Reportable:	**YES** / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

"IN THE HIGH COURT OF SOUTH AFRICA"
NORTH WEST DIVISION, MAHIKENG

CASE NO. M91/17

In the matter between:

STEFANUS GROVE PAPENDORF 1ST APPLICANT

CHRISTIAAN RUURD VAN DER WAAL N.O 2ND APPLICANT

and

ICE-BREAKERS 106 (PTY) LTD RESPONDENT

REASONS FOR JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] The first and second applicant in their capacity as trustees of the Stefanus Papendorf Trust, a shareholder in the respondent applied for the following:

1.1 That the respondent be placed under supervision to commence business rescue proceedings as contemplated in terms of section 131 of the Company's Act 71 of 2008.

1.2 That the Company and Intellectual Property Commission is asked and directed to appoint a duly qualified and experienced senior business rescue practitioner.

1.3 That the court order be published in a local newspaper in Rustenburg.

1.4 Costs

[2] The respondent opposed the application and raised a point in *limine* namely that the applicant failed to satisfy the mandatory requirement stipulated in Section 131(2)(b) of the Company's Act 71 of 2008 (the Act). This issue is canvansed fully hereinbelow.

[3] On the 19 October 2017 this court, heard argument on a point in *limine* and granted the following order:

"1. The point in *limine* is upheld;
2. The application is dismissed;
3. The applicant is to pay the costs of the application on an attorney and client scale;
4. Reasons for judgment will be handed down within 10 days from the date of this order".

POINT IN *LIMINE*

[4] The respondent alleged that the applicants' failed to notify each affected person of the application in the prescribed manner as provided in Section 131(2)(b) of the Act.

[5] Counsel for the applicants', Mr De Villiers submitted *inter alia* that:

5.1 The respondent did not raise the point in *limine* in its answering affidavit and further that in its answering affidavit, the respondent alleged that the allegation relating to service in terms of Section 131(2)(b) of the Act was immaterial.

5.2 The respondent is wrong in fact to aver that the shareholders were not notified as all the shareholders, save for one, signed supporting affidavits. The one shareholder did not depose to the affidavit because of personal ties to the applicants.

5.3 Similarly, Medicross who is a creditor was notified and actively participated in the application.

5.4 The Sheriff effected service of the application on the employees.

5.5 The applicant complied with all the requirements as the shareholders and employees were notified. The court order for publication will give sufficient notice to creditors.

[6] Counsel for the respondent Mr Swanepoel submitted *inter alia* that:

6.1 Section 131(2)(b) of the Act is a mandatory provision and it is compulsory that all affected persons should be notified in the prescribed manner. The obligation rest on the applicant, namely the Trust to notify each affected

person. The applicants' failed to furnish notification of the application to each affected person in the prescribed manner.

6.2 Affected persons are the shareholders, creditors, trade unions and employees. The applicant identified all the shareholders in its affidavits. At best for the applicant, the shareholders may be aware of the application. This is not in compliance with the mandatory requirement that they should be notified.

6.3 In respect of the employees, the sheriff's return was served on a clinic manager and not all the employees received notification. The applicant in paragraph 12.5 of his founding affidavit avers that the employees (more than one) will be notified by the sheriff although Mr de Vlilliers submitted there was only one employee. Hence on their own papers there is more than one employee.

6.4 The singular attempt at compliance with its duty to notify each affected person is contained in the applicants' founding affidavit, where the applicants have stated that "the Court Order should be published in a local newspaper in Rustenburg, which should suffice as notification to all affected parties and a copy of the application will be made available to any affected party requiring same". Publication of the court order does not suffice as notification to affected persons is required.

6.5 Mr Swanepoel relied on the case of ***Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others***[1] to submit that it is fatal if the applicants have not complied with Section 131(2)(b) and the present application falls to be dismissed.

1 2012(5) SA 596 SG

Evaluation

[7] Section 131(1) – (4) of the Companies Act reads:

"131 Court order to begin business rescue proceedings

(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings;

(2) An applicant in terms of subsection (1) must-

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1), the court may –

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that –

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation".

[8] An "affected person" is defined in section 128(1)(a) of the Companies Act:

"**'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."

[9] The prescribed manner of notification is regulated by regulation 123 and 124 of the Companies Regulations which requires delivery of a copy of the Notice and Resolution to every affected person in accordance with regulation 7. In terms of regulation 7 delivery may take place in a manner contemplated in Section 6(10) of the Act or in the manner set out in Annexure 3, Table CR3.

[10] Although the respondent failed to raise the issue of non-compliance of Section 131(2)(b) of the Act in its answering affidavit and questioned the relevance of Section 131 in its answering affidavit, this did not bar the respondent from later raising the point in *limine*. It is trite that a point in law can be raised at the hearing of a matter, and the validity of the point in law has to be considered.

[11] In ***Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others*** *supra*, the court considered the notification requirements in terms of regulation 124 and at paragraph 24 said the following:

"at the very least it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered".

[12] In ***Taboo Trading 232 (Pty) ltd v Pro Wreck Scrap Metal***[2], the court at paragraph 11.3 said:

> "The purpose of the notification required by s 131(2)(b), is to facilitate participation in terms of s 131(3), by affected persons in the hearing of the business rescue application. Creditors, being affected persons, in the business rescue application, also have a material interest in the liquidation proceedings. In my view, it is implicit in ss 131(2)(b) and 131(3), that reasonable notification must be given to affected persons. Short notice which renders participation in the hearing impossible, cannot be regarded as due compliance with s 131(2)(b). There is a strong policy justification for interpreting these provisions in a way which would not facilitate a dilatory or supine approach by an applicant in business rescue proceedings. Service of a copy of the application on the Commission, and notification of each affected person, are not merely procedural steps. They are substantive requirements, compliance with which is an integral part of the making of an application for an order in terms of s 131(1) of the Companies Act". (own emphasis)

[13] Section 131(2)(b) of the Act contains a mandatory provision that all affected persons should be notified. This is not just a procedural step but a substantive requirement. The applicants failed to satisfy this court that all affected persons were notified. They submit that all the shareholders are aware of the application as they filed supporting affidavits and furthermore there is a return of service as proof that the application was served on the employee. On their own version, there is a concession that not all the creditors were notified.

2 Taboo Trading 232 (Pty) Ltd v Pro Wreck Metal CC, Joubert v Pro Wreck Scrap Metal CC and Others 2013(6) 141 (KZP) paragraph 11.3

[14] The applicants did not in their affidavit state whether they are aware of any affected person(s) to whom notification of the application should be given. In *casu*, it is clear that the applicants took no steps to establish who the creditors or the employees are and to notify them of the application.

[15] On the applicants' own version there are several (interested) creditors of the respondent. All creditors should have received the required notification. As the court in ***Taboo Trading*** *supra*, said, creditors being affected persons have a material interest in the liquidation proceedings. In *casu*, as no notification was given to the creditors, they could not participate in the hearing of the application as provided in section 131(3) of the Act and accordingly prejudiced thereby. *Ex post facto* notification cannot in the circumstances suffice.

[16] The fact that the shareholders were made aware of the application and signed supporting affidavits does not absolve the applicant of its responsibility in terms of section 131(2)(b) of the Act. There is no evidence of when and how the shareholders gained knowledge of the application. "Reasonable notification" must be given to all affected persons and short notice which renders participation in terms of section 131(3) of the Act impossible is not due compliance with subsection (2)(b) of the Act[3]. The applicant failed to show that they notified the shareholders as provided in section 131(2)(b) of the Act.

[17] On persusal of the Notice of Motion and founding affidavit, it is apparent that the applicants failed in terms of Section 131(2)(b) of the Act to notify each affected person of the application in the prescribed manner. As stated supra,

3 Henochberg on the Companies Act 71 of 2008

the purpose for the notification is to enable affected persons to participate in terms of section 131(3) of the Act. The affected persons have been deprived of their statutory right to participate. I agree with counsel for the respondent that no reason exists in law and on the facts to deviate from the existing legal position in accordance with statutory requirements. Accordingly the point in *limine* is upheld.

[18] The respondent sought an order dismissing the application with a special punitive cost order against the applicants' in their representative capacities. The respondent alleged that the application was materially flawed, vexatious and vindictive. Further that the application was brought in a haphazard manner, that litigation was unfounded and there was a flagrant disregard of the Act.

[19] In general it can be stated that the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as, for example, that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous, or that he has acted unreasonably in his conduct of the litigation or that his conduct is in some way reprehensible.

[20] In my order I awarded costs to the respondent on an attorney and client scale for the following reasons:

20.1 The respondent raised a mandatory provision and the applicants' persisted with their opposition. The applicants' could have sought a postponement to enable service to be effected in compliance with the Act.

20.2 The applicants' contention that service of the court order would cure the need for prior notification was materially flawed. The opposition was in my view frivolous in view of the mandatory requirement and the defence was spurious[4]

20.3 The applicants' failed to provide any documentary proof that the affected persons were notified and instead relied on the fact that the shareholders were notified because they signed supporting affidavits, when in fact the shareholders were not notified by the applicant in accordance with the provisions of section 131(2)(b) of the Act.

[21] For the aforestated reasons, the point in *limine* was upheld, and the application was dismissed with costs on an attorney and client scale.

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N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 19 OCTOBER 2017
DATE OF REASONS	: 02 NOVEMBER 2017
COUNSEL FOR APPLICANT	: ADV R F DE VILLIERS
COUNSEL FOR RESPONDENT	: ADV P A SWANEPOEL
ATTORNEYS FOR APPLICANT	: SMIT STANTON INC. (Instructed by ZIETSMAN HORN ATTORNEYS.)

4 Friederich Kling GmbH v Continental Jewellery Manufacturers: Speidel GmbH Continental Jewellery Manufacturers 1995(4) SA 966 (C) at 974 G – 975 H

ATTORNEYS FOR RESPONDENT	: VAN ROOYEN TLHAPI WESSELS INC. (Instructed by VAN VELDEN DUFFEY)