APPLICANTS AS SET OUT IN ANNEXURE "A" TO THE NOTICE OF MOTION	3RD TO 61ST APPLICANTS

And

GCC ENGINEERING (PTY) LTD	1ST RESPONDENT
GERT LOUWRENS STEYN DE WET N.O.	2ND RESPONDENT
MOHAMMED YASEEN KHAMMISSA N.O.	3RD RESPONDENT
FRANS LANGFORD N.O.	4TH RESPONDENT
KGASHANE CHRISTOPHER MONYELA N.O.	5TH RESPONDENT
COMPANIES AND INTELLECTUAL PROPERTY	

COMMISSION 6TH RESPONDENT

JUDGMENT

Fabricius J,

1.

In this urgent application set down for 6 June 2017, but heard on 9 June 2017, the Applicants sought the following orders:

2. "That Mr Etienne Naude be appointed as manager of the First Respondent, with full powers and capacity of a board of directors of a company, to manage the First Respondent from date hereof until date of finalization of a business rescue operation for the business rescue of the First Respondent, currently pending.

3. That Mr Etienne Naude be ordered to provide the Court hearing the business rescue application, with a full report of his management of the company over the interim period, with specific reference to the possibility of the First Respondent being rescued as a result of business rescue proceedings".

2.

This judgment only deals with the legal issue that was raised and in respect of which, so I was told, no previous decision of the High Court could be found. This judgment does not deal with urgency, which I accepted, nor with any other peripheral issue that was raised. At the time of the hearing of the application, the relevant business rescue application had been lodged and served.

3.

The Second, Third, Fourth and Fifth Respondents filed a counter-application and an Answering Affidavit. In the counter-application they sought an order that their powers as provisional joint liquidators be extended in terms of the provisions of S. 386 (4)

(a) of the ***Companies Act, 61 of 1973***, read with ***Schedule 5, Item 9*** to the ***Companies Act, 71 of 2008*** (as amended) to oppose this application and to file the relevant Answering Affidavit. In the alternative, I was asked to postpone the application *sine die* pending the directions of the Master of the High Court in this context. The Third Respondent has elected not to oppose the application, but filed a Notice to Abide. In that respect, there was no compliance with the provisions of s. 382 (1) of the ***Companies Act of 1973***, and accordingly the remaining Respondents sought the order that I have referred to in the counter-application. There was no dispute that I could grant such an order and under the present circumstances therefore I do so. This section reads as follows:

"382. Plurality of liquidators, liability and disagreement. – (1) When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.

(2) Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to

the Master who may thereupon determine the question in issue or give directions as to the procedure to be followed for the determination thereof".

4.

On 2 February 2017, the First Respondent was placed under Business Rescue and under the supervision of a business rescue practitioner in terms of the provisions of s. 131 of the ***Companies Act of 2008***. A Mr G. Vosloo was appointed as provisional business rescue practitioner and the liquidation application was withdrawn.

5.

On 3 May 2017, this Court issued an order in terms of which the business rescue was terminated and the Respondent was placed under liquidation in the hands of the Master in terms of s. 141 (2) (a) (ii) of the ***Companies Act***. The orders were subject to a rule *nisi* with the return date being 13 September 2017.

6.

Despite the new ***Companies Act of 2008*** being in operation, s. 9 of ***Schedule 5*** to this ***Act*** provides that Chapter 14 of the 1973 ***Companies Act*** continues to apply with respect to the winding-up and liquidation of companies under the ***Act***.

The effect of the grant of the provisional liquidation order was that the directors of the First Respondent ceased to be such functionally, officially and nominally, their powers and duties were terminated, and they were deprived of all control of the company's property.

See: ***Secretary for Customs and Excise vs Millman, N.O. 1975 (3) SA 544 (AD) at 552 H***.

7.

Applicants' argument:

Applicants' argument is that where liquidation proceedings are suspended, the liquidators cannot act. The assets of the company fall under the control of the Master. The ***Act*** is silent as to who would manage the business of the Company.

The submission was that such power would re-vest in the director, who could then appoint a manager.

Section 131 (6) of the ***Companies Act of 2008***, reads as follows: "If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –

a) The court has adjudicated upon the application; or

b) The business rescue proceedings end, if the court makes the applied for".

I was also referred to the provisions of s. 361 of 1973 ***Act***, which provides that the First Respondent's property shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. If the office of liquidator is vacant, or if the liquidator is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master.

8.

Before dealing with the abovementioned statutory provisions, it is necessary to refer to Applicants' Replying Affidavit where the following was said, and this actually encapsulates the argument raised by Mr N. Maritz SC, on behalf of Applicant: "In the alternative to the relief claimed in prayers 2 and 3 of the Notice of Motion the Applicants under the prayer for alternative relief will request the Court to make a finding and declaration that the effect, in terms of the provisions of s. 131 (6) of the ***Companies Act 2008***, of an application having been made in terms of s. 131 (1), is that the liquidation proceedings, including the exercise of any powers by the provisional liquidators, have been suspended, and that I as a sole director of the First Respondent have been re-vested with the power and authority to manage the business and affairs of the First Respondent pending the final determination of the pending business rescue application".

Mr N. Maritz SC submitted that this argument and submissions followed naturally from a proper interpretation of the relevant statutory proceedings, and was also in line with the purpose of business rescue proceedings. I was referred to ***Rentacor***

(Pty) Ltd v Rheede and Berman N.N.O. 1988 (4) SA 469 (TPD), where at 503 the Court held that by virtue of the suspension of the operation and the execution of the winding-up order in terms of ***Rule 49 (11) of the Uniform Rules*** of this Court, the Board of Directors of Rentacor had been re-vested with the control of the company's affairs, and the winding-up order, both in respect of its operation and its execution, was suspended pending the judgment on appeal and no longer operated. In that case the company had been placed under liquidation and the appointed liquidators had commenced the process of winding-up. The Appellate Division had however granted leave to appeal against the winding-up order, and hence the said suspension and the re-vesting of the control of the company's affairs in the hands of the directors.

9.

In ***Boschpoort Ondernemings v ABSA Bank 2014 (2) SA 518 (SCA) at par. [25]***, the Court said the following: "In terms of s. 131 (6) of the new Act, an application for business rescue proceedings to commence has the effect of suspending an

application for the liquidation of a company. The subsection provides that the suspension of the liquidation proceedings against the company operates until the court has adjudicated upon that business rescue application or the business rescue proceedings have come to an end". In ***PMG Motors Kyalami v First Rand Bank 2015 (2) SA 634 (SCA) at p. 640 C [12]***, the following was said: "Further, in terms of the business rescue provisions of the new Companies Act 71 of 2008, a company in liquidation may be placed under business rescue by the court. Once an application to do so is launched, the liquidation is suspended until it is finalized. If an order is granted, the liquidation is suspended until the business rescue proceedings come to an end. During the time the liquidation is suspended, the company will resume trading so as to enhance the possibility of the business being rescued". I was asked by Mr N. Maritz SC: how one would give effect to this *dictum*? He supplied the answer: the assets of the company do indeed fall under the control of the Master, but the company, if it is to resume trading and to do business, must be under the direction of its previous director, the present Applicant. There is therefore a clear and logical distinction, so he submitted, between the assets of the company

and the trading aspect. According to him, the provisions of s. 131 of the ***Act*** suspend liquidation proceedings in every respect, and that means that the powers of the liquidators are suspended, and such powers are then re-vested in the directors of a company. The submission was that this was the only practical and business-like interpretation to be applied to the relevant provisions read together, inasmuch as the ***Act*** itself was silent who would be in control the business activities of the company once the liquidation proceedings were suspended.

There is no doubt that proper interpretation of a statute requires an approach that leads to a sensible and business-like result and promotes the apparent purpose of the particular statute.

See: ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA at 604 B***.

The purpose of business rescue orders is to provide for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. It is meant to be a flexible, effective process of extending the life-span of companies and businesses. The very scheme

of business rescue envisaged by the ***Act*** is aimed at fulfilling the objectives of providing for revival of a financially distressed company with all its attended social benefits. In the present matter a large number of employees are involved and the social benefit aspect is an important consideration when interpreting the ***Act*** so as to fulfil its stated purpose. An unduly restrictive approach in this context is not justified.

See: ***Dawid Jacques Richter v ABSA Bank Ltd [2015] ZASCA 100 (1 June 2015), at par. [15] and [16].***

It was also submitted that the mentioned dictum in ***PMG Motors supra*** was in line with the scheme of the ***Act***, although this was not the issue before that Court.

10.

Mr N. Maritz SC therefore argued that in order for a company to resume trading so as to enhance the possibility of the business being rescued, someone must obviously be vested with the power to manage the company and to conduct its affairs. The Master does not do so. The answer to the question posed was that the sole director of the company, being the First Applicant herein, would be re-vested

with the power and authority to manage the company, and he would then obviously be entitled to appoint a manager and to delegate to that manager the same powers and authority which he, a sole director of the company would have. He wished to appoint Mr Naude as manager and accordingly I would be able to make that order.

11.

It was added that to safeguard the interests of creditors, I should and could order that Mr Naude provide security to the satisfaction of the Master and that he also file monthly reports as to his activities and state of the company with the Master.

12.

Respondents' argument:

Mr C. A. Boonzaaier submitted that in the ***Richter decision supra***, the SCA did not consider the issues raised in this application, namely the assertion that no-one is in control of a company by virtue of the operation of s. 131 (6) of the 2008 ***Act***, or the assertion by a director that the assets and affairs of the company has re-vested

in him. He relied on an unreported judgment of ***Jansen van Rensburg N.O. and Another v Cardio-Fitness Properties (Pty) Ltd and Others [2014] JOL 31979 (GSJ)***. In that decision the factual situation was that the particular company had been provisionally liquidated and that the directors had therefore been divested of their responsibilities, duties and functions. A final liquidator had not yet been appointed and a business rescue practitioner had not been appointed. Kgomo J held that in his view an "unhealthy lacuna" existed in the Act. To avoid the negative consequences of such a lacuna, he held that the liquidation proceedings did not suspend the appointment of the joint liquidators. Section 131 (6) of the ***Companies Act of 2008***, was silent as to whether their powers were affected. It was his view that had the legislature intended that provisional liquidators would be relieved of control before a business rescue practitioner was appointed, it would have said so clearly and unambiguously. (par. [52]) It was his finding that it was not the intention of the legislature that the liquidated company at any stage be a "rudderless ship or a ship without a captain". The reasoning was that if the Respondents' contentions in that case were anything to go by, the suspension of the liquidation

proceedings meant the forthwith departure of the Applicants (the provisional liquidators). As no business rescue practitioner had yet been appointed as at date of argument in that case, then the First Respondent would remain without anybody to control and protect its assets and safeguard its takings.

Mr N. Maritz SC submitted that the judgment was clearly wrong in that it proceeded from the wrong premise. In terms of the provisions s. 361 of the 1973 ***Act***, property of the company shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. As far as the assets of the company were concerned, the ship was therefore not "rudderless". Even if no business rescue practitioner had been appointed as yet, the Master would control and protect the assets of the company.

13.

The judgment in the ***Jansen van Rensburg decision*** was delivered on 4 March 2014. In March 2015, the judgment in ***Knipe and Another v Noordman N.O. and Others 2015 (4) SA 338 (NCK)***, was delivered. It was held therein with reliance on

Richter v Bloempro CC 2014 (6) SA 38 (GP) that an application for business rescue does not suspend the completed liquidation proceedings and that provisional liquidators could continue with their functions. The ***Richter decision*** was overruled by the SCA in ***Richter v ABSA Bank supra***. That decision was delivered on 1 June 2015 and no reference appears in that judgment to the ***Knipe decision***. In ***Knipe supra***, the Court was also referred to the decision of ***Van Zyl v Engelbrecht N.O. 2014 (5) SA 312 (FP)***, in which Lekhale J stated that based on the provisions of s. 131 (6), a business rescue application suspended the liquidation proceedings and in turn the office of the liquidator. The Judge in ***Knipe supra*** did not agree with this judgment and its reasoning and regarded the facts as being distinguishable.

14.

Respondents' argument was therefore the following:

1. Upon an application being made in terms of s. 131 (1) of the 2008 ***Act***, liquidation proceedings are suspended in terms of s. 131 (6);

2. Section 131 (6) does not contemplate that the company is left with no-one in charge of its assets or affairs;

3. The powers and duties of a provisional joint liquidator are not rendered nugatory and are not suspended pending the outcome of the application for business rescue. In fact, the provisional joint liquidator is under a continued obligation to secure and preserve the assets pending the outcome of the business rescue application.

4. The ***Jansen van Rensburg decision supra*** was correctly decided;

5. Insofar as the business of the company in these circumstances is concerned, it appears impermissible for a company to carry on business where it has been placed under winding-up, and even where application for business rescue was brought. If it were allowed to do so, it would be trading in either insolvent circumstances or in circumstances where it is financially distressed.

6. Even if the First Applicant's contentions were correct, i. e. that the powers and duties of the provisional joint liquidator are suspended by virtue of s. 131 (6) of the 2008 ***Act***, the result would be that the provisional joint liquidator

would be unable to act. In such circumstances, the assets and affairs of the company would vest in the Master of the High Court in accordance with the provisions of s. 361 (2) of the 1973 ***Act***. Section 361 (2) reads as follows:

"In any winding-up of any company, at all times while the Office of liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master".

15.

My reasoning:

It must be remembered that the business rescue plan in s. 128 (1) (b) (iii), contemplates two objects or goals, a primary goal, which is to facilitate the continued existence of the company in a state of solvency and, a secondary goal which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company that would result from immediate liquidation.

See: ***Oakdene Square Properties v Farm Bothasfontein (Kyalami) 2013 (4) SA 539 SCA at 549 [par. 23]***.

In ***Richter v ABSA Bank supra***, it was also decided that "liquidation proceedings" include Court proceedings, and the complete process of winding-up or liquidation of a company. The complete process is in my view suspended by the relevant application for business rescue proceedings in accordance with the provisions of s. 131 (6). This would mean that the powers of the liquidators are suspended. The control of the assets falls under the Master of the High Court in accordance with the provisions of s. 131 (2). If the particular company trades, such as is envisaged by ***PMG Motors Kyalami (Pty) Ltd supra***, and the powers of the liquidators are suspended, the Master cannot assume the powers and obligations of the previous directors, and the powers in this context are re-vested with the particular directors, to control and manage the company pending the determination of the pending business rescue application, so as to promote the objects of the ***Act*** with all attended social benefits. I therefore, with respect, do not agree with the reasoning of the learned Judges in ***Jansen van Rensburg N.O. supra***, and ***Knipe supra***. In my

view, these decisions were wrongly decided and ought not to be followed. They do not achieve the purpose of the Act. Also, if there is a lacuna in an Act, it must be interpreted so as to achieve its stated purpose, and certainly not restrictively.

16.

Counsel for Respondents kindly warned me that if this interpretation were to be applied, it would in future lead to an abuse of proceedings inasmuch as interested parties dissatisfied with the liquidation order would connive to launch business rescue proceedings with the aim to avoid the consequences of liquidation proceedings. Unfortunately, there is an opportunity for deceit and dishonesty wherever one looks, but I am convinced that in the present context the Courts would be alert to such an approach, and would carefully examine all relevant facts and circumstances. A purposeful interpretation of a statute should not be defeated by the possibility of possible deceitful conduct in the future.

17.

As a result, the following order is made:

1. **In terms of s. 387 (3) of the Companies Act of 1973, the provisional joint liquidators (the Second, Fourth and Fifth Respondents) are authorized to oppose the present application and sign and file all necessary Affidavits.**
2. **Mr E. Naude is appointed as manager of the First Respondent, with the powers and capacity of a director of First Respondent, to manage its business affairs from date hereof until date of finalization of the business rescue application for the business rescue of First Respondent, currently pending.**
3. **The said Mr E. Naude is to provide security to the satisfaction of the Master of the High Court for the proper performance of his duties.**
4. **He may not dispose of any assets of First Respondent without the written consent of the Master or the consent of this Court.**

5. **Mr E. Naude is ordered to provide the Court hearing the business rescue application with a full report of his management of the company, and with specific detail as to the possibility of the First Respondent being rescued as a result of business rescue proceedings.**

6. **The costs of this application shall be costs in the business rescue proceedings.**

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JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 36777/17

Counsel for the Applicants: Adv N. Maritz SC

Instructed by: Lucienne Attorneys

Counsel for the 2nd, 4th & 5th Respondents: Adv C. A. Boonzaaier

Instructed by: Serfontein, Viljoen & Swart

Date of Hearing: 9 June 2017

Date of Judgment: 15 June 2017 at 10:00