IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA)

4/3/14

Case No: 69531/2012

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
REVISED.
14/03/2014
DATE SIGNATURE

DAWID JACQUES RICHTER	Applicant
and	
BLOEMPRO CC	First Respondent
LUKE BERNARD SAFFY NO	Second Respondent
TSIU VINCENT MATSEPE NO	Third Respondent
ABSA BANK LIMITED	Fourth Respondent

JUDGMENT

BAM J

1. On 17 September 2012 the first respondent, upon an application brought by the fourth respondent, ABSA, was finally liquidated in the Bloemfontein High Court, Free State Division. The basis for the liquidation was that the first respondent was unable to pay its debts. The second and third respondents are the appointed liquidators. A Business Rescue Application, ("*BRA*") lodged at the same instance was rejected. The BRA application was brought by the applicant in this matter in his capacity as member of the first respondent. On 8 April 2013 leave to appeal the final liquidation order was refused by the trial court.

2. It is common cause that the first respondent's main office was, subsequent to the final liquidation, moved from the Free State to within the jurisdiction of this Court. Although the parties, applicant and fourth respondent, are ad idem that this court has jurisdiction in regards to the matter before court, I will later herein return to that issue.

3. On 12 February 2013, before the application for leave to appeal the final liquidation order was dismissed, the applicant, who described himself as *"employed by the first respondent as general Manager"*, served on the first second and third respondents a Business Rescue Application (*"BRA"*) in terms of the provisions of Chapter 6 of the Companies Act, No. 71 of 2008, in respect of the first respondent. The BRA was issued by the Registrar of this court.

4. On 18 March 2013 the fourth respondent, ABSA, served on the applicant an application to intervene and to have the BRA set aside. On 28 March 2013 the applicant filed a Notice to Oppose. The said Notice was however subsequently withdrawn for certain reasons, according to the applicant, to which I will refer later. The applicant's opposing affidavit was not filed. On 6 May 2013, in this Court, whilst the applicant was in default, the fourth respondent was granted leave to intervene in the aforesaid BRA and the BRA was dismissed.

5. The applicant now applied for the rescission of the default judgment of 6 May 2013 and an order entitling the applicant to proceed with the BRA on an opposed basis. The application is opposed by only the fourth respondent. It is assumed that the second and third respondents abide this court's decision.

6. The rescission application was enrolled on the opposed motion roll for the week 24 February 2014. At the inception of the arguments I requested counsel for the applicant, Mr de Villiers, and counsel for the fourth respondent, Mr Badenhorst SC, to address me on;
(a) the issue whether the applicant has *locus standi* to lodge this application, and the BRA, and,
(b) whether the BRA can be brought in view of the final liquidation order of first respondent.
I indicated that I intended to deal with those two issues *in limine.*

7. In regards to the first point, Mr de Villiers contended that the applicant was an affected party as envisaged by section 128(a) of the Companies Act, and that he was on that basis entitled to lodge the BRA in respect of the first respondent, it followed that the applicant also has *locus standi* to lodge this application for rescission. It was further contended by Mr de Villiers that the first respondent's business was still continuing and that the applicant was still in the employment of first respondent and paid a salary.

8. In respect of the second issue Mr de Villiers submitted that a BRA can be lodged at any time during liquidation proceedings, even after a final liquidation order has been granted.

9. Mr Badenhorst contended that the applicant was not an affected person in view of the fact that his employment with the first respondent was terminated by the liquidation, and that the applicant therefore has no *locus standi* to lodge a BRA in respect of the first respondent.

10. Pertaining to the second issue, Mr Badenhorst submitted that the final liquidation order had the effect that the first respondent, as legal entity, has no *locus standi* anymore in that the final liquidation order brought an end to its legal existence, as envisaged by the Insolvency Act. Mr Badenhorst also referred to the unreported judgment of *EJ Janse van Rensburg N.O. & Others v Cardio Fitness Properties (Pty) Ltd & Others,* case number 46194/2013, at Par [7].

11. It is of importance to appreciate what the effect of a provisional and final liquidation order entails.
    (a) Firstly, all the contracts with employees are suspended in terms of the provisions of Section 38 of the Insolvency Act, No. 24 of 1936. This section reads as follows:
    "38. Effect of sequestration on contract of service. –(1)The contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order."

    Item 9 of Schedule 5 of the new Companies Act, No.71 of 2008 provides that Chapter 14 of the old Companies Act of 1973 still applies in regards to the winding up of companies. Section 339 (Chapter 14) of the Old Act provides that the insolvency law applies *mutatis mutandis* to the winding up of companies unable to pay its debts.

    (b) Secondly, in terms of the provisions of Section 359 of the Old Act, all legal proceedings by or against the company become suspended until the appointment of a liquidator, and that after the appointment of the liquidator the liquidator shall be notified in writing before any legal proceedings are instituted. Any business of, and dealings by, or with a company in liquidation, fall under the control and jurisdiction of the liquidator(s). No former employee, or director, may conclude any deals concerning the liquidated company without authorization by the liquidator(s).

12. The applicant, in view of his status as employee of the fist respondent, was an affected person in accordance with the definition of affected person in section 128 of the Companies Act. In terms of Section 38i of the Insolvency Act his service contract as employee of the first respondent was suspended when the final liquidation order was made. However, the question to be answered in this case is whether the applicant's status as an affected person was terminated.

13. Section 38 provides only for the suspension of an employee' contract with the company but not the termination thereof. In practice it may happen that the liquidators will be entitled, depending on the circumstances, to extend any suspended contract. Although an employee will have no authorization, without being instructed or mandated by the liquidator(s), or the Master, to act as an employee of the liquidated company the employee's former status will not disappear and cannot be terminated *ex post facto*. On that basis, in my view, the applicant remains an affected person as contemplated by the Companies Act although he was apparently not re-appointed as employee by the liquidators.

14. The averment by the applicant that the first respondent's business is continuing, and that he considers himself to be in the employment of the first applicant, it is of no avail to him. When the provisional liquidation order was granted, the applicant was deprived of any powers he previously enjoyed as an employee or even as manager of the liquidated first respondent. See in this regard *Insulations Unlimited (Pty) Ltd v Adler and Others 1986(4) SA 756 (W)* and *Secretary for Customs and Excise v Millman N.O. 1975(3) SA 544 (AD)* at 552.

15. The second issue to be considered is whether it is in law permissible, or possible, to grant business rescue procedure after the final liquidation order was granted. It is therefore of importance to consider what the intention of the Legislature was with the wording of Section 131, quoted above, more specifically the words : *"... may apply . . . at any time for an order placing the company under supervision and commencing business rescue proceedings."*

16. In this regard the provisions of the following sub-sections seem to be relevant:

• Section128(b) "**business rescue"** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for ----

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. (My underlining.)

• Section 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 immediate ensuing six months; or

(ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months. (My underlining.)

•Section 132:

"**Duration of business rescue proceedings. –** (1)Business rescue proceedings begin when

(a) . . . .

(b) an affected person applies to the court for an order placing the company under supervision in terms of section 131(I);

(c) a court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 131(7).

(2) Business proceedings end when—

(a) the court----

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings. (My underlining.)

17. From the above quoted sub-sections it appears, in my view, that Business Rescue Proceedings and a final liquidation order are two different concepts that are incompatable and separate considerations that cannot co-exist. It also appears that, more specifically from the definitions of *"business rescue"* and *"financially distressed"*, sections 128(b) and 128(f) that the Legislature intended to provide for Business Rescue Proceedings *before* a final liquidation order is made.

18. My reasons are as follows:

(i) The purpose and incidence of Business Rescue is described in section 128. It starts with the reference to companies in financial distress, further stating that the business rescue contemplated should, if it is not possible for the business to continue, result in a better return *than would the immediate liquidation have as effect*. The definition of *financially distressed* contemplates an unlikelyhood of the company paying its debts in future and the future likely insolvency of the company.
In this case the court granting the final liquidation order has already decided upon, and found, that the company was unable to pay its debts and that it was indeed insolvent.

(ii) A final liquidation order has the effect of stripping a company from its original legal status. The company, in itself, has no *locus standi* anymore. It cannot operate without an order of court, or the Master's rulings or decisions of the liquidators. If it was the intention that a final liquidation order can be suspended by business rescue proceedings, it would mean that an interim order of business rescue may substitute the final liquidation order. This seems to be untenable .

(iii) Although section 132(1)(b) provides that a BRA of a *"company"* can be brought *"during liquidation proceedings"*, it is in my view remarkable that the Legislature did not refer to a company *already* under liquidation. Although there is no definition in the Companies Act of what precisely *liquidation proceedings* entail, the section does apparently not include a *liquidated* company. In attempting to determine what the legislature intended, the Interpretation Rules are clear, one should consider the plain meaning of the words used. Whilst the said section refers to *liquidation proceedings,* I am of the opinion that the legislature would have stated clearly, if that was the intention, that business rescue is possible even *after* a final Liquidation order.
For the above reasons I respectfully differ from the finding in *Absa Bank Ltd v Summer Lodge (Pty) LTD 2013 (5) SA 444(GNP)* where the learned judge found that *liquidation proceedings* include the final liquidation processes *after* granting of the final liquidation order.

In this regard the court relied on the full bench decision of *Vermeulen and Another v CC Bauermeister (Edms) Bpk and Others* 1982(4) SA 159 (T) (approved in *Kalil V Decotex (Pty) Ltd and Another* 198(1) SA 943 (A). Although respecting the said decisions and appreciating the *stare decisis* principle, I am of the respectful view that neither the Full Bench of the TPD nor the Appellate Division considered the issue in view of what the Legislature intended with the enactment of business rescue proceedings. I am therefore of the opinion that the *dicta* in the said two decisions are not binding on this court insofar as business rescue proceedings are concerned.

(iv) Section 132(2)(a)(ii) makes provision for the *conversion* of business rescue proceedings into liquidation proceedings and not the other way around. This section does not empower a court to convert a final liquidation order into business rescue proceedings. In my view, if the legislature intended that business rescue proceedings would still have been possible after a final liquidation order has been granted, one would have expected that provision would have been made for the *conversion* of such a final order into business rescue proceedings.

(v) If it was the Legislature's intention that business rescue is possible even after final liquidation it would mean that in the event of a business rescue application granted that all legal consequences of a final liquidation order will be suspended and substituted by empowering the specific company, without any fear of interference by the Master, or the appointed liquidators , to dispose of the company's property in accordance with the provisions of section 134 of the new Act. This seems to be untenable.

(vi) If business rescue would indeed have been possible after final liquidation, further problems arising is what should eventually happen to the final liquidation order and the appointment of the liquidators. There seems to be no solution in that regard.

(vii) The Free State High Court, before the final order was made, considered business rescue, but rejected the application.

19. In my view it therefore follows that a BRA is not in law possible after a final liquidation order has been made, unless that order is set aside on appeal.

20. It further follows, in view of the fact that the liquidation order was made in the Free State Division of the High Court, that this court, in any event, does not have jurisdiction to entertain a BRA before the liquidation order has not been set aside. The fact that the applicant presented the BRA to this court does not mean, in view of this court's finding regarding the lack of jurisdiction, that this court did have jurisdiction to entertain that application.

21. Accordingly, although the applicant may be an affected person contemplated in section 128 of the Companies Act of 2008, for the reasons stated above, the applicant's application for the relief sought cannot succeed.

Order

The application is dismissed with costs, including the costs of senior counsel.

A J BAM JUDGE OF THE HIGH COURT

10 March 2014