REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2012/28972

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

_____ _____
DATE SIGNATURE

In the matter between -

ABSA BANK LIMITED APPLICANT

and

MAKUNA FARM CC RESPONDENT

JUDGMENT

BORUCHOWITZ J:

[1] The applicant applies for an order placing the respondent under final winding up. It is a substantial creditor of the respondent arising from various credit and loan agreements concluded between them. The respondent has

been trading under insolvent circumstances since at least 2008, when it was unable to comply with its contractual obligations to the applicant, and its outstanding indebtedness is approximately R14 million.

[2] On 24 April 2013, the applicant obtained an order placing the respondent under provisional winding up. The return date of the provisional order was extended on two occasions, until 26 August 2013.

[3] That the respondent is profoundly insolvent and liable to be wound up is uncontested. The respondent resists the grant of a final winding up order on the ground that its sole member has launched an application to place the respondent under supervision and commence business rescue proceedings in terms of s 131(1) of the Companies Act, 71 of 2008 ("the Act").

[4] Reliance is placed upon the provisions of s 131(6) of the Act, which read:

> "(6) If liquidation proceedings have 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 order applied for."

[5] At issue is whether this Court is precluded from granting a final winding up order in view of the suspension of "*liquidation proceedings*" referred to in the abovementioned section of the Act.

[6] The pivotal question for determination is whether the words "*liquidation proceedings*" as they appear in the section is a reference to the substantive application taken by a creditor to obtain a winding up order, or to the liquidation proceedings and processes that follow the grant of such order. If the reference in the section is to the application proceedings to obtain a winding up order, then clearly the suspension envisaged therein would apply to the grant of a final winding up order.

[7] The express wording of the section makes it is plain that the stay contemplated applies to "*liquidation proceedings*" that "*have already been commenced by or against the company at the time an application is made in terms of subsection (1)*". Winding up proceedings only commence, albeit with retrospective effect in terms of s 348 of the 1973 Act, once a winding up order is granted (see *Vermeulen & Another v Bauermeister and Others* 1982 (4) SA 159 (T) at 162A-B). In my view, the aforegoing is an indication that the words "*liquidation proceedings*" in s 131(6) refer to the proceedings that follow the grant of a winding up order, and not to the application to obtain a winding up order. See also in this regard, *Absa Bank Limited v Earthquake Investments (Pty) Limited* (unreported Case No 2012/63190), where a similar view is expressed by Makgoba J.

[8] The launch of business rescue proceedings does not alter the legal status of the company in liquidation but merely stays the implementation of the winding up order. The manifest purpose of the s 131(6) suspension is to delay implementation of the winding up order pending the outcome of the business rescue application, but the company remains under winding up, whether finally or provisionally. Support for this view is to be found in the judgment of Van der Bijl AJ in *Absa Bank Limited v Summer Lodge (Pty) Limited and Others* (unreported Case No 2012/63188), where the learned Judge said the following at para [19]:

> "[19] It is not the intention of the section to render a liquidation order to be set aside or to be discharged by the issue of a business rescue application in terms of section 131(6), but to rather suspend the order so as to delay the implementation of the order, and it can also not have the effect that the company can proceed carrying on business. The company remains to be finally or provisionally liquidated, as the case may be, until such time as the business rescue proceedings have been finalized."

[9] For these reasons I am of the view that it would be permissible for this Court to grant a final winding up order and to do so would not be inconsistent with the object and purpose of 131(6) of the Act.

[10] I turn now to the question of costs.

[11] When argument commenced on Monday, 25 August 2013, the Court was informed for the first time that business rescue proceedings had been launched

by the sole member of the respondent. Counsel for the respondent had emailed a practice note to my secretary at 16h59 on Friday, 23 August 2013, intimating that an application to place the respondent under business rescue proceedings had been launched but for obvious reasons this could and did not come to my attention. I accordingly directed that the application be postponed for argument and the filing of heads of argument until Wednesday, 28 August 2013. The respondent was directed to pay the wasted costs occasioned by the postponement. A rule *nisi* was also issued calling upon the respondent's attorney to show cause why it should not be ordered to pay such costs *de bonis propriis* jointly and severally with the respondent.

[12] To facilitate a proper understanding for the reasons for the issue of such rule, it is necessary to detail the following relevant facts.

[13] On 12 August 2013, I addressed a letter to the respondent which at that stage was unrepresented, in which it was pointed out that the applicant had filed a practice note and heads of argument as required in terms of paragraphs 9.8.1 and 9.8.2 of Chapter 9 of the Practice Manual of the South Gauteng High Court, but that the respondent had not complied with these provisions. The respondent was directed to deliver the required practice note and heads of argument by not later than 12h00 on Wednesday, 14 August 2013.

[14] On 13 August 2013, a letter was addressed to me by Attorneys Rothbart Ingham Inc in which it was stated that they had that day agreed to represent

the respondent; that their counsel was unavailable and that they would be seeking an indulgence from the applicant's attorneys for a postponement of the matter for at least two weeks to enable a supplementary affidavit, heads of argument and a relevant practice note to be filed. They also indicated that there was also a new development which required a supplementary affidavit to be served and filed. In paragraph 5 of this letter, the respondent's attorney stated the following: "*We are addressing a letter to the attorneys of record of the Applicant requesting this indulgence and once we know their response, we will revert to the Honourable Judge*."

[15] On 27 August 2013, Ms Elmarie Verster Ingham, the respondent's attorney, who practises as a director of Rothbart Ingham Inc, deposed to an affidavit in which she explained, among other things: That they had previously acted for the respondent but withdrew as attorneys of record on 4 February 2013 as the respondent had not placed the firm in funds; that they agreed to again represent the respondent on 13 August 2013 and on the same day addressed a letter to me and the attorneys representing the applicant; that in order not to incur the additional costs of briefing new counsel it was decided to retain the same counsel who had previously dealt with the matter who was then away on holiday; that on 13 August 2013 she received a response from applicant's attorneys indicating that they would not agree to a further postponement of the application.

[16] Ms Ingham further explains that in view of the fact that the applicant is the sole creditor of the respondent and that the Department of Agriculture, Forestry and Fisheries had indicated to the applicant that it was willing to assist the respondent with a turnaround strategy, a decision was taken to bring an application in terms of s 131 of the Act to place the respondent under supervision and commence business rescue proceedings.

[17] She consulted with counsel for the first time on Tuesday, 20 August 2013 and the application to commence business rescue proceedings was finalised on Friday, 23 August 2013.

[18] It is common cause that the business rescue application was served by the Sheriff on the Commission and on the applicant on 26 August 2013. One of the provisional liquidators was given notice of the application on 23 August 2013 at 16h30, and the other on 26 August 2013 at 08h30.

[19] Ms Ingham has failed to explain why the undertaking given to the Court in the fifth paragraph of her letter dated 13 August 2013 (which is reproduced above) was not complied with. Nor does she explain why there was non-compliance with the abovementioned practice directive of the South Gauteng High Court and the directive given by me in regard to the filing of a practice note and heads of argument. The filing by counsel of a practice note on Friday, 23 August 2013 at 16h59 clearly does not accord with the required practice.

[20] More importantly, Ms Ingham has failed to explain why no prior indication was given to the Court and the applicant of the fact that business rescue proceedings were about to be launched. The unheralded presentation of the application for business rescue was the clear cause of the postponement that occurred on 26 August 2013. Had the respondent served a practice note and heads of argument dealing with the business rescue application and its effect on the present proceedings immediately after the decision had been taken to launch the business rescue proceedings the postponement could have been avoided.

[21] Ms Ingham's failure to comply with her undertaking to the Court and to properly explain why the practice requirements regarding the filing of a practice note and heads of argument were not complied with merits censure. So, too, does her failure to explain why no prior indication was given to the Court and the applicant of the fact that business rescue proceedings were to be launched. This is sufficient reason for the grant of a punitive order as to costs.

[22] The wasted costs incurred in relation to the hearing on 26 August 2013 ought also not to be borne by the company in liquidation or its creditors.

[23] The following order is granted:

1. The respondent is hereby placed under final winding up.

2. The wasted costs occasioned by the postponement of the application on 26 August 2013 are to be paid *de bonis propriis* by Ms Elmarie Verster Ingham on the scale as between attorney and client. Such wasted costs are to be paid jointly and severally with the respondent.

_____

P BORUCHOWITZ
JUDGE OF THE HIGH COURT

DATE OF HEARING : 26 and 28 August 2013

DATE OF JUDGMENT : 30 August 2013

COUNSEL FOR THE APPLICANT : Adv M A BADENHORST SC

INSTRUCTED BY : SMIT SEWGOOLAM INC

COUNSEL FOR RESPONDENT : Adv JJ BITTER

INSTRUCTED BY : ROTHBART INGHAM INC