REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 34716/2016

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

25.11.16

Date:

WHG VAN DER LINDE

BP Southern Africa (Pty) Ltd	**Applicant**
and	
Intertrans Oil SA (Pty) Ltd	**First Respondent**
Samons, Thomas, NO	**Second Respondent**
Standard Bank of South Africa Ltd	**Third Respondent**
Nedbank Ltd	**Fourth Respondent**
FirstRand Bank Ltd	**Fifth Respondent**

Judgment

Van der Linde, J:

Introduction

[1] The first respondent is under business rescue by virtue of a resolution of 24 August 2016 in terms of s.129 of the Companies Act 71 of 2008, by its only two directors and shareholders. The second respondent is the appointed business rescue practitioner. The applicant is the major creditor. The business of the first respondent is the supply of petroleum product to the macro consumption retail market. It does so under two agreements with the applicant: one regulating the supply of fuel and the letting of premises, and one regulating the supply of lubricants.

[2] The first respondent does not supply product to filling stations. Its market is large volume consumers. In the past, its turnover has run up to R1b per year. Its creditors have historically been mainly the applicant, who provided a revolving credit line of upwards of R80m, and the banks, the third and fourth respondents, in the amount of approximately R1m each. Its only source of income is its debtors, and its margins are limited. According to its management accounts for 31 July 2016, its trade receivables were then R23m, but its trade payables, R69m.

[3] The applicant is an "affected person" as defined in s.128(1)(a)(i) of the Act, and in terms of s.130(1)(a)(ii) the applicant may apply, between the adoption of the resolution and the adoption of a business rescue plan in terms of s.152 of the Act, to set aside the resolution if there is no reasonable prospect for rescuing the company. A business rescue plan has not been published let alone adopted and, in fact, the first respondent has applied in terms of s.150 (5)(a) of the Act for an extension of the twenty five days after the appointment of the second respondent within which the business rescue plan has to be published. That application had been launched in the Gauteng Provincial Division of the High Court, and has

been set down for hearing there in December 2016. The application is to postpone the publication of the business rescue plan until early February 2017.

[4] Reverting to the first respondent's business: a Branded Distribution Agreement was concluded on 13 February 2014 and has a five year term until 31 January 2019. It ties the first respondent into an exclusive purchase for resale arrangement with the applicant on 30 days' credit, and in turn the applicant permits the first respondent to use its brand. The supply of fuel is at an agreed price, the competitive element residing in the extent of discounts or rebates that the applicant affords to the first respondent. The agreement provides for the letting of premises at an agreed rental and the lending of storage and dispensing equipment such as tanks, dispensors and pipelines to the first respondent.

[5] A Lubrication Distribution Agreement was entered into on 6 March 2014 and expires on 20 October 2017. It appoints the first respondent as a distributor of the applicant's branded lubrication oils and greases. This product is sold to the first respondent at agreed prices and on 30 days' credit. This agreement was expressly tied to the Branded Distribution Agreement.

[6] Finally, as security for the credit terms on which the applicant provided product to the first respondent, the latter ceded to the former on 12 October 2006 all it debtors, past and future, howsoever arising.

[7] The applicant now applies in its amended notice of motion for a liquidation of the first respondent, arguing that there is no prospect that the first respondent will recover. In the alternative it assumes the first respondent remains in business rescue, and applies for relief aimed principally at, if not expelling the second respondent altogether, then at least constraining him by requiring that he puts up security and appointing a joint business rescue practitioner with him. Other ancillary relief is also sought in that event.

Background, and central issues

[8] Matters went south for the relationship between the second respondent and the applicant when three major areas of disagreement opened up. First, on 1 September 2016 the second respondent suspended, under s.136(2)(a)(i) and (ii) of the Act, all the obligations of the first respondent in terms of all agreements with anyone, meaning that – amongst other things – the first respondent was no longer obliged to buy product from the applicant, or to pay rental for occupation the premises.

[9] Nonetheless the first respondent continued to enjoy the benefit of the applicant's premises and branding, apparently assuming that its charter party's obligations that were reciprocal with the first respondent's suspended obligations, nonetheless remained fully enforceable at the instance of the first respondent, against the applicant. I revert to this matter below.

[10] Second, the second respondent also adopted the attitude from the outset, without having seen the cession of debts, that the cession was unlawful and invalid and unforceable. Here the second respondent relied on s.228 of the Companies Act 61 of 1973 for the proposition that there was no special resolution authorising what amounted to the disposal of the greater part of the assets of the first respondent. This point was taken despite the fact that the only two directors and shareholders of the first respondent, a husband and wife team, executed the cession, and thereafter reported year after year in the annual financial statements that the debts had been ceded as security for the amount owing to the applicant.

[11] In the alternative, the second respondent argued that his suspension under s.136(2)(a) of all the first respondent's obligations under its agreements with the applicant implied at the very least that the first respondent retained no obligations under the cession of debts in respect of the debts that arise in business rescue. In this latter respect, the applicant was thus no longer a secured creditor, according to the argument. The second respondent argued that in any event the debts are legitimately being used to fund purchases of fuel

which is then on-sold and thus turned into debt once again; no impairment of the security occurs.

[12]The applicant contested these propositions. It argued first that the doctrine of unanimous assent destroyed any reliance on the absence of a special resolution, and that the cession was thus fully enforceable. It disputed that the suspension of obligations impaired the cession of debts that only arose in business rescue. Here it submitted that the suspension of obligations under s.136(2)(a) was, by virtue of s.136(2A)(c), expressly subject to the protection of property over which it had security in terms of s.134(3) of the Act; on its argument all the debts, past present and future, were covered by the cession and were its property, incapable of being disposed of without its consent.

[13]Third, whereas before the first respondent's debt to the applicant for product sold and delivered was never disputed, the second respondent now for the first time disputed that the first respondent owed the applicant any amount at all, not because the fuel had not actually been sold and delivered, but because he contended – on oath - for the first time that the applicant was in fact indebted to the first respondent to the tune of some R288 m for not having afforded the first respondent its due entitlement in respect of rebates. The applicant disputed this.

[14]Against the background of this commercial disharmony, the applicant attacks the conduct of the second respondent on a number of fronts, but centrally for his failure to have published a business rescue plan within 25 days of his appointment, as required by s.150(5) of the Act. It is, despite these weighty issues, necessary first to say something about the litigation history.

The litigation history

[15]The application is in two parts. There is the initial application for part A relief, which comes to some 400 pages. Then there is the part B section, which comes to more than 1000 pages.

The part A section is comprised of the prescribed three sets of affidavits. Not so the part B section; it starts with the applicant's further affidavit, filed with leave of Dewrance, AJ who heard the part A relief. Then follows the second respondent's further answering affidavit, also permitted by order of Dewrance, AJ. The applicant's replying affidavit, also permitted by Dewrance, AJ comes next. Like the answering affidavit, it was a few days late. The part B section thus has its own full set of three affidavits as well.

[16] The second respondent then filed a further affidavit in response to the applicant's further replying affidavit, and applied for its admission. As was to be expected, this elicited yet a further affidavit from the applicants. These last two affidavits take the pages in the part B section from page 605 to page 1013, without any new events of moment justifying their existence. Much of what appears in them is repetition and argument, compounded by hefty annexures. In addition to these affidavits, there was set of affidavits filed by the intervening employees, not paginated, and substantial.

[17]Motion proceedings are challenging, because they often require decisions to be taken that involve an assessment of fact on affidavit, despite the process not having been designed for it. It is for this reason that only three sets of affidavits are permitted, because each has a defined role and a status.

[18]This matter was therefore doubled in complexity by the admission of a wholly new, complete set of affidavits in the part B section. How does one deal with conflicts between the part A affidavits and the part B affidavits? If one then adds to the mix a 67% increase in paper volume excluding the employees' affidavits, it becomes virtually impossible to do justice to the issues that arise in this matter. Were it not for the presence of the employees and their plight, I would have disallowed the last two sets of affidavits. I intend however to focus on the complete set of affidavits exchanged in respect of part B.

[19] The matter was also not wanting for heads of argument. The initial sets included a third set, by Adv. Mathaphuna for the intervening employees; and then on 8th and 11th November

2016 respectively further heads of argument were swapped by the two principal protagonists. Here too the later heads are more pertinent than the earlier ones.

[20]Having regard then to this introduction and the parties' submissions, as I see it the preliminary issues are the following. First, does this court have jurisdiction? Second, is the application fatally flawed for seeking winding-up without first seeking termination of the business rescue proceedings? Third, has a case been made for leave to be granted under s.133 of the Act to be granted to the applicant to institute legal proceedings against the first respondent?

[21]If the matter survives the preliminary issues, the substantive issues are then the following. First, what is the status of the Branded Distribution Agreement? Second, what is the status of the cession of book debts? Third, does the first respondent owe the applicant about R80m in respect of product sold and delivered? Allied with this point, is the point whether the applicant owes the first respondent in excess of R280m for having short-changed the first respondent on rebates. The point is allied, because it goes to whether the first respondent can pay its debts. Fourth, what are the prospects of the current business rescue proceedings rescuing the first respondent's business? And fifth, what about the position of the employees?

[22]I deal with these issues in turn.

The preliminary issues

[23]The first and second respondents argue that this court has no jurisdiction because both the registered address and the main place of business of the first respondent fall within the area of jurisdiction of the Gauteng Provincial Division of the High Court, namely respectively Pretoria and Olifantsfontein, Tembisa.

[24]However, the areas of civil jurisdiction of the Gauteng Provincial Division and the Gauteng Local Division are now co-extensive, and Tembisa falls within the area of Ekurhuleni North.[1] Both the local division and the provincial division therefore have jurisdiction, and the objection to jurisdiction fails.

[25]The second point is that winding–up cannot be granted without first having business rescue set aside. But it seems to me implicit in the prayer for winding-up that the setting aside of the business rescue is being sought.

[26]The third point is that s.133(1)(b) of the Act places a moratorium on legal proceedings against the company in business rescue, except with leave of the court. Here the competing contentions are that separate *a priori* proceedings were required, by way of a substantive application, to lift the moratorium before the present application could have been launched; and that substance should trump form, particularly here where leave to institute proceedings and the merits are so intertwined as here.

[27]The applicant asks, in a separate prayer, for leave to institute these proceedings. The prospects of such an application would generally be heavily reliant on the prospects of success in the main relief to be sought. Where the main relief to be sought goes to the very status which invokes the moratorium protection, it seems overly technical to insist on two distinct applications as opposed to one application with two (sets of) prayers: one for permission, and one for the substantive relief.

[28]In other words, if the application is bad on the merits, the order should be to refuse leave to institute the proceedings. In short, this point goes with the substantive issue, and the latter is discussed below. As the regards the matter of form, i.e. whether a court should insist on a discrete prior application: as is further discussed at the end of this judgment, it would appear that a full court of the Gauteng Provincial Division has decided the issue against the first and second respondents' argument.

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[1] Government notice no. 30 dated 13th January 2016, published in Government Gazette no. 39601, 15 January 2016.

The substantive issues

[29]A short introduction about the first respondent's business is needed. The first respondent has 96 employees. According to the second respondent the first respondent's turnover is about R65m per month. It sells 10m litres per month, and its margin is R0.07 per litre. Its gross profit is therefore R700 000 per month. Salaries, wages and rental come off gross profit to render net profit.

[30]The first respondent's management accounts for July 2016 reflect gross profit at R3,3m, and net profit at R499, 363. They reflect too liabilities over assets, thus balance sheet insolvency, of some R2,47m, although current assets, made up mainly of debtors (R23m) and cash (R12m), come to about R50m.

[31]Nonetheless, as the second respondent complains, margins are very thin: were it not for unidentified *"other income"* of R202,318, the difference between gross profit (R3,320,598) and expenses (R2,999,144) was a surplus of only R321,454. The gross profit seems to have decreased in any event from 31 July 2016: R3,3m down to R0,7m. Assuming overheads stayed the same, as they usually would, the business of the first respondent is deteriorating at about R2m per month.

[32]The interim order of 5 October 2016 required the following payments to be made to the applicant's attorneys: R7m on 6 October 2016; R500,000 by 12 October 2016; and R500,000 by 19 October 2016. The first and second respondents were also directed to provide the applicants, in respect of debtor payments after date of the order, by the close of business each Friday, with a statement indicating the name of each debtor and the amount received from each debtor.

[33]There is a dispute on the papers as to whether in fact these orders were complied with. In my view it is unnecessary to resolve that dispute, and I turn now to consider the substantive issues.

The status of the Branded Distribution Agreement

[34] The competing contentions here are that the second respondent says that he has suspended all of the first respondent's obligations to the applicant in terms of this contract. The applicant disputes the entitlement of the second respondent to have done, while at the same time insisting on performance by the applicant of its reciprocal obligations in terms of that agreement.

[35]Since the entitlement to suspend is founded in express terms in s.136(2)(a) of the Act, the real question is whether those provisions are to be read as excluding the power to suspend obligations when at the same time the company insists on performance by the creditor of the latter's reciprocal obligations in terms of the same contract; or whether instead the position is simply that the creditor's reciprocal obligations are automatically and equally suspended as a matter of law; or whether the creditor's reciprocal obligations are not suspended without more, but the creditor acquires the right to elect either to rely on the *exceptio non adimpleti contractus* – and so in effect procures a suspension of its counter-prestation, protected against *mora* - or instead to cancel the agreement for breach.

[36]The section reads in relevant part as follows (emphasis supplied):

"136. Effect of business rescue on employees and contracts
(1) Despite any provision of an agreement to the contrary-
(a) ...
(b) ...
(2) Subject to subsection (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 obligation 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; or
(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).
(Section 136(2) substituted by section 87(b) of Act 3 of 2011)
(2A) When acting in terms of subsection (2)—

(a) ...
(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company.
(Section 136(2A) inserted by section 87(c) of Act 3 of 2011)
(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages."

[37]Interpretation starts with a textual treatment of the words in their context.[2] The language conferring the power of suspension is pretty clear, at least on the face of it; *"any"* is notoriously a word of wide if not unlimited import, and so it would, at least *prima facie* and unless any absurdity is thrown up, include obligations that are contractually tied with a reciprocal obligation of the creditor.

[38]Also, since the section is silent about the effect that the suspension has on such an obligation, and since the Legislature knew and knows the residual Law of Contract, it must be accepted that the creditor has available, subject to the normal rules, the *exceptio non adimpleti contractus* and, again, if the normal rules of materiality and contractual notices apply, the creditor also has available the normal rights of cancellation.[3]

[39]Applied to the agreement under discussion, the applicant's obligation to avail product is obviously reciprocal with the first respondent's obligation to pay for it; but also with the first respondent's obligation to purchase exclusively from the applicant. So too would the applicant's obligation to avail the premises be reciprocal with the first respondent's obligation to pay the rental. In my view the applicant's obligation to avail the equipment is also reciprocal with the first respondent's obligation exclusively to purchase product from the applicant. There may also be other sets of reciprocal obligations, but it is not necessary further to explore this point.

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[2] Cool Ideas 1186 CC v Hubbard and Another, 2014(4) SA 474 (CC) at [28].
[3] See Cloete Murray & Another, NNO v FirstRand Bank Ltd t/a Wesbank, 2015 (3) SA 438 (SCA).

[40]It follows that the suspension of all the first respondent's obligations entitle the applicant withhold: product; access to the premises; and access to the equipment. The applicant may also cancel the Branded Distribution Agreement, provided the appropriate notices will have been given. However, the applicant may not simply ignore the suspension and insist on performance contrary to it.

[41]These consequences are not merely academic, but they are very material to the ultimate assessment of whether or not the first respondent's business rescue has prospects of success. These considerations are weighed below when the required assessment must be made.

The status of the cession of book debts

[42]Here the competing contentions are whether or not the cession of book debts continues to operate in respect of debts that arise from sales concluded during business rescue.

[43]The relevant provisions of s.134 are as follows (emphasis supplied):

"134. Protection of property interests
(1) Subject to subsections (2) and (3), during a company's business rescue proceedings-
(Words preceding section 134(a) numbered (1) by section 85(a) of Act 3 of 2011)
(a) the company may dispose, or agree to dispose, of property only-
(i) in the ordinary course of its business;
(ii) in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner; or
(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;
(b) any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and
(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.
(Section 134(c) substituted by section 85(b) of Act 3 of 2011)
(2) The practitioner may not unreasonably withhold consent in terms of subsection (1)(c), having regard to-
(a) the purposes of this Chapter;

(b) the circumstances of the company; and
(c) the nature of the property, and the rights claimed in respect of it.
(3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must-
(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
(b) promptly-
(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person."

[44] It might at first blush be supposed that this section and s.136 are in conflict; how can the security be preserved if the debtor's obligations to the creditor are suspended? But s.136(2A)(c) expressly carves out a suspended provision of an agreement relating to security, and proclaims that it "*... continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company.*"

[45]Again, this provision too must be read in the context of the applicable law, at least to the extent that it has not expressly or by necessary implication been swept aside. A security cession of future book debts is, by our law, complete and effective by mere initial agreement. When at the future date the book debts come into existence then, without more and without any further obligation of the cedent, they become the property of the cessionary.[4]

[46]No further obligation on the part of the cedent exists or is required to be performed for the debt to become subjected to the rights of the cessionary, including for instance, to recover the debt from the debtor.[5] Even the reversionary right was ceded to the creditor in this agreement.[6] That being so, there was no obligation of the first respondent arising from the cession of book debts that was capable of being suspended, certainly not as regards the

[4] Headleigh Private Hospital (Pty) Ltd v Soller & Manning Attorneys, 2001(4) SA 360 (W) 366; see also Western Breeze Trading 43 (Pty) Ltd v Engen Petroleum Ltd [2016] ZAWCHC 42 (17 March 2016) at [50].
[5] See Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd [2008] ZASCA 128 (30 September 2008) at [14].
[6] Page 153, clause 4.

right of the cessionary to enforce the debts, albeit that they arose only in business rescue, and to allocate the proceeds towards the cedent's indebtedness to the cessionary.

[47]In consequence, whenever the first respondent's book debts arise, now or in the future, they belong to the applicant,[7] at least to the extent of the first respondent's indebtedness to the applicant. They may not be *"disposed of"* without the applicant's consent, as provided in s.134(3)(a).

[48]Again, this is a consideration that must be weighed in considering whether the business rescue has prospects of success. If the first approximately R80m will be subsumed in repaying the applicant, as on this construction of s.134 read with s.136 the cession of book debts exacts, then where will the first respondent obtain capital to source product for resale? On this note it is appropriate then to address the next topic.

Who owes whom what

[49]There are two directors of the first respondent; JJ Pretorius and MM Pretorius. On 24 August 2016, JJ Pretorius made an affidavit confirming that the first respondent owed the applicant at least R80m. Since this was in respect of product sold and delivered on 30 days credit, that amount is now due and payable. It is the applicant's case that the first respondent cannot pay that amount, and that therefore it has proved that the first respondent cannot pay its debts as envisaged in s.345 (1)(c) of the Companies Act 61 of 1973.

[50]The second respondent's resistance to this indebtedness relies on his new contention that the applicant owes the first respondent far more by way of rebates not afforded. He argued in his affidavit of 26 October 2016 that the applicant was obliged by law, in respect of diesel and paraffin, to have given the first respondent a wholesale margin of 64,7 cent per litre, but in fact only gave it a margin of 31,4 cent per litre.[8] This conduct was said to be unlawful, and

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[7] See Kritzinger & Another v Standard Bank of South Africa, 2013 [ZAFSHC] 215 (19 September 2013), esp at [49] to [55].
[8] Page 146 para 3.18.

was perpetuated in that despite being obliged to give the applicant a rebate relating to secondary distribution in the amount of 11,7 cent per litre, in fact it only afforded the first respondent a rebate of 13,7 cent per litre.[9] The total amount in respect of which the applicant short-changed the first respondent thus came to 53,8 cent per litre,[10] amounting to an indebtedness owed by the applicant to the first respondent of at least R286,499,200.64.[11]

The calculations in respect of petrol were still under way.[12]

[51]These assertions were disputed. The applicant, in its part B replying affidavit, points to the vagueness of the contentions made by the second respondent; and to the fact that in truth the rebate structure is a function of agreement between the parties.[13] The applicant points[14] to the very Branded Distribution Agreement and its terms where the agreement relating to price and rebates are expressly set out.[15]

[52]The second respondent's attack on the rebates allowed persisted even in his affidavit of 3 November 2016.[16] It was there said: *"As has been stated ad nauseum, the key issue of dispute relates to whether or not certain rebates were payable ..."*.

[53]However, the next day, when the matter was argued on 4 November 2016, during oral argument, counsel for the first and second respondents conceded that in fact there was no regulatory framework that entitled the first respondent to the rebates for which the second respondent had repeatedly contended on oath.[17] It was, he correctly conceded, a matter for agreement between the parties, although he persisted in arguing that the agreement was unfair.

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[9] Page 146, para 3.20.
[10] Page 146, para 3.21.
[11] Page 147, para 3.22.
[12] Page 147, para 3.23.
[13] Page 489, para 25.2.
[14] Page 510, para 36.11 to page 517, para 36.23..
[15] Pages 88, 89.
[16] Page 615, para 5.1.3.
[17] It is disconcerting that the second respondent appears oblivious to the gravity of making serious allegations on oath, and then executing an about-turn without an affidavit that explains the new position.

[54]This concession then leaves intact only the fact of the indebtedness of the first respondent to the applicant in approximately the amount of R80m. There is no credible case that the applicant owes the first respondent anything in respect of rebates not afforded.

The prospects of the business rescue

[55]Taking stock then of where the first respondent finds itself at this stage: its business rescue practitioner has suspended all its obligations in terms of the Branded Distribution Agreement with the first respondent's supplier of some 16 years. That includes its obligations to buy product exclusively from the applicant; to use the applicant's branding; to use the applicant's equipment; and to pay rental in respect of the premises which it occupies.

[56]In turn, this suspension of obligations entitles the applicant to decline product, to withdraw permission to use the applicant's equipment, and to require of the first respondent to vacate the premises from which it is conducting its business.

[57]In addition, the cession of book debts remains in place as far as concerns the existing and future trade receivables. Those belong to the applicant, and they may not be disposed of without the consent of the applicant. The applicant has throughout these proceedings insisted on the enforcement of its security cession.

[58]This means that until the debt of R80m to the applicant has been paid, the trade receivables belong to and must be paid to the applicant. Any credit to the first respondent's bank accounts will likewise belong to the applicant, until the debt to the applicant has been paid.[18]

[59]In its further heads of argument the applicant has stressed the failure of the second respondent to have published a business plan in terms of s.150 of the Act within 25 business days after the second respondent's appointment. The business rescue did not without more

[18] Compare Kritzinger op cit, [49] to [58].

lapse as a result.[19] The second respondent has applied for an extension for the filing of his business plan until February 2017. This application, vague as it is as to content,[20] comes in the face of the commercial bridges that have now been burnt by the suspension of the first respondent's obligations in terms of the Branded Distribution Agreement and, in particular, the obligations under the lease. The second respondent has complained about lack of credible financial information. The problem is that it is no answer, because even assuming that the current information is unreliable, and better information is needed, the better information may simply make matters worse.

[60]The applicant has made it clear that it will not surrender its security. That means that unless the business rescue practitioner can propose recourse to short-term capital of the order of R80m, it will not be able to trade at all. Such a prospect has not been illustrated.

[61]In these circumstances it is difficult, particularly where the second respondent has not really assisted, to conceive of a business plan that will rescue the business in the face of the extraordinarily large short-term debt, underwritten by the security cession. Attached to the second respondent's 3 November 2016 affidavit as SAM 21 was a seven page undated document now relied on in argument by the first and second respondents, called a "Preliminary Executive Report", prepared by the second respondent and a Mr Van den Bergh, who is described as a "business rescue analyst".

[62]The document expresses objectives, some slightly naïve, such as "Aggressive focus on increasing gross and nett profit margins", and "Strong focus on client and market development". The document purports also to report on the most recent financial performance, being from 1 July 2016 to 2 November 2016 and annexes, uncritically, draft annual financial statements for the year ended 30 June 2016.

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[19] Shoprite Checkers (Pty) Limited v Berryplum Retailers CC and Others, [2015] ZAGPPHC 255 (11 March 2015).
[20] See pages 386, para 10.6 to page 387, para 10.10. It does not help that the crucial page (internal pagination 11) is missing.

[63]Unfortunately this preliminary report and its annexures were furnished too late to be able them to be properly examined by opposing experts, but there plainly disconcerting features. The first is that as of 30 June 2016 the first respondent is still reflected as being insolvent to the tune of R2,5m, and will also have traded at a loss of R2,5m for that year.

[64]The second is a 40% drop in turnover.[21]

[65]This feature must be viewed against the background of a contention by the second respondent that in fact, the first respondent's business does not need the applicant as its supplier, and the first respondent's customers are wholly neutral as to the source of the product the purchase from the first respondent. Moreover, it does appear superficial to argue, as does the second respondent in this document, that there has been an increase in both the gross and the net profit margins: after, if the turnover drops as dramatically as it apparently has, the very substrate for future profits is threatened.

[66]The first and second respondents argue in their latest heads of argument that no case has been made out to establish that there is no reasonable prospect for rescuing the first respondent, on the following bases. First, they submit that the first respondent does not need the applicant's product, premises or branding. The first respondent is able, they say, to conduct its business by collecting fuel in the first respondent's trucks and tankers from the alternative suppliers and then delivering it direct to the first respondent's customers.[22]

[67]The difficulty with this proposition is that it involves a change in the way in which the first respondent has functioned up to now. It smacks of devising a simplistic make-shift solution to an insurmountable problem, and selling it as the panacea that was there all the time. If it were that simple, why was it not implemented all along?

[68]Second, they submit too that on the basis of better rebates afforded by the alternative suppliers, the first respondent's profitability will be enhanced, and the first respondent will

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[21] Preliminary Executive Report, para 5.5.

[22] First and second respondent's heads of argument, paras 5.5.4 to 5.5.8.

be able to repay the debt owed to the applicant[23]within just over three years.[24]This proposition does no more than show up the lack of available working capital. The elephant in the room is the immediacy of the applicant's demand. The applicant is not obliged, in law, to wait for three years plus for the repayment of a 30 days' debt.

[69]Third, although they persist in disputing that the security cession is valid at all,[25] they submit that the cession of book debts may be enforced, given the suspension, only up until such time as the business rescue proceedings commenced.[26] This submission has been considered and rejected above.

[70]Fourth, they submit that the employees will be worse off under liquidation that they will in business rescue.[27]This is accepted; unless, of course, the business is taken over by a liquidator who is able to sell it as a going concern to a purchaser who has financial muscle and is able to come to an acceptable arrangement with the applicant for liquidating its debt.

[71]Against these considerations, what is the yardstick to be applied? S.130(1)(a)(ii), read with s.130(5)(a)(i), provides that a business rescue resolution may be set aside if there is no *"reasonable prospect"* for rescuing the company. A court hearing such an application may also, under s.130(5)(a)(ii), set aside the resolution if, having regard to all of the evidence, the court considers that it is otherwise *"just and equitable"* to do so. It has been said that a *"reasonable prospect"* means: something less than a reasonable probability; something more than a prima facie case; something more than an arguable possibility; a prospect based on reasonable grounds; and mere speculative suggestion is not enough.[28]

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[23] Now apparently admitted.
[24] Heads of argument, paras 5.7 to 5.9.
[25] Page 612, para 3.2. The argument is also advanced here that there is in fact no disposal of the book debts, because they are replaced by new book debts. The slip shows in this submission when the very next submission is that the replacement debts are not covered by the cession, because they arose after business rescue had commenced.
[26] Heads of argument, paras 5.11 to 5.20.
[27] Heads of argument, para 5.24.
[28] Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others, 2013(4) SA 539 (SCA) at [29] ff. Brand, JA also concluded that the discretion under s.134(4) is a so-called " *"discretion in the loose sense"*, thus a value judgment, and thus appealable without any misdirection first

[72]In this case, the best case scenario advanced by the first and second respondents as set out above ultimately fails for the following reasons. First, according to the second respondent the first respondent will not be conducting the same business as before. It will not need a forecourt at all. It will instead, gypsy-like, fetch and deliver fuel. But whether such a business has any legs at all, is not proven.

[73]Second, the first respondent has no working capital to speak of. The second respondent's latest "Preliminary Executive Report" acknowledges this fact.[29] It clearly is wholly dependent on the lawfulness of its business concept, which is to sweep aside the applicant's cession of book debts and to use that money, without the applicant's consent, to keep the business ticking over. It has become a wholly hand-to-mouth operation.

[74]Third, the first respondent blithely ignores its obligation to pay its R80m debt to the applicant immediately, an obligation which was due before business rescue incepted, and was thus not capable of suspension by the second respondent. The moratorium under s.133 prevents its direct enforcement, but for so long as it remains owing, the security cession remains effective.

[75]The first respondent's propositions are, in my view, not realistic at all. The first proposition is, as I have remarked, unproven. The substrates of the second and third propositions have been analysed in this judgment and both have been found to be unmeritorious. The scenario put up by the second respondent is thus speculative and unrealistic. It naïvely supposes that it can ignore two mountains in its way: the R80m debt, coupled to the cession of book debts; and the lack of working capital. Any business plan that ignores these is in my view bound to fail.

[76]It follows that in my view the resistance against liquidation must fail.

The position of the employees

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required, as is the case with a *"discretion in the strict sense"*. It is suggested that the same applies in regard to the powers under s.130(5)(a)(ii).

[29] SAM 21, paras 1.6, 1.8, 1.9, and 2.4.

[77]On behalf of the employers it was submitted that the court should prefer business rescue proceedings to the death knell of liquidation. In particular, it was submitted that the cases have preferred business rescue proceedings to liquidation, one of the reasons being that job losses often occur in liquidation. It was accordingly submitted that in this case, where there was a tussle as to whether business rescue proceedings or liquidation was the preferred route, the court should opt for business rescue.

[78]The most recently released national statistics of official unemployment of greater than 27% are, of themselves, hugely disquieting and generally supportive of the employees' argument. Further job losses will not help our challenged economic circumstances.

[79]The difficulty is that, as is often the case, one is not simply dealing with a case where the choice between the one or the other is evenly balanced. When business rescue will probably not rescue the company, it would be manifestly wrong to perpetuate that state. It is thus unavoidable to engage on the merits of the tussle, and to decide which standpoint is likely correct.

[80]Where a company is distressed, it is not always the solution to deny principal creditors, without whose preparedness to have extended working capital in the first place the business would not have existed at all, the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts are not prepared to enforce commercial securities, investment, the essential precursor to employment opportunities, will seek other pastures.

Conclusion and order

[81]As will have been inferred from the aforegoing, in my view the liquidation of the first respondent is inevitable. As indicated, there was an argument by the first and second respondents that this application is fatally flawed for not having been preceded by a discrete application for relief under s.133(1)(b) of the Act. From a substantive perspective, in my view

a case for liquidation has been made out. From a formal perspective, it seems that the first respondent's proposition has been foreclosed by the full court of the Gauteng Provincial Division.[30]

[82]In the result I make the following order:

[55.1] The applicant is granted leave in terms of s.133(1)(b) of the Companies Act 71 of 2008 to have brought this application and to request the relief sought in it.

[55.2]The resolution of the first respondent dated 24 August 2016 placing the first respondent under business rescue as provided for in s.129 of the Companies Act 71 of 2008, and the appointment of the second respondent as business rescue practitioner, is hereby set aside in terms of s.130(1)(a)(ii) of the Companies Act 71 of 2008.

[55.3]The first respondent is hereby placed under provisional winding-up.

[55.4]All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding up of the respondent on Monday, 6 February, 2017 at 10h00 or so soon thereafter as the matter may be heard, and subject to the final paragraph of this order.

[55.5] A copy of this order must be served on the first respondent at its registered office.

[55.6] A copy of this order must be published forthwith in the Government Gazette.

[55.7] A copy of this order must forth be forwarded to each known creditor by prepaid registered post or by electronically receipted telefax transmission.

[55.8] a copy of the provisional winding-up order must be served on –

[55.8.1] every registered trade union representing the first respondent's employees;

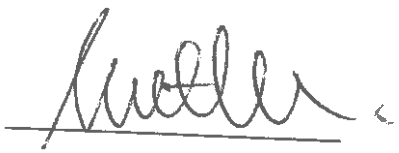
[55.8.2] the employees of the first respondent by affixing a copy of the application to any notice board to which the employees have access inside the first respondent's premises, or if there is no access to the premises by the

[30] LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others (A513/2013) [2015] ZAGPPHC 78 (26 February 2015), effectively overruling Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another (13/12406) [2013] ZAGPJHC 109 (10 May 2013).

employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the first respondent conducted any business at the time of the presentation of this application; and

[55.8.3] the South African Revenue Service.

[55.9]Any person who is entitled to respond to this rule nisi is also entitled to apply, on notice to the applicant, to anticipate the return date, and to set the matter down for determination on an earlier date as one of urgency, if circumstances justify it.



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Judge, High Court
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Date argued: 4 February 2016, with further written argument on 8 and 11 November 2016
Date judgment: 25 November 2016