IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE

CASE NO: 2544/2013

In the matter between:

BLUE STAR HOLDINGS (PTY) LTD Applicant

and

WEST COAST OYSTER GROWERS CC Respondent

JUDGMENT: 23 AUGUST 2013

GAMBLE, J:

[1] On 20 February 2013 the Applicant launched an application for the winding-up of the Respondent company on the basis that it is unable to pay its debts.

[2] When the matter came before the Motion Court on 27 February 2013 the Respondent opposed the application and an agreed order was taken referring the matter to the semi-urgent role for hearing on 6 May 2013. A timetable was agreed for the exchange of further affidavits and the filing of heads of argument.

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[3] The Respondent did not file its Answering Affidavit on time (it was some 6 weeks or more late) and the timetable had to be adjusted at the hearing on 6 May 2013 pursuant whereto it was further postponed for hearing on the semi urgent roll on 30 July 2013.

[4] When the matter came before me on that day an attorney from Coetzer Attorneys in Melkbosstrand (Mr Lou Coetzer) appeared and informed the Court that his partner who had been dealing with the matter (Mr Paul Myburg) was unable to argue the matter on that day. I accordingly stood the matter down for 2 days to enable Mr Myburg to prepare properly for argument.

[5] It came as little surprise that when the matter was called on 1 August 2013 Mr Myburg was not in Court and a Notice of Withdrawal was handed up by Mr Coetzer: the matter had by then all the hallmarks of dilatory practice by the Respondent. The Court was informed that the Respondent's sole member, Ms Nelia Lochner, was in Court to appear in person on behalf of the Respondent.

[6] In an emotional plea for an indulgence, Lochner informed the Court that the Respondent required a postponement of just 1 week to overcome its long-standing economic woes. She told the Court that an investor with very deep pockets was due to return from Zimbabwe shortly and that she required a postponement to save the Respondent and its various employees from bankruptcy. The indulgence was reluctantly granted much to the chagrin of the Applicant and the matter was accordingly adjourned until 8 August 2013.

[7] However, the dilatory tactics continued apace. Late on the afternoon of 7 August 2013 a new firm of lawyers, Van Aswegen Attorneys, fortuitously also from Melkbosstrand, filed a Notice of Appointment as Attorneys of Record. This appointment was supported by a resolution signed by Lochner on behalf of the Respondent.

[8] When the matter was called on 8 August 2013, Mr Blom of the Cape Bar appeared. He informed the Court that he did so as “a courtesy” as he put it, but that he had no instructions to represent the Respondent in the pending winding-up application. Rather, he handed up to the Court a copy of an application lodged that very morning with the Registrar under case number 12865/13. That case is an application by Lochner for the Respondent to be placed under the supervision of a business rescue practitioner in terms of section 131 of the Companies Act, 71 of 2008 (”the New Act”). The Notice of Motion was drafted in the long form and in the (unlikely) event that it is not opposed, it will be heard on the ordinary Motion Court roll on 27 August 2013.

[9] No submissions were advanced to the Court by Mr Blom in respect of the business rescue application, properly so because that would have been premature. Mr Tsegarie then addressed the Court on behalf of the Applicant and pressed for a provisional order of winding-up. It was of great concern to the court that Van Aswegen attorneys had filed an entry of appearance and failed (intentionally it must be inferred given the presence of Lochner and Mr Blom) to instruct counsel to

appear, or to appear themselves to represent their client. But that is a matter for consideration by the Law Society and not this Court.

[10] I should mention that after a break in the proceedings on 8 August 2013, Ms Lochner sought to appear on behalf of the Respondent and handed up a document which she believed was a Notice of Withdrawal on behalf of Van Aswegen Attorneys. However, the unsigned document related to another matter and was returned to Lochner, whose manipulative attempts to delay the matter had by then reached new heights.

[11] I asked Mr Tsegarie to then address the Court regarding the power to consider the granting of a provisional order of winding-up once business rescue proceedings had evidently been launched. Lochner played no further part in the proceedings although she and Mr Blom remained in attendance throughout.

[12] Mr Tsegarie referred the Court to section 132 of the New Act and in particular sub-para (1) (b) which provides as follows:

"***132 Duration of business rescue proceedings-"***

(1) Business proceedings begin when-…

(a) …

(b) An affected person applies to the court for placing the company under supervision in terms of section 131 (1)…."

[13] Section 132 must be read in conjunction with section 133 (1) of the New Act 133 whichis to the following effect:

"133 General moratorium on legal proceedings against company-

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commencedor proceeded with in any forum, except-

(a)with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business proceedings began;

(d) criminal proceedings against the company or any of its directors or officers;

(e) proceedings concerning in any property or right over which the company exercises the powers of a trustee; or

(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."

[14] No leave was sought from the Court in terms of section 133 (1) (b) and the remaining proviso's to the section do not apply here. In the circumstances, the application for voluntary winding-up of the Respondent may not be proceeded with "during business rescue proceedings".

[15] The issue that then arose was what was meant by the word “during” in section 133 (1)? Was it intended that the commencement of a business rescue application by the filing of the papers with the Registrar would stop any pending liquidation proceedings in their tracks? Or, did business rescue proceedings only commence when that application came before the Court for the first time? Or, was it only when the business rescue practitioner had been appointed by the Court in terms of section 131(4)?The relevant parts of that section read as follows:

“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) …

(3) …

(4) After considering an application in terms of sub-section (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 had 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 matter; or

(iii) it is otherwise just 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."

It will be noted from the a foregoing that section 131(4) (a) contemplates commencement of business rescue only upon the granting of an order to that effect.

[16] Mr Tsegarieopted for the second scenario and argued that the phrase *"applies to the court'* in section 132 (1) (b) meant that the general moratorium contemplated in section 133 onlycommenced when the application for business rescue actually came before theCourt for the first time. Only at that stage, it was argued, did business rescueproceedings begin. That submission does not accord with the express provisions of section 131 (4) (a) which have been set out above.

[17] I asked Mr Tsegarie with reference to the provisions of section 348 of the Companies Act 1973 ("the Old Act") and the body of case law that has developed thereunder[1], whether presentation of the application for business rescue to the Registrar of the Court for the issue thereof did not in fact constitute the requisite application to Court sufficient to interrupt the pending application for winding-up.

[18] Mr Tsegariesuggested that the use of the word "applies" in section 132 (1) (b) was an obvious attempt at distinction on the part of the Legislature, indicating that some time other than the presentation of the papers to the Registrar of the Court was the time that business rescue proceedings commenced. If the Legislature had intended that time to be when the papers were issued by the Registrar, it would have said so, argued Mr Tsegarie.

[1]See for example Wolhurter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd 1983 (3) SA 815 (O) at 816 D – E; Storti v Nugent and Others 2001 (3) SA 783 (W) at 794 E – F; Development Bank of South Africa Ltd. v Van Ronsburg and Others NO 2002 (5) SA 425 (SCA) at 431 para 8.

[19] Section 348 of the Old Act is cast in the form of a deeming provision and has been interpreted as ante-dating the consequences of the winding-up order to the date of lodgment with the Registrar[2]. The provisions of the New Act dealing with business rescue do not contain any such deeming provisions.

[20] The matter is not without its problems as Rogers AJ observed in Bruyns[3]. In a case like the present, a business rescue application might well be used by an obstructive debtor intent on avoiding the obviously inevitable as part of its ongoing strategy to hinder a creditor from pursuing its lawfully permissible goal, and, experience tells one that the business rescue proceedings may then be advanced by the debtor with a degree of tardiness inversely proportional to the alacrity with which it initially approached the court.

[21] The answer to the conundrum in this case I think lies in the provisions of section 131 (6) of the New Act:

*"**S 131 (6)** If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of sub-section (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 order applied for.

[2] Development Bank case *supra*, at para 8.
[3] Investec Bank Ltd v Bruyns2012 (5) SA 430 (WCC) at 433 para 12.

[22] The operative phrase for consideration in section 131(6) is **"at the time an application is made"**. Was the application for business rescue under case number 12865/13 "made" by Lochner on the morning of Thursday 7 August 2013, or will it only be "made" when the matter eventually comes before the Court some weeks (possibly only months) hence, after the potential objectors to business rescue have delivered their papers under section 131 (3) and Regulation 124, Lochner has replied thereto,heads of argument have been filed and the matter is allocated a date on the semi-urgent role?[4]

[23] Absent any directions in the provisions of the New Act dealing with business rescue as to how the word "**made**" (or its synonym "**make**") is to be understood, the word must be given its ordinary meaning in the context in which it appears in the statutory setting.

[24] The use of the word "**made**" in a statute was discussed in a series of cases relating to earlier compulsory motor vehicle insurance legislation. For present purposes it will surfaceto refer to the judgment of Theal Stewart JP in Modise[5] in which the earlier authorities are collected. The statutes in question in those cases permitted a person whose damages claim had statutorily prescribed to approach the court by way of an application for condonation. Such application was, however, completely barred

*"unless….the application is **made** within a period of 90 days after the date on*

[4]At the time of this judgment dates on the semi-urgent roll are being allocated in the second half of October 2013.

[5]Modise v Incorporated General Insurances Ltd 1985 (4) SA 650 (BGD) at 655 D

which the claim became prescribed".

(See section 24 (2) (b) (i) of the Compulsory Motor Vehicle Insurance Act, 56 of 1972 – emphasis added)

[25] The Court held in Modise that such an application was "**made**" when it was filed with the Registrar and served on the respondent. As to the proposition that the application was only "**made**" when first called in open court, the Court held that this interpretation was impractical given the time delays that would inevitably result once the application was lodged with the Registrar.It was conceivable, said the Judge President,that this could even occur only after the expiry of the 90 day period contemplated in that Act.

[26] In Zungu[6], which was cited with approval in Modise, Didcott J considered the same argument and dismissed it without more.[7]

> "*Strictly linguistic treatment perhaps elicits nothing less than a demand for every application to be moved by counsel in Court during the period of ninety days.*
>
> *The purist would properly insist that none was actually "made" unless and until that happened. The Courts, however, have balked at such a construction. It is far too pedantic for the sub-section to bear. I say this because of the artificial and incongruous results it would often produce. These were discussed in Kunene's case, supra,[8] and need not be repeated. Once one declines to go to such*

[6] Zungu v Kwazulu Government 1980 (1) SA 231 (D)
[7] 233 A – B
[8] 1976 (4) SA 782 (D)

lengths, one is left with a number of other stages in the progress of an application which suggest themselves of alternative criteria for the "making" of it."

[27] As to the method of interpretation, Ditcott J offered courts the following advice[9]:

"It should rather, in my opinion, take the words of the sub-section as it finds them, examine the particular course of the application before it, and decide whether the proceedings had gone far enough when the period expired for it to be said of them in all the circumstances, and aptly said, that the application was already "made" by then. Of crucial importance to the inquiry, of course, is the question whether they had advanced sufficiently to fulfill the sub-section's underlying purpose. This, as Friedman AJ mentioned in Peters case[10], was to ensure that such an application was brought to Court without delay. To that end an arbitrary deadline was set, and the applicant was certainly required to meet it when starting its application. There was not the same need for pressure on him, however, once the respondent or the Court itself had become involved, and he alone no longer controlled the pace of the proceedings."

[28] In Peters[11] Friedman AJ defined the crux of the approach as follows:

"After an application is launched, the Rules of Court make provision for the manner in which and the time limits within which that application is to be brought before Court. If the applicant does not avail himself of the time limits within which he can set the matter down for hearing, rights are afforded

[9] 233 D - F
[10] 1978 (2) SA 58 (D) at 60 G - H
[11] Peters v Union National South British Insurance Company Ltd 1978 (2) SA 58 (D) at 60 G - H

to the respondents to bring the matter before Court.But, once the application is launched, then it is within the respondent's power in terms of the Rules of Court to ensure that the matter is disposed of as expeditiously as the Rules permit. This being so, it seems to me that the rights both of the applicant and of the respondent are fully protected and that finality will be reached in the matter within a reasonable time."

[29] Applying this functional approach to section 131 (6), it is obvious that in this case the lodging of the application with the Registrar for the issue thereof, constituted the "making" of the application and the commencement of proceedings to place the company under business rescue (as opposed to the commencement of business rescue *per se*). It was fortuitously brought to the intention of the creditor's legal representatives an hour or so later when a copy was handed to them at Court. Service therefore occurred almost instantaneously and the application then fell within the purview of the Rules of Court, read with the New Act and the Regulations issued thereunder[12].

[30] To suggest that the application for business rescue only commences when it is called some day in open Court will lead to impractical and even absurd consequences. It would mean that the Court seized with the winding-up application could continue with its work and notionally even grant a final order of liquidation before the business rescue application is heard.

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[12] Regulation 124, for example, prescribes the method of service on parties affected by the lodging of the business rescue application.

[31] Our Courts are enjoined to interpret statutes purposively[13].This requires the Court to examine the objects and purport of an Act and to interpret legislation in conformity with the Constitution to the extent that this is reasonably possible. If one has regard to the various purposes of the New Act set out in Section 7 one finds under section 7 (k) that the New Act is intended to:

"(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders;"

Such a purpose is likely to be thwarted if the application for business rescue only commences when it is called in open Court sometime in the uncertain future when a winding-up order could already have been granted.

[32] In the circumstances, I am satisfied that the provisions of section 131 (6) of the New Act apply to this case and that the application for winding-up is therefore automatically suspended.

[33] Now that the application for business rescue has commenced, it is open to the applicant in this case, (as a creditor of the Respondent and therefore "an affected person" in the business rescue application) to hold Lochner to the time limits that govern the business rescue application, to ensure that dilatoriness does not persist (or at least is limited) and to ensure that the two applications are heard simultaneously. If the business rescue application has merit it may well be to the benefit of the Applicant, whose debt may be settled in full, or who may receive a better dividend than anticipated in liquidation. If there is no merit in the business

[13] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others 2001 (1) SA 545 (CC) at 558 para 22 – 559 para 24

rescue application, the Court hearing that application will be entitled, under section 131(4) (b),to put the Respondent out of itscommercial misery and place it under provisional liquidation.

[34] There are two further issues that merit brief mention at this stage. Firstly, there is a substantial amount of wasted costs that have been incurred by the Applicant as a result of Lochner's machinations.When the Court hearing the liquidation matter (together with the business rescue application) ultimately comes to consider the question of costs, Lochner will, in terms of the order I intend making, be given the opportunity to show cause why she should not bear those costs personally on the punitive scale.

[35] Secondly, the conduct of Messers Coetzer Attorneys and Van Aswegen Attorneys of Melkbosstrand in this matter has, *prima facie*been to subvert or hamper the proper administration of justice. Their conduct merits the attention of the Cape Law Society to whom a copy of this judgment will be forwarded.

[36] **In the circumstances the following order is made:**

A. The application for winding-up is suspended in terms of section 131 (6) of the Companies Act, 71 of 2008;

B. The application for winding-up is postponed to be heard together with the application for business rescue commenced in this Court under case number 12865/13;

C. The Registrar is directed to afford the parties, including any affected parties, to the business rescue application, the earliest possible set-down of that matter;

D. In the event that the applicant in the business rescue application (or any other party thereto) unduly protracts that matter or fails to take any steps timeously in terms of the Companies Act, the Regulations promulgated thereunder, the Rules of Court or the Practice Notes of this Division, the Applicant may approach this Court on 3 days notice to the relevant parties for appropriate urgent relief;

E. All wasted costs in this application occasioned by the commencement of the business rescue application are to stand over for determination by the Court hearing the business rescue application;

F. When liability for such wasted costs is determined, Respondent's sole member, Ms Nelia Lochner, is to show cause why she should not be held personally liable to pay, on the scale as between attorney and own client, the wasted costs of 6 May 2013, 30 July 2013, 1 August 2013 and 8 August 2013.

G. The Registrar is directed to send a copy of this judgment to the Director of the Cape Law Soceity.

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P.A.L Gamble, J

FOR APPLICANT	**:**	Adv. A. Coetzee
INSTRUCTED BY	**:**	Apollos and Associates
FOR RESPONDENT	**:**	Attorney Mr. Louw Coetzer
INSTRUCTED BY	**:**	Coetzer Attorneys

New Counsel 1 August 2013

FOR APPLICANT	**:**	Adv. G. Blom
INSTRUCTED BY	**:**	Apollos and Associates
FOR RESPONDENT	:	Adv. CMD Tsegarie
INSTRUCTED BY	**:**	Van Aswegen Attorneys and Conveyancers (New attorneys of record) c/o Heyns and Partners
DATES OF HEARINGS	**:**	30 July 2013; 1 August 2013; 8 Augustus 2013
DATE OF JUDGMENT	**:**	23 August 2013