REPUBLIC OF SOUTH AFRICA

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

CASE NO: 18085/20

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

SIGNATURE **DATE: 14 AUGUST 2020**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	Applicant
and	
C AND E ENGINEERING (PTY) LTD	First respondent
MAHOMED MAHIER TAYOB N O	Second respondent
COMMISSIONER, COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Third respondent

CASE NO: 16611/20

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

C AND E ENGINEERING (PTY) LTD
(IN BUSINESS RESCUE AS DULY REPRESENTED BY MAHIER TAYOB N O IN HIS CAPACITY AS DULY APPOINTED BUSINESS RESCUE PRACTITIONER) Respondent

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J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. This judgment concerns two related applications that came before me in the urgent court. The applications involve the same parties and the same events. In the circumstances, while they remain separate applications for different relief, it is convenient to deal with them in one judgment. In both matters the applicant, Standard Bank (or the bank), aims to protect its rights as creditor in respect of the first respondent, C and E Engineering (Pty) Ltd (the company), as its debtor. Mr Tayob acts on behalf of the company as the appointed business rescue practitioner.

2. Under case number 16611/20, Standard Bank obtained an *ex parte* provisional order on 14 July 2020 (the perfection order) permitting it to perfect its security held under a General Notarial Bond by taking possession of the company's movable property. It executed the order on the same day. Mr Tayob applies to anticipate the return day of the perfection order under Uniform Rule 6(8), or alternatively, for its reconsideration under 6(12)(c). In either event, he seeks to have the perfection order discharged on the basis that it was not lawfully sought and granted. This is

because on 7 July 2020 the directors had filed a resolution placing the company in business rescue under s129(1) of the Companies Act[1] (the Act). Standard Bank opposes this relief, contending that the perfection order is not invalid. I will call this the perfection application.

3. Under case number 18085/20, Standard Bank applies to set aside the resolution taken by the board of directors to place the company under supervision and in business rescue. The bank wants an order declaring that the business rescue proceedings have ended, as well as an order placing the company under provisional winding up. Mr Tayob, opposes the relief. He wants an order that he be given 60 days within which to determine whether there is a reasonable prospect of the company being rescued. I will call this the business rescue application.

4. There was some debate between the parties as to whether the correct starting point is with the perfection order application, or with the business rescue application. The appropriate approach, in my view, should be determined having considered the common factual substratum underpinning both applications.

FACTUAL BACKGROUND

5. In opposing the business rescue application, Mr Tayob did not take issue with most of the factual averments contained in the founding affidavit. The same holds true in respect of the perfection application. In the circumstances, much of the factual background in both matters is common cause.

6. The company entered into five facility agreements with Standard Bank. As security under the agreements, Standard Bank holds, among other forms of security, a cession of the company's book debts, and the General Notarial Bond over all the

[1] Act 71 of 2008

company's movable property. The company is in breach of the facility agreements, with the result that it is indebted to the bank in the sum of R44 million. It is common cause that Standard Bank is the company's major creditor.

7. Since approximately March 2020, Standard Bank was in communication with the company about its precarious financial state, and its breach of the agreements. The Bank exercised its rights under the cession of book debts. In May 2020, the company admitted that it was in financial distress and it transmitted to Standard Bank a comprehensive business proposal and proposed terms for the repayment of the amounts owing, while it continued to trade. It is not necessary to set out the details of these proposals, save to say that they were fairly comprehensive.

8. In turn, Standard Bank indicated its willingness to accommodate the company, on various conditions. The parties conducted a number of virtual conferences with a view to trying to reach an accommodation between them. The company failed to make its own proposed repayment in May, indicating that it was struggling to recover book debts. No repayments were made for June or July.

9. After further communication between the company and Standard Bank, a final agreement was transmitted to Mr Bateman, one of the directors of the company, for signature. This was on 3 July 2020. No response was forthcoming from Mr Bateman. When Standard Bank tried to follow up with Mr Bateman on 6 July 2020, it could not raise him telephonically. Nor did Mr Bateman respond to an email on 7 July 2020.

10. Between 7 and 8 July, and without telling Standard Bank of its intentions, the company transferred funds, amounting to R1 843 125.11, from its overdraft account held with Standard Bank to certain entities associated with Mr Bateman and other

directors. This was contrary to Standard Bank's instructions that no further funds should be drawn against that account without the bank's consent.

11. This is how matters stood as at the first week of July. In light of the company's conduct, Standard Bank moved urgently, and on an *ex parte* basis, to obtain the perfection order. It indicated in its founding affidavit that it feared that the company might resort to placing itself in business rescue, and for this reason it was imperative for Standard Bank to perfect its rights of security. As I have indicated, the perfection order was obtained on 14 July 2020.

12. On the same day, Standard Bank moved to execute the order. The Sheriff, together with certain agents of the bank attended at the company's premises for purposes of attaching and inventorying the company's movable property. As far as Standard Bank was concerned, it had perfected its rights as a secured creditor under the General Notarial Bond by taking possession of the movable property.

13. What Standard Bank did not know, at the time it applied for and was granted the perfection order, and when it executed the order, was that on 7 July 2020 the company's directors had passed a resolution to commence business rescue proceedings. The resolution was accompanied by sworn statements from the directors, including Mr Bateman. The resolution was filed in terms of s129(1) of the Act on the same day, with the effect that as from 7 July 2020 the company was in business rescue.

14. It is significant that the adoption of the resolution coincided with Mr Bateman, without explanation, cutting off communications with Standard Bank. It is also significant that the transfers from the company's overdraft account amounting to R1,8 million were made after the directors resolved to place the company in business rescue.

None of this is contested, or even answered by Mr Bateman in the papers before court.

15. Standard Bank provided further uncontested evidence that Mr Bateman acted both actively and passively to mislead the bank as to the fact that it had commenced business rescue. Mr Bateman was present when the perfection order was executed on 14 July 2020. In fact, the perfection order was served on Mr Bateman. However, he failed to inform any of Standard Bank's agents who were present, that the company was in business rescue.

16. It was only on the 14 or 15 July 2020 that the company's attorney advised Standard Bank's attorney (in response to a question directed by the latter) in a telephone conversation that the company had placed itself under business rescue. And it was only on 16 July 2020 that Mr Tayob provided Standard Bank, as an affected person, that the company had commenced business rescue proceedings. The notice was accompanied by, among other things, the resolution of the company to commence business rescue and the accompanying sworn statements of the directors, and an agenda for the first meeting of creditors scheduled for 22 July 2020.

17. Mr Tayob accepts that the notice was not published within five business days, as required under s129(3) of the Act.

18. Standard Bank took legal advice concerning its position. According to this advice, it accepted that it would probably have to file an urgent application to court to protect its position by *inter alia*, seeking an order terminating business rescue proceedings and placing the company under provisional liquidation. However, it held off proceeding to file an application at court pending the first meeting of creditors. Standard Bank's legal representatives attended that meeting.

19. At this meeting, Mr Tayob tabled a resolution that he be provided with an extension of 60 days within which to prepare a business reduce plan. The resolution was voted on with all creditors other than Standard Bank voting in favour of the resolution. It is common cause that the vote was based on the numerical majority of creditor's present, and not on the basis of the relative weighting of the voting rights each creditor.

20. Mr Tayob also told the meeting that if funds in the amount of R10 million were recovered from Standard Bank, which had exercised its rights under its agreements with the company, this would make business rescue possible. In other words, if these funds were recovered, according to Mr Tayob, the company could be rescued as a going concern.

21. Standard Bank served the business rescue application on 23 July 2020. In the notice of motion, it gave the respondents until 4pm on 28 July to file its answering affidavit, with the matter being placed on the urgent court roll of 4 August 2020.

22. On 28 July, Mr Tayob's attorneys filed the answering affidavits in both the business rescue application and the perfection order application. Simultaneously, they also set the latter down for hearing on 4 August.

URGENCY OF THE BUSINESS RESCUE APPLICATION

23. Mr Tayob opposed the business rescue application on the grounds that it lacked urgency. He submitted that given the magnitude of the relief sought in the application, there was no reason why Standard Bank could not obtain redress in the ordinary course. He pointed out that with the appointment of himself as the business rescue practitioner, there had been a "changing of the guard", and that Mr Bateman and the other directors were no longer in charge of the company. As such, it was

submitted on behalf of Mr Tayob, that Standard Bank did not have anything further to fear from any alleged underhand activity on their part that might undermine its interests in the company's assets.

24. Mr Tayob also argued that to permit the application to proceed by way of urgency would undermine the purpose of the business rescue provisions of the Act. The business rescue process was designed to afford time to

25. the business rescue practitioner to fulfil certain obligations. To hear the matter as an urgent application, so counsel for Mr Tayob argued, would prevent this to the detriment of the other creditors who had voted to permit Mr Tayob an extended period to fulfil his duties. In short, a recurring theme of the submissions made on behalf of Mr Tayob was that the application was premature.

26. Mr Tayob's submissions go further. He says that the urgent application constitutes an abuse of process in that its real purpose is to protect the perfection order, and hence Standard Bank's status as a secured creditor, in circumstances where that order ought never to have been granted because of the pre-existing business rescue process.

27. It is not unusual in this division of the High Court for matters involving business rescue and liquidation to be placed on the urgent court roll. Nor is it unusual for them to be dealt with on an urgent basis by the court. This division has a relatively commercially-heavy case load. It is understood that there is often an element of inherent urgency in business rescue and related matters.

28. Of course, this does not mean that all matters of this nature must be treated as urgent. Obviously, the court must have regard to the facts of the matter at hand. In this case, Standard Bank seeks to challenge the validity of the resolution adopted

by the directors placing the company in business rescue. It does so against the backdrop of facts that suggest that the resolution may not have been adopted for the *bona fide* purposes of business rescue, but rather to frustrate Standard Bank's rights under the General Notarial Bond, and as the company's major creditor. The vulnerability of the business rescue proceedings is compounded by the common cause fact that Mr Tayob did not afford notice to affected parties within 5 days of the commencement of proceedings as required in s129(3).

29. In light of these facts, I cannot accept Mr Tayob's contention that the application is an abuse of process. Standard Bank challenges the business rescue process on what appear for all intents and purposes to be reasonable grounds. There can be no question that as the majority creditor which holds security in the form of a General Notarial Bond, it cannot be accused of having abused the urgent process by proceeding to court to attempt lawfully to undo the process in terms of which its rights of security have been affected.

30. In circumstances where the very underpinnings of the business rescue process are quite legitimately challenged by a creditor with an obvious and substantial interest in the matter, it seems to me to be self-evident that the matter is urgent. This is particularly so when there is uncontested evidence placing real doubt on the *bona fides* of directors in resolving to place the company in business rescue in the first place. It is in the interests not only of Standard Bank, but indeed of all creditors, for the legal challenge to be disposed of sooner rather than in the ordinary course.

WHICH APPLICATION SHOULD LEAD PROCEEDINGS?

31. Mr Tayob contends that the court should first consider the perfection order application, and only thereafter, the business rescue application. His reasoning for this submission is that the perfection order was granted after the company was

placed in business rescue. Thus, it was granted contrary to the general moratorium on legal proceedings against a company in business rescue as provided in s133(1) of the Act. That section provides that:

> "During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum except-
> (a) with the written consent of the practitioner; (or)
> (b) with the leave of the court and on any terms the court considers suitable; …"

32. Mr Tayob submits that Standard Bank did not seek leave under s133(1)(b). Accordingly, the perfection order ought never to have been granted. As I understand it, the argument proceeds to the effect that to consider the business rescue application first would be to permit Standard Bank to circumvent its problem with non-compliance of that section. This would cement Standard Bank's position as a secured creditor, to the detriment of other creditors. It would give retrospective effect to an order, and a secured creditor status, that ought never to have been given legal recognition in the first place.

33. On the papers in both applications before me it is common cause that but for the pre-existing business rescue resolution of 7 July 2020, Standard Bank was entitled to take steps to perfect its General Notarial Bond. The common denominator of the disputes between the parties is thus the validity of the business rescue resolution, and whether the business rescue process initiated by that resolution should continue or be terminated. This is the material issue at the heart of both applications. The outcome of that inquiry, which is directly addressed in the business rescue application, will have important consequences for the perfection order application. For this reason, the appropriate route forward is to consider the business rescue application first, and thereafter to consider the protection order application.

THE RELEVANT STATUTORY PROVISIONS

34. I have already made reference to s133(1) insofar as it pertains to the moratorium placed on legal proceedings against a company under business rescue.

35. Section 129(1) permits the board of a company to commence voluntary liquidation proceedings. It provides that:

> "Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-
> (a) the company is financially distressed; and
> (b) there appears to be a reasonable prospect of rescuing the company."

36. A resolution has no effect until it has been filed.[2] Section 129(3) requires the company, within five business days of filing the resolution, to publish a notice of the resolution to every affected person, including a sworn statement of the facts relevant to the grounds on which the board resolution was founded. It must also appoint a business rescue practitioner. In terms of s129(5)(a):

> "If a company fails to comply with any provision of subsection (3) or (4) … its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity".

37. In *Panamo Properties (Pty) Ltd and Another v Nel N O and Others*,[3] the Supreme Court of Appeal considered the meaning and effect of this provision. It held that:

> "If there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity and is liable to be

[2] Section 129(2)(b)
[3] 2015 (5) SA 63 (SCA), confirmed in *Eravin Construction CC v Jacobus Nicolaas Bekker N O and Another* [2016] ZASCA 30 (30 March 2016)

set aside under s130(1)(a)(iii). In all cases the court must be approached for the resolution to be set aside and business rescue to terminate."

Consequently, the failure to comply with the procedural requirements of s129(3) does not, without more, invalidate and put an end to business rescue proceedings. It does no more than render the proceedings liable to being set aside. To give effect to the invalidity, and to terminate the business rescue proceedings, an order of court is necessary.

38. Section 130 is particularly relevant in this case. It deals with objections to a company resolution to commence business rescue. It provides, in relevant part as follows:

> "(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—
> (a) setting aside the resolution, on the grounds that
> (i) there is no reasonable basis for believing that the company is financially distressed;
> (ii) there is no reasonable prospect for rescuing the company; or
> (iii) the company has failed to satisfy the procedural requirements set out in section 129; …
> …
> (5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may—
> (a) set aside the resolution—
> (i) on any grounds set out in subsection (1); or
> (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;
> (b) afford the practitioner sufficient time to form an opinion whether or not—
> (i) the company appears to be financially distressed; or
> (ii) there is a reasonable prospect of rescuing the company,
> and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and
> (c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including—
> (i) an order placing the company under liquidation; or … ."

39. In *Panamo Properties*, the SCA held that the word "or" between sub-paragraphs (i) and (ii) of s130(5)(a) should be read conjunctively as "and". In other words, an

affected person who wishes to apply to have a company resolution to enter business rescue set aside on the grounds provided in s130(1) must not only establish that ground, but must, in addition, satisfy the court that it would be just and equitable that the resolution be set aside.[4]

40. Finally, s134 deals with protection of property interests. In particular, for purposes of the present case, s134(3) provides that:

> "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; …"

THE BUSINESS RESCUE APPLICATION

41. Standard Bank objects to the company resolution placing it in business rescue. It asks the court to set aside the resolution and to terminate the business rescue proceedings. Allied to this, Standard Bank asks the court to place the company under provisional liquidation. As to the first leg of relief, Standard Bank relies on the following grounds of objection outlined in s130(1)(a):

41.1. First, the company failed to comply with the procedural requirements set out in s129(3) rendering the resolution and business rescue proceedings liable to be set aside under section 130(1)(a)(iii).

41.2. Second, and in any event, there is no reasonable prospect for rescuing the company, which renders the resolution objectionable under s130(1)(a)(ii).

[4] *Panamo Properties*, above, paras 31-33

41.3. Third, and in addition to either of the above two grounds, it is just and equitable in the circumstances of this case to set aside the company resolution and to terminate the business rescue proceedings.

42. In response, not only does Mr Tayob oppose the relief, but he has filed a counter-application, seeking from the court an order under s130(5)(1)(b) giving him a period of 60 days within which to determine whether there are reasonable prospects of rescuing the company.

43. As to the failure to comply with the provisions of s129(3), it is common cause that neither the company, nor Mr Tayob gave the affected parties notice that the company had commenced business rescue within 5 days of the date on which the resolution was filed. It is clear from *Panamo Properties* that this in itself does not automatically render the resolution and the business rescue proceedings a nullity. An order of court is required to have this effect. Further, in deciding whether or not to set aside the resolution, the court will still have regard to whether it would be just and equitable to do so.

44. This means that the meat of the present matter is to be found in the second ground of objection, considered together with the question of justice and equity. An underlying consideration, arising from the particular facts, is whether the company resolution was taken for the *bona fide* purposes of business rescue. There is an intertwined relationship in this case between the issue of whether there are reasonable prospects of rescue, the issue of justice and equity, and the *bona fides* of the company's conduct.

45. It is not in dispute that the company is in financial distress, and Mr Tayob accepts this. Indeed, in the sworn statements signed by the directors in terms of s129(3), the deponents expressly acknowledge that the company is in financial distress and

that "*it appears reasonably unlikely that it will be able to pay all its debts as they fall due and payable within the ensuing six months*."

46. The background facts set out earlier demonstrate that the company's financial distress was evident from earlier this year, with the first letter of demand being dispatched in March 2020. This was followed by Standard Bank invoking its rights under the cession of book debts in April 2020. Two months prior to the company resorting to business rescue, it compiled a business proposal which it put to Standard Bank. However, the respondent was unable to comply with its proposed terms of repayments in May, June and July. The correspondence between the parties indicates that the company was reliant on the continued use of the overdraft facility, or its book debts, in order to continue to trade. In other words, it was reliant on Standard Bank being willing to extend the company further financial support under the facility agreements.

47. In their sworn statements, the directors did not state that there were reasonable prospects of rescuing the company. The statements are simply silent in this regard. This is a noteworthy omission, as s129(1)(b) requires that a resolution to place the company in business rescue must be based on reasonable grounds to believe not only that the company is in financial distress, but also that there are reasonable prospects of it being rescued. The resolution in this case does not comply with this fundamental statutory requirement.

48. Moreover, Mr Tayob, as the business rescue practitioner, has indicated that he does not yet have sufficient information at this disposal to make a proper determination as to whether there are reasonable prospects of the business being rescued. He does not have recent financial statements and related material from the company. It is for this reason, he says, that he should be afforded time to make a proper

assessment as to whether the company can be rescued. It is to be noted, however, that this is not the stance he took in the first meeting of creditors. The minutes of that meeting record Mr Tayob's view that if R10 million was recoverable from Standard Bank, the business could be rescued. It is not clear what he based this view on, and Mr Tayob does not address this contradiction in his answering affidavit.

49. Business rescue is aimed at the rehabilitation of a company in financial distress. The process envisages that ultimately there will be an adoption of a plan to rescue the company 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, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company".[5]

50. As the SCA explained in *Oakdene*[6] a company does not have to establish a reasonable probability that it can be rescued. It is required only to establish a reasonable prospect, which entails a lower bar. However, it still requires more than a mere *prima facie* case or an arguable possibility. It must be based on reasonable grounds, and not speculation.[7] The company does not have to set out a detailed plan as to how the rehabilitation might take place. However, it must establish grounds, i.e. facts that would show that there is a reasonable prospect of either of the two goals cited above being met.[8]

51. Mr Tayob says that in order to permit him to do his duty under the Act, the court should act prudently and afford him more time to conduct his investigations into the prospects of rescue. I have no quarrel with Mr Tayob's submission as a general

[5] Section 128(1)(b) read with s128(1)(h)
[6] *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2013 (4) SA 539 (SCA)
[7] Para 29
[8] Para 31

principle. Of course a court should not run headlong into terminating business rescue proceedings without proper consideration of the facts and interests involved. However, there will be cases where the prudent path is to terminate business rescue rather than to afford the business rescue practitioner more time to consider the company's position. This is precisely such a case.

52. As I have already noted, the company has already attempted to restructure its affairs. It engaged with Standard Bank in this regard and proposed a repayment schedule, but was unable to meet its own commitments. In light of this, it is perhaps not surprising that the directors avoided dealing with the prospects of the company being rescued in their sworn statements.

53. It is also significant, as I have already indicated, that prior to adopting the resolution, the company was dependent on further financial resources being made available to it from Standard Bank by way of further drawdowns on the overdraft facility. Standard Bank has indicated that it will not be prepared to extend any further facilities to the company. In fact, it made its position to the company clear in its letter dated 1 July 2020. There is thus no prospect of post-commencement finance being extended by Standard Bank for purposes of rehabilitation of the company under business rescue.

54. The prospect of post-commencement finance is critical to the prospects of rehabilitation. Without it, a company that is in financial distress is unlikely to be able to restructure its operations so as to enable it to trade in solvent circumstances. It is also unlikely that unless there is a reasonable prospect of post-commencement finance, the business rescue process will be in the best interests of creditors. Where the major creditor, which previously provided the company with financial facilities,

turns off the tap because of the company's default on its obligations, this does not bode well for the company's post-commencement prospects.

55. The only prospective source of financial injection into the company in this case is the collection of book debts. However, there are substantial obstacles in the way of this option. Significantly, Standard Bank holds security over the book debts under the cession. In order for Mr Tayob to use the book debts for purposes of keeping the company in business, he would need the consent of Standard Bank, as a secured creditor, under s134(3). Standard Bank expressly states it will not give consent. In light of the amounts owed to Standard Bank, and the failure by the company to meet its previous proposals of payment, it can hardly be said that Standard Bank's declared intent is unreasonable or *mala fides*. Its stance cannot be ignored, and should be given due consideration by the court.[9]

56. Mr Tayob indicates that there may be difficulty for Standard Bank in asserting its rights of security over some of the book debts, as they may be subject to *pacta de non cedendo*. He points to one agreement containing such a clause. There is no other evidence that this presents a pervasive problem that would serve to undermine Standard Bank's rights of security over the book debts. If some debts are subject to a provision of this nature, this is an issue that can be dealt with in winding up, should such an order be made. What is clear is that the evidence of one contract with a *pactum de non cedendo* is insufficient to treat Standard Bank at this stage as anything other than a secured creditor in respect of the book debts of the company.

57. In any event, as Standard Bank shows through the financial analysis contained in its affidavits, there is little more than R4 million currently owed to the company by

[9] *Oakdene*, above, para 38

its debtors. This sum is quite obviously inadequate to keep the company afloat and to service its debts, including the R44 million owed to Standard Bank.

58. On this basis alone, it seems to me that there would be very little to be gained by granting Mr Tayob an additional 60 days to consider whether the company can be rescued. There is simply nothing before the court to support the prospect of such an outcome, let alone a reasonable prospect.

59. However, there are other facts that weigh heavily against the continuation of the current business rescue proceedings. There are strong indications from the facts leading up to, and taking place immediately after, the adoption of the company's resolution to go into business rescue that the resolution was not adopted *bona fide* with a view to achieving the purposes of business rescue.

60. Prior to 6 July 2020 the company and Standard Bank were involved in an ongoing process of trying to reach agreement on how the company could meet its obligations under the facility agreements. The company had not honoured its previous proposals. Nonetheless, shortly before the resolution was taken, there seemed to be a prospect of reaching agreement. Instead, and without reverting to Standard Bank, the directors adopted the business rescue resolution. Mr Bateman's conduct shows that he actively avoided playing open cards with Standard Bank.

61. There can be no question on the evidence before me that there was a deliberate tactic on the part of the directors secretively to adopt the resolution in order to obstruct Standard Bank in the exercise of its rights. This inference is reinforced by the fact that even after the resolution was adopted, and Standard Bank executed the perfection order, Mr Bateman did not tell the bank's agents that the company was in business rescue. Moreover, and very significantly, transfers of R1,8 million were made out of company accounts after the resolution had been adopted. Mr

Bateman did not answer the damning allegations relating to his conduct in this regard. He simply signed a standard, general confirmatory affidavit in support of Mr Tayob's answering affidavit.

62. Had the company been *bona fide* in resolving to enter business rescue, one has to ask why it did not share this information with its major creditor, Standard Bank, with whom it was in discussions at the time. Why did it keep the information from the bank even after the resolution had been adopted? If it was *bona fide* in its resolution, why were transfers made after the resolution's adoption to entities associated with the directors?

63. It has been held by Spilg J in this division[10] that the Act presupposes that a resolution under s129(1) is taken in good faith, and that this is a relevant consideration in the determination of whether it is just and equitable to set it aside. The facts of this case demonstrate the importance of this observation. They also demonstrate how the elements of prospects of rescue, justice and equity, and *bona fides* are intertwined.

64. Here, there are no facts to indicate that the company can be rehabilitated. Had there been reasonable prospects of rehabilitation, the obvious route for the company would have been to pursue its discussions with Standard Bank. Instead of doing so, however, it secretly adopted a business rescue resolution, transferred monies from its accounts to connected creditors, and then kept Standard Bank in the dark. This conduct is the antithesis of what would be expected of the directors of a company that *bona fide* had prospects of being rescued.

[10] *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), paras 82-87

65. I find that there is no reasonable prospect of the company being rescued. The absence of *bona fides* on the part of the company in adopting the resolution confirms what the financial facts establish in this regard. In this case it follows axiomatically that it would be just and equitable to set aside the resolution. This will not be to the detriment of other creditors, as this relief does not stand on its own. As I deal with below, it will be coupled with an order placing the company in provisional winding up. The liquidator appointed under that process will have greater investigative powers than Mr Tayob as a business rescue practitioner. In the circumstances, the alternative route of liquidation will better serve the interests of all creditors than continuing to keep the company under business rescue.

WINDING UP

66. In terms of s130(5)(c)(i), when a court sets aside a resolution placing the company in business rescue it may at the same time make an order placing the company under liquidation. Given the facts in this case, the requirements for such an order may be dealt with briefly.

67. It is undisputed that the company is commercially insolvent. This much was expressly confirmed by the directors in their sworn statements accompanying the business rescue resolution. There they stated that it was unlikely that the company would be able to meet its debt obligations as they fall due for the next six months. The company's debt to Standard Bank is also not placed in dispute, nor is the fact that the company has been unable to service its repayment obligations to the bank under the various facilities.

68. These common cause facts demonstrate clearly that the requirements for winding up are satisfied. Prior to the hearing of the matter the court was provided with

evidence that the Master had issued the necessary security bond, and that service of the liquidation application had been effected on the requisite persons and entities.

69. It is accordingly appropriate that the order setting aside the resolution and terminating business rescue proceedings should be accompanied by an order placing it in liquidation.

THE PERFECTION ORDER APPLICATION

70. It is common cause that the perfection order was granted on an *ex parte* basis at the time that the company had been placed under business rescue. It is also common cause that at the time that Standard Bank sought, and Lamont J granted, the perfection order, the bank had no knowledge of this fact. Indeed, the company had gone out of its way at that stage to conceal the business rescue from Standard Bank.

71. At face value, the order was obtained at a time when there was a statutory moratorium on any enforcement proceedings being taken against the company. Section 133(1) establishes this moratorium by providing that such action may only be taken with the written consent of the business practitioner or with leave of the court. Quite obviously, in this case, where Standard Bank had no knowledge of the business rescue, it was unable to pursue either of these routes in order to perfect its rights as a secured creditor under the General Notarial Bond.

72. Mr Tayob contends that because the perfection order was obtained in contravention of s133(1)(a) or (b), it ought never to have been granted. On this basis, he anticipated the return date of the provisional perfection order, and contended that it

ought to be discharged. Standard Bank counters with a plea for the perfection order to be confirmed.

73. The fate of the perfection order is not as simple as Mr Tayob suggests. The implied premise of his case is that because Standard Bank did not comply with s133(1)(a) or (b) the perfection application and order granted are a legal nullity. But this premise is flawed. In *Chetty*[11] the SCA considered the question of whether proceedings instituted by a creditor without consent of the practitioner, or leave of the court ought to be invalidated for this reason. The Court cautioned that the consent requirement under s133(1)(a) should not be mischaracterised as a jurisdictional condition.[12] Further:

> "Section 133(1) was enacted to protect a company under business rescue against claims from creditors. Its object is to prevent the practitioner being inundated with legal proceedings without sufficient time within which to consider whether or not the company should resist them and to prevent the company that is financially distressed from being dragged through litigation while it tries to recover from its financial woes. Its effect is to stay legal proceedings, except in those circumstances mentioned in s 133(1)(a) - (e). The creditor may initiate or continue the proceedings in terms of s 133(1)(a) with the consent of the practitioner.
>
> But s133(1)(a) is not a shield behind which a company not needing the protection may take refuge to fend off legitimate claims. Thus, s133(1)(b) … permits a creditor to seek the court's imprimatur to initiate or continue legal proceedings against the company in the event of a practitioner's refusal to give consent, or directly, even without the permission of the practitioner having been sought. So s133(1)(a) is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue. This is a strong indication that non-compliance with the section is not to be visited with the sanction of a nullity.
>
> Moreover, there is no other indication in the section that non-compliance carries with it the implication that the proceedings are a nullity. "[13] (my emphasis)

11 *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA)

12 At para 37

13 At paras 39-41

74. The Court concluded that properly construed, non-compliance does not in and of itself invalidate legal proceedings instituted without the business rescuer's consent.[14]

75. It is evident from this decision that at heart the consent and leave requirements, s133(1)(a) and (b) have a procedural and pragmatic purpose. They are not intended to non-suit a creditor who, like Standard Bank in this case, *bona fide* seeks to enforce its rights in circumstances where its lack of knowledge of the company's status results in the non-compliance with s133(1)(a) or (b). To do so would place form over substance, and would elevate what are essentially requirements directed at procedure to the status of a substantive jurisdictional requirements.

76. The effect of the section is to stay the initiation or further conduct of proceedings unless consent or leave is obtained. It does not, on its own, nullify them. A court can refuse leave, in which case the stay will persist, or it may grant leave, in which case proceedings may commence or continue.

77. A court could also, as Mr Tayob asks this court to do, set aside an order granted without leave. But this is not the automatic result for an order obtained without consent or leave of the court. As the SCA pointed out in *Chetty*, leave or consent is not a jurisdictional requirement, and non-compliance does not render the proceedings a nullity. It is implicit in this that a court has a discretion to set aside an order obtained without leave or consent, but is not obliged to do so.

78. What this means is that in a case like the present, the fact that the perfection order was obtained without consent or leave is a factor the court must consider on the return day, or on reconsideration, of the provisional order. The court may discharge

[14] At para 42

or set aside the provisional order for want of compliance with the consent or leave requirement. However, it would be perfectly proper for a court to refuse to set aside or discharge such on order on the grounds of non-compliance with s133(1)(a) or (b) in appropriate circumstances.

79. The present matter is a good example of a situation where there is no warrant for staying, or reversing the perfection proceedings. Standard Bank acted in good faith in instituting its perfection application and obtaining and executing the perfection order. It cannot be faulted for failing to comply with the requirements of s133(1). In fact, it was the conduct of the directors of the company that led to this state of affairs.

80. What is more, I have found that it is just and equitable to set aside the resolution placing the company in business rescue. Quite obviously, no point would be served by setting aside or discharging the perfection order in these circumstances. Standard Bank acted *bona fide* in obtaining the order in the first place. It ought not to be deprived of its secured creditor status because it was actively prevented from complying with the section in the first place.

81. For these reasons, I find no merit in Mr Tayob's contention that the perfection order ought to be discharged.

82. There is a second reason why Mr Tayob's quest to have the perfection order discharged must fail. Section 130(5)(c) gives a court the power to make any further and necessary orders when it sets aside a business rescue resolution and terminates business rescue proceedings. In *Alderbaran (Pty) Ltd and Another v Bouwer and Others*[15] the Western Cape Court found that the specific orders contemplated in sub-paragraphs (i) and (ii) of that section did not constitute a

[15] *Alderbaran (Pty) Ltd and Another v Bouwer and Others* 2018 (5) SA 215 (WCC)

numerus clausus of orders that a court may make when setting aside a resolution. The court held further that:

> "To my mind the rationale for the wide discretion conferred on the court in s130(5)(c)to grant 'any further necessary and appropriate order' is to equip the court to deal equitably with the various circumstances which may arise and require regulation following the setting-aside of a s129 resolution and termination of business rescue. The discretion must be exercised judicially, and the only limit on the further order which may be made is that it must be both necessary and appropriate."

83. The court went on to find that it was necessary and appropriate to make an order confirming the validity of a sale in execution of property that had taken place before the creditor in question was aware that the debtor had been placed in business rescue. The circumstances of that case were virtually on a par with those in this matter.

84. I align myself with the approach adopted and conclusion reached by the Court in *Alderbaran* in this regard. If the only case before me was the business rescue application, I would have confirmed the validity of the perfection order through the exercise of my discretion under s130(5)(c) for the same reasons as the court did in *Alderbaran*. As matters stand, however, I am faced, at the same time, with an application to set aside the perfection order, and a counter-application to confirm it under a separate case number, and in separate proceedings. In my view, the procedurally correct approach for me to adopt is to grant the appropriate relief under the perfection order application. The orders set out below make provision for this.

CONCLUSION AND ORDERS

85. For all of the reasons set out above I find that Standard Bank is entitled to the relief it seeks in terms of the business rescue application, including an order placing the

company in provisional liquidation. I am also satisfied that there is no legal basis for discharging or setting aside the perfection order. The effect of this is that the perfection order remains a valid order and Standard Bank is entitled to whatever rights of security flow from it.

86. As the company is now in liquidation, the costs of the applications must be costs in the winding up.

87. I make the following orders:

ORDER UNDER CASE NUMBER 18085/2020

1. This application is urgent and compliance with the forms and service provided for in the rules of court are dispensed with to the extent required or necessary.
2. It is declared that:
   1.1. the resolution taken by the board of directors of the first respondent and filed on 7 July 2020 is set aside; and
   1.2. the business rescue proceedings of the first respondent have ended.
3. The first respondent is placed under provisional winding up.
4. All persons who have a legitimate interest in this matter are called upon to put forward their reasons why this court should not order the final winding up of the first respondent on 26 October 2020 at 10:00 am or so soon thereafter as counsel may be heard.
5. A copy of this order shall be served on the first respondent at its registered address.
6. A copy of this order shall be published forthwith once in the Government Gazette.
7. A copy of this order shall be forwarded to each known creditor by prepaid registered post or electronically receipted telefax transmission.

8. A copy of this order shall be served on:

   7.1. every known trade union representing employees of the first respondent, if any;

   7.2. the employees of the first respondent, if any, by affixing a copy of the order 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 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 the application; and

   7.3. the South African Revenue Service.

9. The costs of this application, including the costs occasioned by the first and second respondents opposing this application, shall be costs in the winding up of the first respondent, and the costs of the applicant are to include the costs of two counsel.

ORDER UNDER CASE NUMBER 16611/2020

1. The provisional order granted under the above case number by Lamont J on 14 July 2020 is confirmed and made final.
2. The costs of the application, including the costs of the respondent anticipating the return day and opposing the order shall be costs in the winding up of the first respondent, and the costs of the applicant are to include the costs of two counsel.

R KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	05 AUGUST 2020
Date of judgment:	14 AUGUST 2020

Appearances:

Counsel for the Applicant:	Adv. JE SMIT
	Adv. De Oliveira
Instructing Attorneys:	Jason Michael Smith Inc. Attorneys
Counsel for the Respondents:	Adv. D Prinsloo
Instructing Attorneys:	Roestoff Attorneys