IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38140/2018

(1) **Reportable** No
(2) **Of interest to other Judges** No
(3) **Revised:** Yes

Date: 9/05/ 2019

Signature.....

In the application between:

THE EMPLOYEES OF SPHYNX TRADING CC	Applicant
and	
SPHYNX TRADING CC	First Respondent
NTSENGEDZENI ANTHONY MICHAEL TSHIVHASE N.O	Second Respondent
THEODORE WILHELM VAN DER HEEVER N.O	Third Respondent
ROSELYN CHANTEL NOEL N.O	Fourth Respondent
SAPPI SOUTHERN AFRICA LIMITED	Fifth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Sixth Respondent
EL SAYED HAFNI	Seventh Respondent
TISSUE WORLD CC	Eighth Respondent

J U D G M E N T

MAIER-FRAWLEY AJ:

Introduction

1. The application is brought in terms of s 131 of the Companies Act 71 of 2008 (the Act)[1] for an order commencing business rescue proceedings for the rehabilitation of the first respondent, Sphynx Trading CC (Sphynx). A final liquidation order was granted against the CC on 18 March 2019.[2] The present application was launched merely 9 days[3] later on 27 March 2019.

2. In terms of section 131(6) of the Act,[4] the liquidation proceedings are stayed pending the outcome of a determination by the court of the application for business rescue.

3. The application was initially set down for hearing in the urgent court during the week of 16 April 2019, but was removed from the roll for purposes of obtaining a special allocation of the matter, given the volume of papers and the time required by the parties to present oral argument. The matter thereafter served before me for hearing on a semi-urgent basis, by special allocation, on 23 April 2019.

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[1] Section 131 of the Act provides as follows:

"(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. "

[2] Liquidation proceedings had been launched at the instance of Sappi. A provisional order was granted on 14 February 2019 by Fourie AJ, who handed down a written judgment dealing with the grounds of opposition proffered by Sphynx in those proceedings.

[3] i.e., 9 *business* days but equating to 7 *court* days.

[4] Section 131(6) of the Act provides that 'if liquidation proceedings have already been commenced by or against the company at the time an application for business rescue is made...the application will suspend those liquidation proceedings'. The term 'liquidation proceedings' has been held to include the process of winding-up of a company after a final liquidation order has been granted. See: *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA) at paras [1] and [18].

4. The seventh and eighth respondents, being judgment creditors of Sphynx, brought an application for leave to intervene in the application, which was not opposed, pursuant to which they were duly joined as respondents in the application.[5] A composite affidavit (deposed to by Mr. ES Hafni on behalf of the seventh and eighth respondents) was delivered in support of the request to intervene in the proceedings, which also served as an answering affidavit in the business rescue application. For convenience, the seventh and eighth respondents will be referred to as 'the intervening creditor' in the judgment.

5. The second, third and fourth respondents (the appointed liquidators[6] in the liquidation of Sphynx) and the sixth respondent (CIPC) did not oppose the application, presumably because of a punitive cost order sought in the Notice of Motion against any respondent who opposed the application.[7]

6. The fifth respondent, Sappi Southern Africa Limited (Sappi) is a creditor of Sphynx in the amount of R11 million, whilst the intervening creditor is a judgment creditor in the amount of R28.5 million.

7. It is not in dispute on the papers that the aggregate total debts owing by Sphynx to its various creditors amounts to approximately R170 million, of which the Industrial Development Corporation (IDC) is the largest judgment creditor in the amount of R117 million.

8. Both the intervening creditor and Sappi oppose the grant of an order for placing Sphynx under supervision and in business rescue, *inter alia,* on the basis that the application amounts to an abuse of the provisions of Chapter 6 of the Act and

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[5] In *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* [2011] ZAGPHC 148, para [30], Boruchowitz J held that an affected person has a right to participate in the hearing of an application in terms of s 131(1) of the Act and 'would not require leave of the court to intervene. Such leave may, however, be necessary as a procedural requirement...'

[6] The liquidators were each appointed under respective Certificates of Appointment issued by the Master of this court on 14 March 2019.

[7] See: para 4 of the Notice of Motion where costs are sought on the scale as between attorney and client in the event of opposition by any party.

because the applicant has in any event failed to establish reasonable prospects of restoring the business so that it may continue in existence on a solvent basis. They also dispute the applicant's *locus standi* on the basis that it has not been demonstrated that one 'Merchant' (who deposed to the founding affidavit on the basis that he represents *all* the employees of Sphynx) (i) had the necessary mandate to do so and (ii) was entitled to represent any non-unionised employees of Sphynx.

9. It bears mentioning at the outset that the application was not served upon all known creditors, including, amongst others, the intervening creditor and IDC, as is required in terms of section 131(2)(b) of the Act, read together with the Companies Regulations, 2011.[8] In this regard, see: *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) at para 24.[9] I deal with the impact of this omission further below.

10. Sphynx Trading CC (first respondent) will be referred to intermittently in the judgment as 'Sphynx' or 'the CC' as the context requires.

Relevant Background

11. Prior to its liquidation, Sphynx conducted business as a manufacturer and supplier of paper rolls and paper related products. It did so since 1999. The business was previously owned by Mr El Sayed Hafni (Hafni) (deponent to the execution creditor's answering affidavit) but it was sold in 2015 to Mr Pavlos Kyriacou (Kyriacou) (who is referred to in the papers as the sole 'director' of Sphynx) as a

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[8] Regulation 124 read with regulation 7 of the Companies Regulations, 2011, published under GN R351 in *GG* 34239 of 26 April 2011.

[9] There the following was said: '*An applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them in accordance with reg 7…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…*'

going concern, together with its movable assets consisting of all the manufacturing and paper mill machines.[10]

12. The court hearing the liquidation application granted a provisional liquidation order on 14 February 2019.[11]

13. The liquidation application was opposed by Kyriacou, acting on behalf of the CC on the basis, *inter alia,* that the CC was not commercially insolvent or unable to pay its debts as they fell due. A reading of the judgment of Fourie AJ[12] reveals that such notion was rejected by the court when granting the provisional liquidation order. The final liquidation order was granted a month later, despite Kyriacou's opposition.

14. Less than two weeks later, the present application was brought on the basis that the business of Sphynx is 'financially distressed' (as defined in s 128(1)(f) of the Act)[13] and that there exists a reasonable prospect of saving the business for the

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[10] See para 7.2 at p. 25 of the papers.

[11] Ibid fn 2 above.

[12] See: unreported judgment of *Sappi Southern Africa Ltd v Sphynx Trading CC*, case no. 29506/2018, delivered on 14/2/2019, at paras [15] -[17] where the following was said: "*Rather than provide a full picture of its financial position, the respondent merely asserts that it owns a large number of movable assets, the value of which exceeds R30 Million…The respondent has failed to provide any other information regarding its financial position. No financial statements, management accounts or other relevant financial information is provided. It is not even clear whether the movable assets listed by the respondent are encumbered or not. In the absence of relevant financial information… in particular information regarding liabilities, the allegation that the respondent's movable assets are worth an estimated R31 million is meaningless. It certainly does not prove on the probabilities that the respondent is commercially solvent…It was for the respondent to provide a full picture of its financial position if it sought to defeat the statutory deeming provision that it is unable to pay its debts. Its failure to do so, which is not explained, leads to the conclusion that it is probably unable to demonstrate commercial insolvency…*"

It appears from a reading of the said judgment that Sphynx attempted to dispute Sappi's claim by asserting that it had a claim for damages against Sappi, which, if successful, would extinguish Sappi's claim. But that contingency was found by Fourie AJ not to have been established, having considered it in the light of what was stated by Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading CC* 2016 (1) SA 261 (WCC) at paras [53] - [54] (in relation to the issue of whether or not the applicant's claim was *bona fide* disputed on reasonable grounds). Fourie AJ ultimately concluded that Sphynx was *prima facie,* in fact, unable to pay its debts within the meaning of s 69 of the Close Corporations Act. Such inability was subsequently conclusively established by virtue of the final liquidation order granted on 18 March 2019.

[13] In terms of s 128(1)(f):
" **'financially distressed'**, in reference to a particular company at any particular time, means that-

benefit of all relevant stakeholders (employees, creditors and shareholders).[14] But, as was demonstrated in the answering affidavits of Sappi and the execution creditor, the CC had already descended beyond the point of 'financial distress' and into the proverbial quagmire of hopeless insolvency by the time the final liquidation order was granted some nine days earlier, rendering the prospect of effective rescue impalpable and not reasonably possibly attainable.

15. The present application is said to be directed at the goal of rehabilitating and restoring the business to a position of liquidity and solvency (on the basis that reasonable prospects are alleged to exist for continuing in existence on a solvent basis by means of restructuring its affairs, business, property, debt and other liabilities and equity).[15] As alluded to earlier, both Sappi and the execution creditor submit that the applicant has failed to show that any reasonable prospect exists for restoring Sphynx's business to a successful one.

16. Until 15 March 2019, the deponent to the applicant's affidavits, Mr. KJC Merchant (Merchant) was in the employ of Sphynx as General Manager (production). According to Merchant, 'it was business as usual' and 'operations were continuing'[16] whilst the application for the final liquidation of Sphynx was pending, that is, until 15 March 2019, on which date the liquidators attended at the place of business of Sphynx and 'indicated that all business, manufacturing, and operations on the premises...should cease and all the employees were instructed to leave the business premises and go home.' By the same token, Merchant states that the

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(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months; "

[14] However, Merchant's primary goal is to have his employment restored. He expressly states so, alleging that the purpose of the application is *'to restore my and the other employees' employment with the First Respondent or at least 164 of the employees so that we can provide for our families.'*

[15] In the alternative, it is postulated that business rescue could possibly result in a better return for the CC's creditors or shareholders than would result from the liquidation of Sphynx.

[16] See para 6.6 at p. 22 of the papers.

employees (including Merchant) 'have limited information with regards to the financial and management statements of the First Respondent and the financial performance and position of the First Respondent.'[17] In the replying affidavit, he states that he has never had 'access to the bank statements, or financial statements or bank accounts of the First Respondent' nor does he possess any knowledge thereof, including knowledge of what was alleged by Kyriacou in his affidavit in the liquidation proceedings or knowledge of 'the doings of Kyriacou' (in reference to the manner in which Kyriacou had conducted the affairs of Sphynx in the build-up to its final liquidation).

17. In the answering affidavits filed by Sappi and the execution creditor, the following facts emerged:[18]

17.1. Preliminary investigations conducted by the liquidators revealed that Kyriacou operates a network of companies.[19] He is the sole member of Sphynx and the sole director and shareholder of Jurgens CI (Pty) Limited (Jurgens), under provisional liquidation. He is also the sole shareholder and director of three 'Nat Tissue' companies, one of which commenced trading on 1 March 2019 (Nat Tissue (Pty) Ltd) (after Sphynx had been placed under provisional liquidation and shortly before the final winding-up order was granted);

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[17] See para 5.18 at p. 20 of the papers.

[18] These facts were not disputed or gainsayed in the replying papers.

[19] The liquidators addressed a circular to all known creditors in which they, *inter alia,* indicated that (i) an application was launched by the joint liquidators to take charge of the assets of Nattissue 1 (Pty) Ltd and Nattissue SA (Pty) Ltd as there was 'more than a reasonable belief' that the assets of such entities (which were trading from the premises of Sphynx), were the assets of Sphynx; (ii) an outstanding debt of R6.6 million was owed by Sphynx to the Mogale City Local Authority; (iii) *should* it be deemed financially prudent and viable, the business will be traded with the support of creditors, to which end, funding would be required from creditors as Sphynx 'has no financial resources to commence trading'; and (iv) all contracts of employment have now been suspended under s 38 of the Insolvency Act, no. 24 of 1936. A copy of the relevant circular appears at pp. 231-232 of the papers.

17.2. In the case of Jurgens (as in the present case), a business rescue application had been launched by employees (there, organised in trade unions), which proceedings are still pending;

17.3. Merchant, Jurgens and Sphynx are represented by the same attorneys, Bert Smith Inc;[20]

17.4. After the launch of the liquidation application against Sphynx, funds in an amount in excess of R7 million were transferred from the bank account of Sphynx to that of Jurgens, all in one month, and at a time when Jurgens was already in provisional liquidation;[21]

17.5. The aforesaid transfer ostensibly occurred without any quid pro quo;

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[20] As pointed out in Sappi's written argument, whilst Bert Smith Inc took instructions from Kyriacou and delivered affidavits deposed to by Kyriacou when the liquidation of Sphynx was opposed, the conflict of the attorneys should be obvious. For instance, in the liquidation, Kyriacou 'flatly denied' that Sphynx was unable to pay its debts and also denied that Sphynx was indebted to Sappi. Such a position is said to be irreconcilable with the position taken by Merchant in the present application, leading to the ineluctable conclusion that the interests of Merchant and those of Sphynx are 'clearly not aligned'. I am inclined to agree, given that Merchant's founding papers in the present proceedings (indicating abject inability on the part of Sphynx to pay its debts and a lack of cash reserves) is in stark contrast to what was said by Kyriacou in the liquidation proceedings and entails ineluctably to the conclusion that Kyriacou must have lied when asserting the converse in the liquidation proceedings. Similar allegations as were made in the answering affidavit filed by the execution creditor, were not dealt with in reply and remain undisputed.

[21] See: para 11.4 at pp. 149-150 of the papers. In total, 24 transfers were made in this manner, in November 2018. In substantiation thereof, copies of the bank statements of Jurgens were provided in the answering affidavit, reflecting payments from Sphynx to Jurgens.

The bald denial by Merchant of such allegation in the replying affidavit (being information which Merchant cannot gainsay, given his version that he does not have any access to or knowledge of the bank accounts of Sphynx (see para 11 at p.284 of the papers in this regard) is of the nature that Courts tend to reject as being bald, laconic and unsubstantiated, and thus incapable of engendering a real dispute of fact. See: *AM Moolla Group Ltd and Others v The Gap Ltd and Another* 2008 (3) SA 371 (SCA) at 585C, para 31: *Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375E-I, paras 12-13 & para 18.

17.6. amounts that were deducted from the salaries of Sphynx employees' (such as UIF, PAYE and the like) have been appropriated and not paid over to the intended recipients (*inter alia,* SARS); and

17.7. the liquidators compiled a list of Sphynx's trade creditors,[22] which reflects that the debts owed by Sphynx are substantial and the creditors numerous and, as is submitted by Sappi, 'If anything, it reveals what amounts to a clear habit (and even a policy) of non-payment on the part of the first respondent'.

18. In addition, it has been shown by execution creditor in its answering papers that:

18.1. The bank accounts of Sphynx have been closed;

18.2. Sphynx has been dissipating its assets by intimating to its customers that payments due to it should be made into the banking account of Nat Tissue (Pty) Ltd as from 1 March 2019, of which Kyriacou is a director;[23] and

18.3. In so doing, the execution creditor submits that Kyriacou has failed to show a genuine concern for the prosperity of Sphynx;[24] and

18.4. Kyriacou refused to co-operate with the liquidators by refusing to hand over the book of account pertaining to Sphynx.

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[22] The list appears at pp.246-247 of the papers. The list reflects that the creditors are numerous and the debts owed by Sphynx, substantial, exceeding R145 million.

[23] See 'IP14' at p. 485 of the papers. These facts mentioned in paras 17.4 – 17.7, read with paras 18.2 – 18.3 above, are not dissimilar to the facts which served before the Supreme Court of Appeal in *Ebrahim and another v Airport Cold Storage (Pty) ltd* 2008 (6) SA 585 (SCA)

[24] In *Airport Cold storage* supra, Cameron JA stated that a transfer 'without any quid pro quo showed reckless disregard for the CC's solvency, for its ability to repay the debts it incurred, and for its capacity as a legal entity to accumulate and preserve assets of its own' and found that conduct of the sort alluded to in para 18.2 above amounted to a reckless carrying on of the business of the CC

19. It is common cause that IDC has obtained judgment against Sphynx in respect of a debt in the amount of R117 million; that IDC is the largest creditor amongst the multitude of Sphynx's other creditors; and that IDC has also perfected its security over all the moveable assets of Sphynx. The moveable assets of Sphynx are presently under the control of IDC who have placed security guards at the premises to secure such assets.[25]

Locus standi of Applicant

20. Merchant alleges in the founding affidavit that the applicant '...are the employees of the First Respondent,' who are said to number 210. He thus purports to bring the application on behalf of 'all the employees'.

21. It was pointed out in the answering affidavit filed by Sappi that: (i) Merchant does not suggest or allege that he acts or speaks on behalf of a trade union; and (ii) the 'employees' are not identified; no confirmatory affidavits have been supplied by the individual employees Merchant claims to represent; and (iii) Merchant has not even provided a list of those employees (if not all the employees) alleged to participate as co-applicants in the application. A challenge was thus brought against the mandate of Bert Smith Inc (applicant's attorneys of record in these proceedings) to represent all of the alleged applicants and Merchant's right to litigate in a representative capacity.[26]

22. Sappi thereafter delivered a notice in terms of rule 7 of the Uniform Rules of Court, calling on the applicant's attorneys to provide proof that they hold instructions from and a mandate to act on behalf of all the CC's employees (210).

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[25] The provisions of s 134(1)(b) read with s 136 of the Act will not be of assistance to an appointed business rescue practitioner (BPR) since these sections afford a BPR only the right to suspend agreements but not court orders. The applicant does not indicate in his papers (nor does it appear from the supporting affidavits deposed to by Holtzhausen or from his report) whether IDC has allowed or will allow the moveable assets of Sphynx to be utilised in the conduct of Sphynx's business, in the event that this application is successful. In the light of the contents of the letter appearing at p. 485 of the papers (about which, more later), it appears to me to be highly unlikely that IDC would consent to the release of the moveable assets of Sphynx.

[26] Sappi's allegations were not dealt with in the replying affidavit.

23. In response:

(i) Bert Smith Inc produced a power of attorney, signed by Merchant, and provided a list containing the signatures of 124 employees. As appears from the power of attorney, it provides for a mandate by Merchant only, conferred on Bert Smith Inc. It makes no mention of the other employees, nor does it confer a similar mandate; and

(i) Merchant provided a list (annexed to the replying affidavit), containing the signatures of only 94 employees.

24. It was pointed out in the answering affidavit filed by the intervening creditor that: (i) The employees of Sphynx in fact number 600;[27] (ii) the application was served on the employees of Sphynx, which would have been 'completely unnecessary' if Merchant had indeed held a mandate to represent the employees; (iii) all the employees of Sphynx (save for management employees) were members of a trade union named SAICWU; and (iv) in section 128(1)(ii) of the Act, the Legislature has determined that unionised employees must be represented by the union.[28]

25. Section 131(1) affords an affected person the standing to apply to a court for business rescue and section 131(3) affords each affected person the right to participate in the hearing. Section 128(1)(a) recognises three separate categories of affected persons, one such being employees. In section 128(1)(a)of the Act,[29] the Legislature has determined that unionised employees are to be represented by the

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[27] This number is corroborated in the preliminary report of the proposed business practitioner (annexed to the founding affidavit) at p. 120 of the papers.

[28] These allegations were left wholly unanswered by the applicant.

[29] Section 128(1)(a) reads:
" **128 Application and definitions applicable to Chapter**
(1) In this Chapter-
(a) **'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; "

Union, whereas non-unionised employees may represent themselves.[30] It is clear from the provisions of section 128(1)(a)(iii) that non-unionised employees do not need to be cited or joined on an individual basis in the proceedings – one or more such employee may authorise a representative to represent him/her/them in the application.

26. The applicant's papers do not state whether the employees Merchant professes to represent are unionised or non-unionised. As the applicant chose not to reply to the answering affidavit of the intervening creditor, the factual allegations contained therein stand wholly undisputed and unrefuted and may therefore be taken as established facts.[31] Accordingly, since the Union has not been cited as an applicant in the application, the unionised employees who are said to support the application, cannot be said to be doing so as individual co-applicants,[32] as they do not enjoy the relevant standing under the provisions of s128(1)(a)(ii) of the Act. The Union remains the 'affected party' who enjoys the necessary standing.[33]

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[30] S 28(1)(a)(ii) of the Act. This is in keeping with the principle of majoritarianism and the policy underpinning it, expressed by Zondo JP in *Kem-Lyn Fashions CC v Brunton & Another* 2001(22) ILJ 109 (LAC), paras [18]-[19], as follows:

" The Act [LRA] *seeks to promote the principle of self-regulation on the part of employers and employees and their respective organisations. This is based on the notion that, whether it is in a workplace or in a sector, employers and their organisations, on the one hand, and, employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail.*

The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable… There are various provisions in the Act which support the legislative policy choice of majoritarianism…"

[31] See: *Boxer Superstores Mthatha and another v Mbenya* 2007 (5) SA 450 (SCA) at para 4. Albeit that Cameron JA's remarks were said within a different context, the principle alluded to therein remains relevant and apposite, namely, that where a party fails to file an affidavit in answer to what is stated in the affidavit of the opposing party, the facts as stated by the opposing party in its affidavit may be taken as established facts.

[32] There is a difference between an application being 'supported' by someone and someone being a co-applicant. A co-applicant is one who enjoys legal standing, as demonstrated by the facts, which facts have not been set out with any clarity or consistency in the affidavits filed by the applicant. Whilst it is permissible for Merchant to represent such non-unionised employees who have mandated him to do so on their behalf, he has not established that those employees who are said to support the application, are in fact, non-unionised employees.

[33] It is remarkable that the applicant attempted to give notice to certain affected parties, including the Union representing the employees and non-unionised employees. (See p.8 of the papers).

27. At the hearing of the matter, I was informed by counsel appearing for Sappi and the intervening creditor that the *locus standi* of Merchant, *qua* non-unionised employee, is not in dispute. Accordingly, I propose treating the application as one which was brought by Merchant alone, in his capacity as a non-unionised employee of Sphynx. As the relevant Trade Union has not been cited as a party in the application, being the statutorily mandated representative of non-management unionised employees, and has not proffered any view on the business rescue, I intend to treat the views expressed by Merchant, qua employee in the application, as his alone.

Relevant Legal Principles

28. The relevant legal principles in terms of which the present application is to be adjudicated are set out below.

29. The papers are voluminous and the disputes many.[34] I have to decide the matter in line with principles that govern the grant of final relief in motion proceedings. The principle was pertinently articulated by Claasen J in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bathasfontein (Kyalami) (Pty) Ltd and others,*[35] as follows:

> "Unfortunately, the legislature has deemed it fit to prescribe motion proceedings in matters where an order is sought for the business rescue of a company. Despite that being the case, litigants and their legal representatives must count the costs of bringing matters to court on motion where disputes are to be expected. Litigants should be reminded of what Harms DP stated in regard to motion proceedings... :[36]

[34] Material disputes relate to, *inter alia*, whether the figures stated in the report of Holtzhausen are accurate and reliable; whether Merchant has provided a factual basis for the conclusion that business rescue presents any prospect, let alone a reasonable one, of the CC being rescued and rehabilitated; and whether the application has been brought for an ulterior purpose and as such amounts to an abuse of the provisions of Ch 6 of the Act, disentitling the applicant to relief.

[35] 2012 (3) SA 273 (GSJ) at par [2].

[36] See: *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290 para 26; *Agrico Masjinerie (Edms) Bpk v Swiers* 2007 (5) SA 305 (SCA) para 3 at 307; *National Scrap Metal (Cape Town) (Pty) Limited & another v Murray & Roberts Limited and others* 2012 (5) SA 300 (SCA) at 307-308.

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's...affidavits, which have been admitted by the respondent...together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'
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> Harms DP went on to say that in motion proceedings the question of onus does not arise and the approach set out above governs irrespective of where the legal or evidential onus lies.[37] "

30. Sappi indicated in its heads of argument that it makes common cause with the allegations made by the intervening creditor in its answering affidavit. It has not been suggested by Merchant that the facts set out in the answering affidavits are inaccurate, untrue, unreliable or untenable. In my view, they are neither untenable nor far-fetched. Accordingly, the facts alleged by Sappi, read together with additional facts put up by the intervening creditor in their affidavits will ultimately govern the outcome of the application.

31. In terms of s 131(1), an affected person 'may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings'. The court may grant the relief sought if it is satisfied that the company is financially distressed,[38] or it 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',[39] or it is 'otherwise just and equitable to do so for financial reasons,[40] *and* there are reasonable prospects for rescuing the

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[37] See *National Director of Public Prosecutions v Zuma* supra at 291A – B.

The approach – to factual disputes in motion proceedings for final relief – in its simplest form, means that the application will be determined on the version stated by the respondent/s in the answering affidavit/s, unless the allegations in the answering affidavit/s are capable of being rejected out of hand, in which regard, see: *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), paras 55 & 56.

[38] ss 131(4)(a)(i).

[39] ss 131(4)(a)(ii).

[40] ss 131(4)(a)(iii).

company'.[41] The court ultimately retains a discretion to dismiss the application in terms of s 131(4)(b) of the Act.

32. The requirement of 'reasonable prospects' was considered by Brand JA in *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2013 (4) SA 539 (SCA) (hereinafter 'Oakdene'). Brand JA held, *inter alia*, as follows:

> "[29] This leads me to the next debate which revolved around the meaning of 'a reasonable prospect'. As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427(1) of the *1973 Companies Act* (see eg *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) para 21). On the other hand, I believe **it requires more than a mere prima facie case or an arguable possibility.** Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on 'reasonable' – which means that it must be a prospect based on reasonable grounds. **A mere speculative suggestion is not enough.** Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers.
>
> [30] Self-evidently it will be neither practical nor prudent to be prescriptive about the way in which the appellant must show a reasonable prospect in every case. Some reported decisions laid down, however, that the applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement (see eg *Southern Palace Investments 265 (Pty) Ltd*) paras 24-25; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) paras 18-20). But in considering these decisions Van der Merwe J commented as follows in *Propspec Investments v Pacific Coasts Investments 97 Ltd* 2013 (1) SA 542 (FB) para 11:
> 'I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.
> And at para 15:
> 'In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'
>
> [31] I agree with these comments in every respect. Yet, the appellants contended that the bar should be set even lower than that. Relying on the reference in s 128(1)*(b)* to 'the development and implementation, if approved, of a plan to rescue the company' their argument was that the reasonable prospect for rescuing the company in s 131(4) demands no more than the reasonable

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[41] s 131(4)(a); *Diener N.O. v Minister of Justice* (926/2016) [2017] ZASCA 180 (1 December 2017) at para [24].

> prospect of a rescue plan. According to this argument, the applicant for business rescue is therefore not required to show a reasonable prospect of achieving one of the goals contemplated in s 128 (1)*(b)*. All the applicant has to show is that a plan to do so is capable of being developed and implemented, regardless of whether or not it may fail. Once it is established that it is the intention of the applicant to develop and implement a rescue plan which has that as its purpose, so the argument went, the court should grant the business rescue application even if it is unconvinced that this will result in the company surviving insolvency or even achieve a better return for creditors and shareholders. I do not agree with this line of argument. As I see it, it is in direct conflict with the express wording of s 128(1)*(b)*. According to this section 'rescuing the company' indeed requires the achievement of one of the goals in s 128(1)*(b)*. Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process. I have indicated my agreement with the statement in *Propspec* that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)*(b)*. " (own emphasis)

33. The goals of business rescue as envisaged in s 128(1)(b) of the Act, are: (i) to rescue the company (by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis) or if it is not possible for the company to so continue in existence, (ii) to achieve a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company – by means of the development and implementation, if approved, of a plan.

34. Counsel for Sappi submits that a reasonable prospect of being rescued is an essential substantive element that must be established, irrespective of which of the jurisdictional requirements in ss (i), (ii) or (iii) of s 131(4)(a) are applicable. The submission appears to be correct.[42] The court's discretion to grant the order in terms of s 131(4)(a) arises when either one of the jurisdictional requirements listed in ss 131(4)(a) are met and it is satisfied that a *reasonable* prospect exists for rescuing the company (as interpreted in *Oakdene* supra).

35. Successful liquidation proceedings constitute a complete process by which a company is brought to an end and the liquidation process culminates in the dissolution of the company up to its deregistration (*See Richter* v *ABSA Bank* supra, at 60D), whereas the primary objective of business rescue under s 128(1)(b) is to

[42] See: *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) at paras 16 & 17.

prevent a viable company from closing down by allowing it an opportunity to regain solvency through the mechanism of business rescue, provided it can be achieved within a reasonable time. In particular, the preamble to the definition speaks of rehabilitating the company. (See *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ)). The purpose is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.[43]

36. In *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (412/2018) [2019] ZASCA 7 (8 March 2019) at para [22], Wallis JA cautioned as follows: 'It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals a punitive costs order is appropriate.' (own emphasis)

37. In *GCC Engineering & others v Lawrence Maroos & Others* 2019 (2) SA 379 (SCA), the Supreme Court of Appeal held that whilst section 131(6) of the Act suspends the liquidation proceedings, it does not suspend the winding-up order that was granted by court. As the liquidation order has not been set aside, the finding by the court which precipitated the order, namely, that Sphynx is factually and commercially insolvent - at the latest 18 March 2019 - remains extant.

Evaluation

Reasonable prospects

38. As indicated earlier in the judgment, Kyriacou's contention (in the liquidation proceedings), namely, that the CC was solvent and in a position to pay its debts was rejected by the court in granting the provisional liquidation order. Kyriacou had failed to provide the financial records of the CC in those proceedings. What is clear is that the CC was in dire financial straits at the time, so much so that it was

[43] Section 7(k) of the Act.

considered commercially insolvent in the judgment of Fourie AJ at the stage of provisional liquidation. Nothing had been put up by Kyriacou to dispel that finding, and a final liquidation order ensued, which remains extant.

39. Kyriacou had managed the CC, which had been under his control and directorship, and was the one person who held intimate knowledge of the financial affairs and workings of the company. Yet he had failed to provide the financial records of the CC in the liquidation application. As appears from the answering affidavits filed in the present proceedings, Kyriacou also failed to co-operate with the provisional liquidators in their investigation into the affairs of the CC, pending the final liquidation order. Kyriacou is the self-same person who supplied information concerning the CC's financial affairs to Holtzhausen,[44] for purposes of enabling him to compile the provisional report upon which Merchant relies for the relief sought in this application.

40. None of the CC's financial statements were provided in these proceedings, including the most recent financial statements for the year ending February 2019. When considering the evidence put up by Sappi and the intervening creditor, the suggestive (if not compelling) inference is that highly selective information pertaining to the financial affairs of the CC was supplied to Holtzhausen for purposes of creating a picture of expectant profitability, far removed from the true state of affairs, not least of all in so far as it pertains to the CC's state of liquidity.

41. Merchant has conceded that he has no independent knowledge of the CC's financial affairs, whether prior to or since its liquidation[45] and he appears therefore to rely to some extent on the say-so of Kyriacou (for the facts set out in the founding affidavit) and exclusively the opinion and recommendation of Holtzhausen as to the prospects of rehabilitating the CC. Holtzhausen in turn

[44] Hotzhausen is one of the proposed BR practitioners in the present matter who compiled a report on the prospects of rehabilitating the business of Sphynx.

[45] See para 5.18 at p 20 of the papers. There Merchant states that he (including the other employees) has limited information with regards to the financial and management statements of Sphynx and the financial performance and position of the CC.

prepared a preliminary report for purposes of these proceedings, in which he constrains or qualifies his conclusions by means of various disclaimers,[46] indicating therein that he relied, *inter alia*, on information that was provided to him by Kyriacou.

42. In so far as Holtzhausen states that he discussed the possibility of business rescue with a representative of IDC (who advised him that IDC is not 'in principle' opposed to business rescue), it is apparent that Holtzhausen did not approach representatives of IDC for their comments in the light of the opposition presented by Sappi or the intervening creditor in application (assuming IDC was aware of the liquidation order that was made at the instance of Sappi), particularly, as regards the alleged cause of the CC's 'financial distress' and the existing state of factual and commercial insolvency which Sphynx found itself in at the time that the final liquidation order was granted, a state which, as it implies, depicts an existing inability to raise sufficient cash resources to meet obligations, or to pay debts as they become due for payment, and which state has surpassed the threshold requirement of 'financial distress' as defined in s 128(f) of the Act.[47] The failure on

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[46] The various disclaimers appear at p112-113 of the papers. They inter alia provide for absolving Holtzhausen or *Sturns Business Rescue Practitioners and Turnaround Specialists* or any other employee of *Strategic Turnaround Solutions (Pty) Ltd* from any of responsibility for any incorrect information provided by the 'director' (Kyriacou) in the compilation of the report, ostensibly due to a '*lack of salient data*' having been furnished and '*limited investigations*' having been undertaken by Holtzhausen. Significantly, Holtzhausen indicates in the report that '*we have not carried out an audit of the Company documents, nor did we have adequate opportunity to verify any of the information given to us by the Company* [kyriacou] *except where expressly stated.*' It appears from the report that only draft financial statements for the years 2015 to 2018 (11 months) were provided by Kyriacou and no formal valuations pertaining to the stated assets of the CC were either obtained.

[47] In terms of s 128*(f)*:

'financially distressed', in reference to a particular company at any particular time, means that-

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;

Ch 6 of the Act is intended to afford companies with reasonable prospects of rescue, some 'breathing space' from a transitory inability to meet its liabilities, to enable it to make a recovery that will benefit the company, the creditors and other affected persons such as employees. As was pointed out in *Griessel* supra at para 78, the '*primary objective is to prevent a viable company from closing down by*

the part of the applicant to serve the papers on the principal creditor (IDC) or to engage with it on the subject speaks volumes in that regard. The unsubstantiated statement by Holtshausen in his report that IDC has indicated that it 'reserves its vote' (at the first meeting of creditors) or has, 'in principle', not objected to business rescue, ostensibly proffered in support of the notion that IDC, who is owed R117 million, would 'possibly' be willing to agree a restructure of the CC's liabilities, amounts in my view to no more than a speculative suggestion, which, as was pertinently warned by Brand JA in *Oakdene* supra, is insufficient for purposes of establishing a reasonable prospect for rescuing the company.[48]

43. Hotzhausen states in his report that the 'financial distress' of the CC was caused as a result of certain 'operational difficulties and challenges experienced in a relatively short period'.[49] Similar allegations appear in the founding affidavit deposed to by Merchant. However, apart from the fact that the allegations lack details or factual support,[50] it was demonstrated in the answering affidavit of the intervening creditor - in reference to the figures tabulated by Holtzhausen in his report - that the alleged operational difficulties could not have caused any appreciable loss of

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allowing it an opportunity to regain solvency through the mechanism of business rescue provided it can be achieved within a reasonable time…' . Ch 6 is not intended to be used to conceal deliberate wrongdoing or to protect rogue directors, officers and shareholders from being exposed and brought to account.

[48] The compelling (if not necessary) inference is that the unsubstantiated statements of the unnamed IDC official would not have been supported, had the papers in this application been served on it.

[49] The challenges include: (i) a loss of production hours of 3 months due to the Randfontein factory moving to an improved location; (ii) a loss in turnover amounting to approximately R45,000.00 occasioned by the previous owner (Hafni) 'interfering in the business of a substantial client'; (iii) a strike action by employees resulting in a loss of approximately one and a half months of man hours on the production lines; (iv) cable theft in December 2017 to date, resulting in a halt in production and loss of income; (v) difficulties in collecting the debtor's book; (vii)'substantial expansion' of company activities and 'excessive growth' causing 'enormous growth' in borrowed funds; and (viii) cost of production escalating with simultaneous increased expenditure.

[50] For example, neither Merchant nor Hotzhausen provide any objective quantification of the purported loss of income that resulted from the loss of operational hours that were caused by the operational difficulties. As to the professed loss of R45 Million alleged to have been caused by Hafni, such allegation was found to lack credence by Dippenaar AJ (as she then was) in the unreported judgment of *Tissue world (Pty) Ltd & Hafni v Sphynx Trading CC,* case no. 73423/2017, delivered on 19/9/2018.

income to the CC[51] and, by process of deduction, could not therefore have caused the CC's alleged present financial crisis. It bears mentioning that both Sappi and the intervening creditor contend that the true reason for the financial demise of Sphynx was the financial impropriety of Kyriacou in the conduct of its affairs. But more about this later.

44. The intervening creditor has in any event produced evidence[52] that belies the accuracy and reliability of the figures depicted by Holtzhausen in his report (in relation to Sphynx's purported financial position from 2015 to 2018[53] as well as in relation to the calculation of a postulated dividend that concurrent creditors would receive in liquidation.[54] As indicated earlier, the factual allegations in the answering affidavit of the intervening creditor have not been disputed or refuted by the applicant, and are thus accepted as correct. It follows therefrom that the financial statement tabulated in Holtzhausen's report is of insignificant value in determining whether or not the business of Sphynx can be rescued.

45. As appears from the applicant's papers, the prospect of rescuing the business primarily hinges on the existence and possible execution (if at all) of an alleged new 'contract' that Sphynx received 'in or during March 2019' for an indefinite period

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[51] For example, the statement of financial position, as tabulated by Holtzhausen in his report (at p. 116 of the papers) evidences a phenomenal rise in income. Assuming the statement to be accurate (for purposes of discussion), the figures depict a 61.2% aggregate total increase in sales from 2015 to 2018, with the costs of sales being no more than 0.3 times larger in 2018 when compared to 2015. Furthermore, the book debt that Sphynx is allegedly struggling to recoup is quantified in the sum of R3.5 million (see para 10.4 at p.29 of the founding affidavit), which is only approximately 1.5% of Sphynx's total income for 2018, being R218,331 447.00. The intervening creditor thus submits that 'it is impossible for such marginal inability to collect income to have any impact on Sphynx's financial position'. See further paras 45-54 at pp.339-342 of the papers.

[52] See paras 55- 65 at pp. 343-350 of the papers, read with annexure 'IP7' at p.400 of the papers. The figures provided in Hotzhausen's report moreover appear to be constructed in a manner so as to increase the asset value of Sphynx and reduce its liabilities, which has been shown to be inaccurate and therefore unreliable.

[53] The statement of financial position of the CC appears at p. 116 of the papers.

[54] The calculation of a postulated dividend appears at p. 117 of the papers.

and which 'will add R106,545 600.00 per annum to the turnover of the company'.[55] No particularity is provided in the applicant's papers as to how the amount of R106,535 600.00 per annum is calculated or who the contracting parties were. Significantly, in the replying affidavit, the 'contract' is said to be no more than a 'purchase order', which is expected to yield a gross profit of approximately R50 million per annum.[56]

46. Mr. De Villiers appearing for the applicant indicated during oral argument tendered in court that the purchase order was received after the liquidation of Sphynx. Certain important questions arise in this context but, however, remain unanswered, namely: (i) which of the entities under the control of Kyriacou would be executing the order, given the undisputed facts set out in para 18.2 above, including the fact that Sphynx management had informed all Sphynx employees as early as March 2018 that Sphynx 'will start operating as NAT Tissue for the 'BIG' customers and all those accounts will run through NAT Tissue' and not Sphynx Trading CC';[57] (ii) who represented Sphynx in securing the order after its liquidation;[58] and (iii) why the purchase order was not disclosed to the liquidators of Sphynx.

47. Sappi and the execution creditor both question the existence of the alleged contract or purchase order, given the lack of particularity and the unanswered questions that surround its appearance, including the justifiably suspicious emergence of a new trading entity on 1 March 2019 (Nat Tissue (Pty) Ltd) with the purchase order apparently received 'in or about March 2019'.

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[55] See: ultimate para at p.119 of the papers.

[56] See: Holtzhausen's proposal at p.119 of the papers.

[57] See: affidavit of Alicia Nicole Rodridgues at p. 483 of the papers. The evidence put up by the intervening creditor points to one of two necessary and critical conclusions: that the new order (assuming it were to come to fruition) will either be diverted to Nat Tissue (if executed by Sphynx) or it will be executed by Nat Tissue (Pty) Ltd and not Sphynx.

[58] If it was Kyriacou, then the purchase order ought to have been disclosed to the liquidators as Kyriacou would have no right to do business on behalf of Sphynx post-liquidation.

48. The identity of the alleged retailer from whom the 'purchase order' was allegedly received has not been disclosed by Holtzhausen or Merchant, allegedly out of 'fear of competition and possible sabotage'.[59] As pointed out by Sappi, it appears unlikely that the unnamed retailer was (or is) even aware of the fact that Sphynx has been finally liquidated. I agree that it is inherently unlikely that a large retailer would be willing to place an order to a value in excess of R100 million with a close corporation in liquidation.

49. I agree with Sappi's submission the proposal contained in Holtzhausen's report is unduly vague and general and creates more questions than answers. The proposal is, at best, a loose prediction of what *might be possible,* what *could possibly be done* and what *might transpire.* As such, the proposal offers no more than 'speculative suggestion' or 'an arguable possibility', which, as held in *Oakdene* supra, is insufficient for purposes of mounting a successful business rescue application. In so far as Holtzhausen states that Sphynx has a 'suitable and functional infrastructure in place to meet current demand' and that the liquidation order has slowed down the fulfilling of most of the 'current contracts in place',[60] he fails to address the following: (i) the fact that the movable assets of Sphynx have been attached by IDC and are presently under guard (ii) the fact that Kyriacou has been shown to be dissipating the assets of Sphynx; (iii) how the intended BRP intends to resolve the problems and issues that Merchant contends led to Sphynx's current financial position;[61] and (iv) the time and capital that will be required (that is, further debt being incurred in order to commence production) in order to start trading and then to trade profitably enough to pay creditors, that is, assuming that

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[59] This is so vague an assertion as to be meaningless.

[60] It is noteworthy that no particularity is provided of the alleged 'contracts in place'.

[61] For example, it is not explained: (i) how the BRP will resolve 'ongoing litigation' in a manner that is favourable to Sphynx; (ii) how the BRP will be able to resolve ongoing problems relating to the non-payment of Sphynx's municipal accounts; (iii) why business rescue will compensate the CC for the months of lost production allegedly caused by cable theft and moving premises; (iv) what role the current management (and Kyriacou) will play in the implementation of the proposal and ultimate business rescue plan; and (v) why it is expected that creditors will vote in favour or a plan, to be formulated.

the new purchase order is capable of being executed by Sphynx or that it will in fact be executed by Sphynx for the benefit of Sphynx (which appears to be questionable).

50. In my view, there is, on the vague and undetailed information before me, no reason to believe that there is any prospect of the business of the respondent being restored to a successful one.

Ulterior purpose and abuse of Ch 6

51. Both Sappi and the intervening creditor submit that the application is an abuse and that it has been launched for an ulterior purpose, namely, (i) to afford Kyriacou a further opportunity to dissipate the funds and asset of Sphynx to the newly formed entity, Nat Tissue (Pty) Ltd, of whom Kyriacou is a director; and (ii) to provide aegis against an independent investigation to be conducted by the liquidators into the payments made by Sphynx (approximately R7 million) to Jurgens, of whom Kyriacou is also a director. The aforesaid submission is principally a function of the role played by Kyriacou and the risk that his future involvement in the business of Sphynx poses to creditors. Both parties submit that the manner in which the business of Sphynx has been carried on (outlined above) under the stewardship of Kyriacou, must be investigated (and if necessary, interrogated at a s 417 enquiry) as a matter of priority.

52. In my view, the evidence presented by Sappi and the intervening creditor strongly suggests malfeasance and deliberate mismanagement of Sphynx and a *modus operandi* of business being carried on to the prejudice of creditors of Sphynx. The liquidators - and not a BRP - are ideally positioned, *inter alia,* to: (i) hold enquiries and to interrogate witnesses; (ii) set aside voidable and unlawful transactions and in this manner, to recover funds; (iii) to preserve and recover assets and where necessary, to liquidate assets in an orderly, structured fashion, whereas the BRP has limited, if any powers, to act on what his investigations might reveal; and (iv) to investigate beyond the books and records of Sphynx – this includes a proper investigation into the relationship between Sphynx and the other entities under the

control and direction of Kyriacou. More importantly, the liquidators will carry out their functions and duties independently of Kyriacou and in fact, to the exclusion of Kyriacou, as opposed to the BRP who will have to work with and rely on Kyriacou.[62] Having regard to the evidence put up by Sappi and the intervening creditor, it is quite obvious that Kyriacou is conflicted and compromised.[63]

53. I am not persuaded in the peculiar circumstances of the matter that business rescue poses a better or more feasible alternative to liquidation. There is no good reason to take Sphynx out of liquidation for purposes of allowing a BRP to investigate what led to Sphynx's current financial position. Sphynx is not 'financially distressed'. It is, in fact, more than financially distressed – it is insolvent and unable to pay its debts. That is the effect of the court order placing it in final winding-up.[64] In my view, the liquidators are better placed than any BRP to properly investigate the affairs of Sphynx and are also better equipped to act on what their investigations will reveal. I agree with Sappi's submission that there is, at this stage, no reason to afford Sphynx the 'breathing space' allowed by Ch 6 of the Act as the CC has for a considerable time afforded itself 'breathing space' by not paying its numerous creditors and in the process, it has incurred debt which, in realistic terms, cannot (or will not[65]) be repaid by it. As demonstrated in the affidavit of the

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[62] Although a BRP may remove or suspend directors, if it becomes necessary, sight cannot be lost of the fact that Sphynx is under the sole direction of Kyriacou and that Hotzhausen has recommended increasing or improving director's levels of control in his report -. see para 6 at p. 121 of the papers - which tends to exacerbate rather than avert the obvious prejudice to creditors.

[63] Whilst Sphynx has one director, it appears highly unlikely that legal proceedings will be instituted by Kyriacou, effectively against himself to recover the R7 million appropriated during November 2018. In this context, the liquidators are far better placed to investigate and recover such funds and if necessary, against Kyriacou personally.

[64] The final liquidation order has not been set aside, and it is not suggested that the court's finding, was for any reason, wrong. Nor has it been suggested that the court erred in placing Sphynx under final winding-up.

[65] Even if business rescue were to be ordered, the likelihood that Sphynx will trade for its own account appears to be non-existent in the light of the evidence put up by the intervening creditor concerning the diversion of its business and/or income to Nat Tissue (Pty) Ltd. That evidence effectively marks the death-knell of the application.

intervening creditor, the total capitalised judgment debt of Sphynx alone amounts to R145 million.[66]

54. Merchant mentions in his affidavits that Kyriacou supports the application for business rescue.[67] It is apparent that Kyriacou could never have thought that a viable business rescue could be instituted in relation to the CC, given the enormity of the debts of Sphynx and its lack of disposable income and cash reserves. The timing of the application suggests that its true purpose was probably to stultify the likely impending interrogation of Kyriacou.[68] The failure by Hotzhausen or

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[66] The amount of R145.5 million is made up of the judgment debt in favour of the intervening creditor in the sum of R28.5 million and the judgment in favour of IDC in the sum of R117 million. As pointed out by the intervening creditor, even accepting Hotzhausen's figures in his report, it has not been shown that Syhunx could realistically trade out of its debt given that it was said to earn a net profit for the entire year of 2018 of only approximately R1.2 million, which averages out over the 11 month period (relied on by Hotzhausen [at p 115 of the papers] to prepare the statement of Spynx's financial position and assets [at p. 116 of the papers]) to be approximately R109 thousand per month for 11 months. The new purchase order which Merchant relies on for the rehabilitation of Sphynx, is said to yield a net profit of approximately R50 million per annum – however, the expenses associated with the production of this order have not been stipulated, nor have the projected costs that are needed to commence production, been stipulated. The allegation as to the gross or net profit to be attained from the execution of the order, remains nebulous, lacking in particulars and in addition, the figures relied on remain unexplained. As such, it does not establish a reasonable or objective premise on which a court can conclude that the business of Sphynx could be rescued as required in *Oakdene* supra. The factual foundation for the existence of a reasonable prospect that the desired goal can be achieved is thus lacking. See *Prospec Investments* supra (referred to in the quoted extract from *Oakdene* supra, at para 52 above).

[67] Whilst Merchant states, on the one hand, that he has no knowledge (i.e., no first-hand knowledge) of Sphynx's financial affairs and performance, he alleges, on the other hand, that he has 'first-hand knowledge' *inter alia* of Sphynx's history, the highs and lows of its performance and its various 'problems and solutions'. He does not say how he, as general manager in charge of production, came to possess such knowledge, and the inference is inescapable that he acquired knowledge by virtue of what Kyriacou would have conveyed to him concerning the financial affairs of Sphynx, given that Merchant indicates that the application was brought with the support of Kyriacou.

[68] As was stated by Cameron JA in *Ebrahim and another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) at paras [15] & [18], *"... it is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable...*

Merchant to deal with any of the issues raised by Sappi or the intervening creditor in this regard indicates that no response was possible.[69] I conclude that the application was brought to provide a reason for avoiding Kyriakou's likely interrogation and with a view to delaying the liquidators in their enquiries as to the squirreling away of assets. All of that constituted an abuse of the process of the court and an abuse of the business rescue procedure.

55. For all the reasons given above, the application falls to be dismissed.

Costs

56. Sappi gave notice to the applicant in para 8.3.4 (at p.146 of the papers) and para 38 (at p. 164 of the papers) that a punitive costs order would be sought in the event that the applicant (Merchant) elects nonetheless to persist with the application, despite the indefensible opposition brought against it. Significantly, Merchant himself sought costs on an attorney and client scale in the event that the application was opposed. The opposition was reasonable and proved successful.

57. Both Sappi and the intervening creditor allege that Kyriacou is the likely driving force behind the application and that he should therefore be ordered to shoulder the costs of the application, together with Merchant. Whilst the submission is not without measure of force, Kyriacou is not a party before court and as such, an order for costs against him personally, cannot ensue.

The statutory provision targets just such heedlessness of corporate autonomy and form. The transfer of Zaki's debt without any quid pro quo showed reckless disregard for the CC's solvency, for its ability to repay the debts it incurred, and for its capacity as a legal entity to accumulate and preserve assets of its own. (It is no doubt with an eye to the importance of a corporate entity's independent asset-accumulating capacity that Henochsberg says that 'recklessly' means carrying business on 'by conduct which evinces a lack of any genuine concern for its prosperity'). " (own emphasis)

[69] Neither Merchant nor Hotzhausen (who filed a supporting affidavit to Merchant's replying affidavit) pertinently addressed the incontrovertible evidence concerning the diversion of Sphynx's assets and/or income to Nat Tissue (Pty) Ltd and the dissipation of Sphynx's assets to Jurgens, including the evidence at paras 82-86 (at pp. 355-357 of the papers), read with "IP11" (at p. 466 of the papers), showing that Sphynx has indicated that it is closing its business, which is being transferred to Nat Tissue (Pty) Ltd.

58. In the light of my conclusion that the application was brought for an ulterior purpose, and having regard to what was stated in *Van Staden* supra (quoted in para 36 above), a punitive costs order is justified.

59. Accordingly, the following order is granted:

1. The application is dismissed with costs on the scale as between attorney and client, which costs are to be paid by the applicant (Mr. John Merchant) and are to include the costs of two counsel for the fifth respondent (Sappi southern Africa Limited) and the costs of one counsel for the seventh and eighth respondents respectively (Mr. El Sayed Hafni and Tissue World CC).

MAIER-FRAWLEY AJ

Date of hearing:	23 April 2019
Judgment delivered:	9 May 2019

APPEARANCES:

Counsel for Applicant:	Adv. RF De Villiers together with Adv. WS Jungbluth
Attorneys for the Applicant:	Bert Smith Incorporated c/o Raymond Joffee & Associates Ref: S. Greef
Counsel for fifth Respondent :	Adv. AJ Daniels SC together with Adv. Vetter
Attorneys for fifth Respondent:	Shepstone & Wylie Ref: N. Besesar
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