IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

20/3/12
DATE

SIGNATURE

(REPUBLIC OF SOUTH AFRICA)

20/03/2012

CASE No. 38326/2011

CASE No. 43043/2011

CASE No. 88376/2011

In the matters between:-

FIRSTRAND BANK LTD	Applicant
and	
LODHI 5 PROPERTIES INVESTMENT CC	Respondent (**Case No. 38326/2011**)
LODHI 4 PROPERTIES INVESTMENT CC	Respondent (**Case No. 43043/2011**)
MUHAMMAD ISLAM LODHI	Respondent (**Case No. 88376/2011**)

JUDGMENT

Van der Byl. AJ:-

Introduction

[1] There are three applications before me. namely -

.../...

(a) **firstly**, an application for the liquidation of Lodhi 5 Properties Investment CC under Case No. **38326/2011**;

(b) **secondly**, an application for the liquidation of Lodhi 4 Properties Investment CC under Case No. **43043/2011**; and

(c) **thirdly**, an application for the sequestration of Mr. Muhammad Islam Lodhi, who is the sole member of the two aforementioned close corporations, under **Case No. 88376/2011**.

[2] It is common cause -

(a) that the Respondent in the first of these applications ("*Lodhi-5*") and the Applicant had on 7 May 2008 entered into -

(i) a loan agreement which, according to the Applicant, was *Shariah* compliant, in terms of which the Applicant lent and advanced an amount of R9,6 million to Lodhi-5 repayable in 120 equal monthly instalments of R120 000; and

(ii) an agency agreement which, according to the Applicant was likewise *Shariah* compliant, in terms of which an administrative fee of R7 600 560 was levied payable in 120 equal monthly instalments of R63 338,

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and that during February 2010 the payments due in terms of both agreements Lohdi-5 were in arrears in the sum of R725 074,40;

(b) that the Respondents in the second and third of these applications executed suretyship in favour of the Applicant securing Lodhi 5's indebtedness.

[3] The outcome of the second and the third applications is dependent on the outcome of the first of these applications.

[4] Amongst various disputes raised in the papers only two issues remained in issue for determination on the merits, namely -

(a) **firstly**, that the administrative fee stipulated in the agency agreement was not payable as the suspensive conditions to which the agreement was subject had not been fulfilled, alternatively, that the Applicant had not rendered its own *quid pro quo*, further alternatively, that the agreement was in effect not *Shariah* compliant;

(b) **secondly**, that an insurance payout of R5 million received by the Applicant in respect of a claim for a loss suffered consequent upon a fire which destroyed the building on the premises purchased by way of the loan granted to Lodhi 5 and which served as security for the loan, sufficiently covered all arrear instalments on the loan agreement in advance for at least another two years.

.../...

[5] At the commencement of the hearing of these applications, however, a point *in limine* was raised by Mr. Maritz SC who appeared on behalf of the Respondents, namely, that, bearing in mind that the applications relating to the two close corporations were issued after the commencement of the Companies Act, 2008 (Act 71 of 2008) ("*the new Companies Act*"), the expression "*solvent company*" or, in so far as that item applies equally to close corporations, "*solvent close corporation*", in item 9(2) of Schedule 5 to that Act means a company that is "*actually (or factually) insolvent*" so that the onus rests on an applicant for the liquidation of a company to prove that such company is "*actually (or factually) insolvent*" in the sense that its liabilities exceed its assets.

In support of this contention it was submitted that there are at least two indications in the new Companies Act to this effect, namely -

(a) the definition of "*solvency and liquidity test*" in section 4(1) of the new Companies Act;

(b) the expression "*financially distressed*" used in its defined meaning in section 131 of that Act.

It would appear that in argument no reliance was placed on the first of these indications.

I deal below with the second of these perceived indications.

[6] The parties informed me from the bar that they are in agreement that I be called

.../...

upon to first hear and pronounce upon the point *in limine* and, in anticipation that judgment may be reserved, that the remaining issues in the two applications and the third application be postponed *sine die*, pending determination of the point *in limine*.

[7] In order to understand the submissions made on behalf of both parties on this point, it is in my view necessary to set out a brief overview of the relevant legal provisions as they existed before the commencement, and now exist in terms, of the new Companies Act.

Relevant legal provisions before the commencement of the new Companies Act

[8] In terms of section 66(1) of the Close Corporations Act, 1984 (Act 69 of 1984), before its amendment as provided in Schedule 3 to the new Companies Act, the provisions of the Companies Act, 1973, which relate to the winding-up of companies (excluding, *inter alia*, sections 344, 345, 346(2) and 349) applied *mutatis mutandis* (on the construction provided in subsection (2) of that section) to the liquidation of close corporations.

[9] Sections 344, 345, 346(2) and 349 of the Companies Act, 1973, provided -

(a) in the case of section 344, for circumstances in which a company may be wound up by the Court, *inter alia*, if the company is unable to pay its debts as described in section 345 (see: **paragraph (f) of that section**);

(b) in the case of section 345, for the circumstances when a company is deemed to be unable to pay its debts;

(c) in the case of section 346(2), that a member is not entitled to present an application for the winding-up of the company unless such member is registered as a member in the register of members for a period of at least six months, being a subsection dealing with a situation not applicable to close corporations;

(d) in the case of section 349, for circumstances under which a company may be wound up voluntarily if the company has by special resolution resolved that it be wound-up.

[10] The apparent reason for the exclusion of these sections is obviously because of the following provisions of the Close Corporation Act, 1984, namely -

(a) section 67 which provides, as is provided in section 349 of the Companies Act, 1973, for the voluntary winding-up of a close corporation by way of a resolution passed by all its members;

(b) section 68 which provides, as is provided in *inter alia*, section 344(c) of the Companies Act, 1973, that a close corporation may be wound-up by the Court if the corporation is unable to pay its debts;

(c) section 69 which provides, as is provided in almost similar terms in section 345

.../...

of the Companies Act, 1973, for the circumstances under which a corporation is deemed unable to pay its debts.

Relevant legal provisions after the commencement of the new Companies Act

[11] Section 66(1) of the Close Corporation Act, 1984, was amended as provided in Schedule 3 to the new Companies Act, to read as follows:

> "**66.** *(1) The laws mentioned or contemplated in item 9 of Schedule 5 of the (new) Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.*".

Subsection (1A) of that section relates to a new concept introduced in Chapter 6 of the new Companies Act (sections 79 to 83), namely, business rescue which is obviously now also introduced in respect of close corporations (to which I will refer in more detail below).

Subsection (2) of that section which makes, as its predecessor, provision for the manner in which the relevant provisions should be construed in their application to close corporations.

In relation to the liquidation of solvent close corporations section 67 of the Close Corporations Act, 1984, as amended by Schedule 3 to the new Companies Act read as follows:

.../...

> ***67.*** *(1) Part G of Chapter 2 of the Companies Act, read with the changes required by the context, applies to a solvent corporation.*
>
> *(2) This Part of this Act must be administered in accordance with the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act.*".

In terms of this section the provisions of sections 79 to 83 of the new Companies Act, providing for the liquidation of solvent companies accordingly equally apply to close corporations.

[12] Item 9 of Schedule 5 to the new Companies Act referred to in section 66(1) quoted above, reads as follows:

> '***9.*** *(1) Despite the repeal of the previous Act (ie., the Companies Act, 1973, before its repeal by the new Companies Act), until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3)*
>
> *(2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.*' (My underlining).

[13] Chapter 14 of the Companies Act, 1973 (sections 337 to 426) deals with winding-up of companies or, as provided in section 66 of the Close Corporation Act, 1984, closed corporations -.

[14] The sections excluded by item 9(2) in respect of a "*solvent company*" deal with -

(a) modes of winding-up (**section 343**);

(b) as I have already indicated, circumstances in which company may be wound up by Court (**section 344**);

(c) as I have also already indicated, applications for winding-up of companies (**section 346**);

(d) commencement of winding-up by Court (**section 348**);

(e) as I have also already indicated, circumstances under which company may be wound up voluntarily (**section 349**);

(f) members' voluntary winding-up and security(**section 350**);

(g) creditors' voluntary winding-up 9(**section 351**);

(h) commencement of voluntary winding-up (**section 352**);

(i) effect of voluntary winding-up on status of company and on directors (**section 353**).

[15] The apparent reason for the exclusion of those sections from application to "*solvent*" close corporations is in my view to be found in Part G of Chapter 2 (sections 79 to 83) of the new Companies Act.

.../...

[16] Section 79 provides that a solvent company (or close corporation) may be dissolved -

(a) voluntary winding-up initiated by the company (or close corporation) as contemplated in section 80, and conducted either by the company (or close corporation) or by its creditors, as determined by resolution of the company (or close corporation); or

(b) winding-up and liquidation by court order, as contemplated in section 81.

This section in so far as it provides for the modes in which a solvent company (or solvent close corporation) may be dissolved seems to explain the reason for the exclusion of **section 343** of the Companies Act, 1973, by item 9(2) of Schedule 5 to the new Companies Act.

[17] Section 80 provides for the manner in which a solvent company (or solvent close corporation) having no debts (see: subsection (3)(b)(ii)) may be voluntarily wound-up. namely, by special resolution which may be effected by the company (or close corporation) or its creditors.

[18] Section 81 providing for the winding-up of "*solvent companies*" (or "*solvent close corporations*") by the Court, authorizes a Court to order such a company (or close corporation) to be wound-up if, *inter alia* -

.../...

(a) the company (or close corporation) has resolved by special resolution that it be wound-up by the Court or its voluntary winding-up be continued by the Court;

(b) the practitioner of a company (or close corporation) appointed during business rescue proceedings applied for liquidation in terms of section 141 (2) (a), on the grounds that there is no reasonable prospect of the company (or close corporation) being rescued; or

(c) one or more of the company's (or close corporation's) creditors have applied to the court for an order to wind-up the company (or close corporation) on the grounds that -

(i) the company's (or close corporation's) business rescue proceedings have ended in the manner contemplated in section 132 (2) (b) or (c) (i) and it appears to the Court that it is just and equitable in the circumstances for the company (or close corporation) to be wound up, or

(ii) it is otherwise just and equitable for the company (or close corporation) to be wound up;

(d) the company (or close corporation) , one or more directors (or members) or one or more shareholders (or members) have applied to the court for an order to wind-up the company (or close corporation) on the grounds that -

.../...

(i) the directors (or members) are deadlocked in the management of the company (or close corporation), and shareholders (or members) are unable to break the deadlock and irreparable injury to the company (or close corporation) is resulting, or may result, from the deadlock or the company's (or close corporation's) business cannot be conducted to the advantage of shareholders (or members) generally, as a result of the deadlock;

(ii) the shareholders (or members) are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors (or members) whose terms have expired; or

(iii) it is otherwise just and equitable for the company (or close corporation) to be wound up;

(e) a shareholder (or member) has applied, with leave of the court, for an order to wind-up the company (or close corporation) on the grounds that the directors (or members), prescribed officers or other persons in control of the company (or close corporation) are acting in a manner that is fraudulent or otherwise illegal or the company's (or close corporation's) assets are being misapplied or wasted; or

(f) the Commission or Panel has applied to the court for an order to wind up the

.../...

company (or close corporation) on the grounds that the company (or close corporation) , its directors (or members) or prescribed officers or other persons in control of the company (or close corporation) are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company (or close corporation) has failed to comply with that compliance notice and within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984, were taken against the company (or close corporation), its directors (or members) or prescribed officers, or other persons in control of the company (or close corporation) for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.

[19] Section 82 deals with the dissolution of companies (or close corporation) and removal from the register.

[20] Section 83 deals with the effect of the removal of a company (or close corporation) from the register.

[21] In relation to business rescue proceedings -

(a) section 131 provides that an affected person (who by definition includes a creditor) may apply to a Court for an order placing the company (or close corporation) under supervision and commencing business rescue proceedings and the Court may grant such an order if it is satisfied, *inter alia*, that the

.../...

company (or close corporation) is "*financially distressed*" (which per definition means that 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 that it appears to be reasonably likely that the company (or close corporation) will become insolvent within the immediately ensuing six months;

(b) section 132 (2) (b) or (c) (i) referred to in section 81(1)(c)(i) business rescue proceedings end when the practitioner has filed with the Commission a notice of the termination of business rescue proceedings or a business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner.

Submissions on behalf of the Respondents

[22] On the basis of the aforegoing provisions, and, particularly, item 9(2) of Schedule 5 to the new Companies Act, it was submitted on behalf of the Respondents -

(a) that a close corporation can in terms of section 66(1) of the Close Corporations Act, 1984, as amended by Schedule 3 to the new Companies Act, be wound up at the behest of a creditor "***only*** *in the case of a (close corporation) that is* ***not*** *solvent*";

(b) that the Legislature did not intend that Chapter XIV of the Companies Act, 1973

(sections 337 to 426), read with item 9 of Schedule 5 to the new Companies Act, to apply to "*solvent*" companies (or close corporations) because section 81 of the new Act now provides for the winding-up of "*solvent*" companies (or close corporations);

(c) that, bearing in mind the ordinary meaning of "*solvent*" in relation to a company (or close corporation) a creditor must first show that the company (or close corporation) is not "*solvent*" in the ordinary meaning of the word (ie., its liabilities, fairly estimated, exceed its assets fairly valued and, therefore, being "*actually insolvent*") before it is entitled to a winding-up order; and

(d) that the Applicant made no allegation that Lodhi-5 to the effect that it is not so "*solvent*" and that section 81 of the new Companies Act does not apply.

[23] In elaboration of these submissions Mr. Maritz SC in effect submitted -

(a) that in so far as section 344 of the Companies Act, 1973, providing, *inter alia*, that a company can be liquidated if it is unable to pay its debts (in other words, if it is "*commercially insolvent*", is excluded from application in respect of solvent companies (and the more or less corresponding section 68 of the Close Corporations Act, 1984, has been repealed by Schedule 3) the Court is not empowered to grant an order winding-up a company (or close corporation) , but can only make an order in terms of section 81 of the new Companies Act in terms of which the company (or close corporation) is place under supervision

and business rescue proceedings be commenced;

(b) that the reason for the exclusion of section 344 in item 9(2)(and the repeal of the aforesaid section 68) is that section 81 of the new Companies Act provides for the liquidation of a "*solvent company*" or a "*solvent close corporation*");

(c) that the question is accordingly what is meant by the expression "*solvent company*" (or "*solvent close corporation*") in item 9(2) and what "*solvent*" and "*insolvent*" mean in that context;

(d) that "*insolvent*" in its ordinary meaning refers to a situation where a person's liabilities, fairly estimated, exceeds his assets fairly valued (which has at all times been referred to as "*actual (or factual) insolvency*" as opposed to "*commercial insolvency*' being a situation where a person is unable to pay his debts;

(e) that the scheme of the new Companies Act is that if a company (or close corporation) cannot pay its debts, in other words where it is "*commercially insolvent*", but it is not insolvent in the sense the its liabilities do not exceed its assets, in other words where it is not "*actually (or factually) insolvent*", it can only be dealt with in terms of section 81 of the new Act and in terms of the transitional provisions of the new Companies Act;

(f) that a company (or close corporation) that is "*commercially insolvent*" is, if

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regard is had to the definition of "*financially distressed*" in section 128 of the New Companies Act, actually financially distressed and that, bearing in mind the provisions of section 81(1)(c) of the new Companies Act, such a company (or close corporation) will first have to go through the business rescue process.

[24] The argument in short means -

(a) that because of the exclusion of section 344 of the Companies Act, 1973, by the provisions of item 9(2) of Schedule 5 to the new Companies Act and the repeal of section 68 of the Close Corporations Act, 1984, in respect of a "*solvent company*" (or a "*solvent close corporation*") a Court is no longer empowered to liquidate a company that is "*commercially insolvent*" in the sense that it is unable to pay its debts and that the deeming provisions of section 345 of the Companies Act, 1973, although not excluded, is of no assistance any longer;

(b) that, regard being had to, *inter alia*, section 81(1)(c), read with section 131 and the definition of "*financially distressed*" in section 128, of the new Companies Act, a creditor, as in this case, should in the case of a company (or close corporation) that is "*commercially insolvent*" approach a Court for business rescue as envisaged in section 131 of the new Companies Act;

(c) that section 344 (and section 345) of the Companies Act, 1973, can accordingly only apply if it is proved by the creditor that the company (or close corporation) is insolvent in the sense that its liabilities exceed its assets.

.../...

Evaluation of submissions made on behalf of the Respondents

[25] Our law has always, for the winding-up of a company (and, as provided in section 66(2) of the Close Corporation Act, 1984, a close corporation), relied, in addition to the concept of "*actually (or factually insolvent*", on the inability of a company (or close corporation), either because of the deeming provisions or otherwise, to pay its debts.

By way of example I can refer to the judgment In ***Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C)*** in which Berman J remarked at ***440F*** as follows:

> "*The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F:*
>
> > *'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'*
>
> *Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the*

> *creditor is entitled, ex debito justitiae, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F)".*

This is a principle applicable not only in our law, but also in English law.

In "***Words and Phrases Judicially Defined***" by Roland Burrows where the author refers to an extract from an English judgment where the learned Judge explained the expression "*Solvent*" as follows which seems to me to be apposite here:

> *"A question has been raised as to what 'solvent' means in section 226 of the Companies Act, 1929. .....It is not necessary to say that 'solvent' there is limited to one meaning; but in my opinion a company is not solvent within the meaning of s. 266 unless it can pay its debts as they become due. It has been urged that 'solvent' means 'commercially solvent' and that if, upon balance-sheet figures, a company's assets exceed it liabilities, the company is solvent. I do not accept that view.".*

In ***De Waard v Andrew & Thienhaus Ltd., 1907 TS 727***, where Innes CJ said.

> *"Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says: 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities ' To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.".*

[26] I find myself unable to agree with the contention that the Legislature intended to do away and in fact did away with this well established and in the words of Berman J in the ***Rhebokskloof case, supra*** "*commercially sensible*" approach which has been followed in our law for decades

[27] I disagree with the contention raised on behalf of the Respondents for various reasons.

[28] In **the first piece** this is apparent from the fact that the Legislature has explicitly elected to retain the provisions of section 345 of Companies Act, 1973, and section 69 of the Close Corporation Act, 1984, in terms of which a company or a close corporation is deemed to be unable to pay its debts under certain circumstances.

[29] In **the second place** it is, upon a proper interpretation of the relevant legislative provisions as they applied before and after the commencement the new Companies Act, in my opinion clear that there always existed and still exist two distinct bases in which the Legislature dealt with the winding up of companies and close corporations.

There were before the commencement of the new Act -

(a) on the one hand the provisions of the Companies Act, 1973, providing for the liquidation by the Court of insolvent companies and, as provided in section 66 of the Close Corporations Act, 1984, insolvent close corporations; and

(b) on the other hand, in the case of companies, the provisions of the Companies Act, 1973, providing for the liquidation of solvent companies and, in the case of close corporations, the provisions of the Close Corporations Act, 1984, providing similarly for te liquidation of solvent close corporations.

.../...

There are now after the commencement of the new Act -

(a) on the one hand the provisions of Chapter XIV of the Companies Act, 1973, as they continue, by virtue of the provisions of item 9 of Schedule 5 to the new Companies Act, to exist in respect of insolvent companies and, as provided in section 66 of the Close Corporations Act, 1984, as amended by Schedule 3 to the new Companies Act, insolvent close corporations; and

(b) on the other hand the provisions of Part G of Chapter 2 of the new Companies Act providing for the liquidation of solvent companies and, as provided in section 67 of the Close Corporations Act, 1984, as amended by Schedule 3 to the new Companies Act, solvent close corporations.

Although this situation was not disputed on behalf of the Respondents, Mr. Maritz SC contended that it calls for a determination of the meaning of, particularly, the expression "*solvent company*" in item 9(2) of Schedule 5 to the new Companies Act. In his endeavour to show that, in a perceived radical change effected by the new Companies Act, the expression does not refer to a company that is "*commercially insolvent*" in the sense that, as is the premise on which the Applicant based its case in the first two applications, the company (or close corporation) concerned is unable or deemed to be unable to pay its debts.

In this regard reliance is placed on the provisions of particularly, section 81(1)(c)(i), read with section 131 and the definition of "*financially distressed*" in section 128, of the new

...*f*...

Companies Act.

Section 81(1)(c)(i) reads as follows:

"*(1) A court may order a solvent company to be wound up if -*

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that-

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132 (2) (b) or (c) (i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up;"

Section 131(1) and (4) reads as follows:

***131.** (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.*

.....

(4) After considering an application in terms of subsection (1), the court may -

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-

(i) the company is financially distressed;

(ii) the company 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; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

.../...

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.".

The expression "*financially distressed*" is defined in section 128 solely for purposes of the application Chapter 6 as follows:

"... 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;".

Section 132(2)(b) and (c)(i) referred to in section 81(1)(c)(i) reads as follows:

"(2) Business rescue proceedings end when -

.....

(b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or

(c) a business rescue plan has been -

(i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or".

I fail to see for various reasons any support in these provisions for the submission that the expression "*solvent company*" in item 9(2) does not relate to a company (or close corporation) that is "*commercially insolvent*".

.../...

Firstly, the definition of "*financially distressed*", apart from it being a definition applicable solely to Chapter 6 (and not for purposes of section 81), does not in my view define a situation where a company is "*commercially insolvent*" at the time an application for its liquidation is lodged. What the definition envisages is, on the one hand, a situation, not where the company is unable to pay its debts at a given moment, but where it is "*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, not, as I understood the argument on behalf of the Respondents, that it will in fact be unable to pay its debts within six months. On the other hand it envisages a situation where it appears to be "*reasonably likely*" that the company will become, not that it is, insolvent (in contrast to being solvent as envisaged in the whole of Part G of Chapter 2) within the immediately ensuing six months. On the clear wording of the definition it relates to a company (or close corporation) that is at the time of an application under section 131 which is neither "*commercially insolvent*" or "*actually (or factually) insolvent*". If the company (or close corporation) is so insolvent the Court will in all probability issue and order dismissing the application together with an order placing it under liquidation as envisaged in section 131(4)(b).

In order to rely on this definition in support of a contention that section 81 and in particular subsection (1)(c)(i) of that Act deals with situation where the company concerned is "*commercially insolvent*" in the sense that it is unable to pay its debts, is in my opinion without substantiation.

Secondly, there are the provisions of subsection (6) of section 131 which read as

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follows:

> " *(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until -*
>
> *(a) the court has adjudicated upon the application; or*
>
> *(b) the business rescue proceedings end, if the court makes the order applied for.*".

As is apparent from this section a company (or close corporation) or any other affected person may if liquidation proceedings had been launched against the company (or close corporation) may, in order to have those proceedings suspended, bring an application for it to be placed under supervision and business rescue proceedings to be commenced in the event of which the company (or close corporation) or the affected person concerned will have the onus to prove the requirements for an order in terms of section 131. In discharging that onus the company (or affected person concerned) will have to show that, if regard is had to the definition of "*financially distressed*", the company (or close corporation) is not at that stage unable to pay its debts, but that it is reasonably unlikely that it will be able to pay its debts as they become due and payable (not that they are at that stage due and payable) within the next ensuing six months or that it is reasonably likely that it will become (not is) insolvent within the next ensuing six months in the sense that its liabilities will exceed its assets within the next ensuing six months (and not that the liabilities already exceeded its liabilities)

Thirdly, if regard is had to the grounds as appears from subsection (4) of section 131, on which a Court may grant such an order, it is highly unlikely that a creditor may have

.../...

any information available which may serve as evidence to prove such grounds or to prove that the company (or close corporation) is "*actually (or factually) insolvent*" in the sense that its liabilities exceed its assets which is ordinarily facts that may be peculiarly within the knowledge of the company (or close corporation) itself.

Furthermore, the question can be asked how should a creditor know that it is reasonable unlikely that the company (or close corporation) may within the next ensuing six months be able to pay its debts as envisaged in the definition of "*financially distressed*" or that it is reasonably likely that the company (or close corporation) will so become insolvent.

I cannot accordingly agree that a creditor is in a case where a company (or close corporation) is unable to pay its debts by virtue, *inter alia*, the deeming provisions of section 345 of the Companies Act, 1973 (which has not been excluded in item 9(2)), must first bring an application in terms of section 131 of the new Companies Act for an order placing the company under supervision and commencing business rescue proceedings.

[30] In conclusion and by way of summary I am, for the reasons dealt with above, of the opinion -

(a) that there is, in the absence of an express provision, no indication in the new Companies Act that the Legislature intended, particularly, in so far as it left section 345 of the Companies Act, 1973, in tact, to do away with the principle that a company (or a close corporation) may be liquidated on the grounds of its

"*commercial insolvency*";

(b) that the expression "*solvent company*" in item 9(2) of Schedule 5 to the new Companies Act relates to solvent companies, being companies that are either not "*actually (or factually) insolvent*" or "*commercially insolvent*", envisaged in Part G of Chapter 2 of the new Companies Act, in contrast to companies that are insolvent, being companies that are either "*commercially insolvent*" or "*actually (or factually) insolvent*" which are to be dealt with in terms of Chapter XIV of the Companies Act, 1973.

Order

In the result the following order is made:-

1. **THAT** the point *in limine* be dismissed.

2. **THAT** the remaining issues in the two applications under Case Nos 38326/2011 and 43043/2011 and the application under Case No. 88376/2011 be postponed *sine die*.

3. **THAT** the question of costs in respect of all three applications be costs in the applications.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

.../...

ON BEHALF OF APPLICANT	ADV D M LEATHERN SC ADV. J E SMIT
On the instructions of:	EDWARD NATHAN SONNENBERGS INC c/o JACOBSON & LEVY INC 215 Orient Street Arcadia PRETORIA Ref: Mr J Levy/as/K2661 Tel: (012) 342 3311
ON BEHALF OF RESPONDENTS	ADV J D MARITZ SC
On the instructions of:	SAVAGE JOOSTE & ADAMS 171 Boshoff Street Nieuw Muckleneuk PRETORIA Ref: J K Hendey/rvh/H099/10 Tel: 012 452 8200
DATE OF HEARING	15 March 2012
JUDGMENT DELIVERED	20 March 2012