IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 45279/14

In the *ex parte* application of:

29/7/2014

GEORGE NELL NO First Applicant

GERT LOUWRENS STEYN DE WET NO Second Applicant

NORMAN MBUYISWA MZIZI NO Third Applicant

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

28/07/14
DATE

SIGNATURE

JUDGMENT

Tuchten J:

1 This application concerns the power to control Filapro (Pty) Limited ("the company"). It used to trade as a processor of waste rock dumps on mine sites. On 12 March 2014 the company was placed under business rescue. The rescue was initiated by a resolution filed pursuant to s 129(1) of the Companies Act, 71 of 2008 ("the new Companies Act"). On 21 March 2014 the company appointed the first

applicant as the company's business rescue practitioner under s 129(3)(b).[1]

2 This provision enables a financially distressed company, without consulting its creditors, to achieve a general moratorium against legal proceedings.[2] The moratorium is of limited duration and subject to safeguards but it is important to remember that a rescue initiated by resolution achieves a moratorium and vests the control of the company in an individual selected by the company without any prior judicial oversight or consultation with its creditors. The moratorium is a limitation on the rights of creditors to have access to courts under s 34 of the Bill of Rights.

3 On 24 April 2014 two creditors of the company, Ferguson Investments and Capital Acceptances, launched an urgent application out of this court under case no 30779/2014 to set aside the resolution under which the rescue had been initiated and to place the company under liquidation. This was done, according to the applicants, under s 130(1)(a) on the ground that the company was not financially

---

1 References to statutes in this judgment will be to the new Companies Act unless otherwise stated.

2 Section 133 of the New Companies Act.

distressed[3] and because there was no reasonable prospect of rescuing the company's business.

4 Section 130(1)(a) is one of the safeguards to which I referred. It must be read, for present purposes, with s 130(5) under which the court hearing an application under s 130(1)(a) has the power in the same proceedings to place the company under liquidation. The provisions of ss 130(1) and 130(5) relevant for present purposes read as follows:

> (1) ... [A]t 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) ...
> (b) ...
> (c) ...
> (2) ...
> (3) ...
> (4) ...

---

3 The basis for this allegation appears to be the contention that the company cannot be rescued. I doubt that this reflects a correct interpretation of s 130(i)(a)(i) but nothing turns on the point for present purposes.

(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

(ii) ...

5 The first applicant ("the practitioner") opposed the application. He also brought an application under case no. 32271/2014 for an extension of time within which to file a business rescue plan. The development of such a plan and the submission of the plan to creditors and holders of voting interests in the company at a meeting convened and presided over by the practitioner is an essential step in

the rescue process.[4] Under s 150(5), the plan must be published by the company within 25 business days of the date on which the practitioner was appointed or such longer period as may be allowed by the court or the holders of a majority of the creditors' voting interests.

6 These applications were heard on 15 May 2014 before Thlapi J. On 27 May 2014 the learned judge dismissed the practitioner's application for an extension of time, set aside the resolution pursuant to which the rescue process had commenced and placed the company under final liquidation. Mr RK Pollock and the third applicant were appointed as the company's provisional liquidators.

7 Unfortunately, the written judgment prepared by the learned judge was on the date the order was made rendered inaccessible by computer error. I understand that the judgment has now been handed down but it does not form part of the papers before me.

8 By notice dated 28 May 2014, the company and the practitioner gave notice of an application for leave to appeal against the whole of the order of Thlapi J. Regrettably, the application for leave to appeal has

---

4 Sections 150-152

not yet been heard. I understand that the learned judge is on long leave.

9 The delay in the adjudication of the application for leave to appeal has had unfortunate consequences for the administration of justice because a dispute has now arisen over who has the power to control the company until the final determination of the litigation as it makes its way through the courts. The company and the practitioner on the one hand said that the notice of application for leave to appeal suspends the operation of all the orders made by Thlapi J. The creditors of the company and the then provisional liquidators maintained that control should vest in the liquidators.

10 The form in which this application has been brought, a declaratory order focussing purely on the legislation bearing on the point, has undesirable consequences. I have little idea of the real disputes between all the parties and the facts underlying those disputes and have had to decide what I think is a difficult law point in a factual vacuum. The interests of justice would have been better served if the issues arising before me had been debated together with the application for leave to appeal against the order of Thlapi J and any appropriate applications for orders to regulate the control of the company pending appeal. I trust that if this judgment does not finally

determine the control of the company pending appeal, the parties will bear these remarks in mind.

11 By agreement between all interested parties, the present application was made by the practitioner and the then provisional liquidators as joint applicants for orders in the alternative reflecting their respective standpoints. On 11 July 2014, the present second and third applicants were appointed as joint liquidators of the company. By consent the second applicant in his nominal capacity was substituted for Mr Pollock.

12 The dispute before me arises because of the provisions of s 18 of the Superior Courts Act, 10 of 2013, which reads:

> (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)-

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

13 Before the advent of the Superior Courts Act, the status of an order of court under appeal was regulated by the common law read together with Rule 49(11). This rule reads in relevant part:

> Where an appeal has been noted ..., the operation and execution of the order in question shall be suspended, pending the decision of such appeal ..., unless the court

> which gave such order, on the application of a party, otherwise directs.

14 In *Reid and Another v Godart and Another* 1938 AD 511 at 513 and 514, the common law position in regard to the status of orders under appeal was set out at 513-514:

> Now, by the Roman-Dutch Law the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out, and no effect can be given thereto, whether the judgment be one for money (on which a writ can be issued and levy made) or for any other thing or for any form of relief granted by the Court appealed from. That being so, I see no reason why the Rule should be confined to judgments on which a sheriff may levy execution. The foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy under a writ, or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from ... [T]he word "execution" means, as it seems to me, "carrying out" of or "giving effect," to the judgment, in the manner provided by law; for example, by specific performance, by sequestration, by the passing of transfer, by issue of letters of administration, by ejectment from premises, or by a levy under a writ of execution.

15 But the general rule was subject to an exception in cases where the estates of debtors were placed under sequestration or companies unable to pay their debts were wound up. Appeals against sequestration orders did not suspend the operation of such orders. In *Foley v Hogg's Trustee* 1907 TS 791 at 793, the court held that if the general rule were applicable to sequestration orders, certain very remarkable results would follow and great confusion would result. The court pointed out that the effect of a sequestration order is to divest an insolvent of his estate in favour first of the Master and then of the trustee and that the effect of an appeal was not to alter the nature of the judgment but to stay execution, of which sequestration was a species. The court pointed further to the statutory consequences of a sequestration order.

16 *Foley* was followed in *De Villiers v Miller and Co* 1931 CPD 83 at 88. The court placed emphasis on the fact that a sequestration order divested the insolvent of his estate in favour of the Master until a trustee was appointed.

17 Section 150 of the Insolvency Act, 24 of 1936, was enacted to regulate appeals against sequestration orders. Section 150(3) in its terms provides that the provisions of the Insolvency Act shall nevertheless apply despite the noting of an appeal, with the proviso

that pending the appeal, no property of the insolvent may be realised without the insolvent's written consent.[5]

18 The provisions of the Insolvency Act show that significant consequences and powers of the trustee are triggered by the sequestration order. Importantly, under s 20(1) of the Insolvency Act, a sequestration order divests the insolvent of his estate and vests it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, in the trustee. Other examples are: under s 37(1), a trustee may determine a lease entered into by the insolvent; under s 38(1) contracts of service of employees of the insolvent are suspended with effect from the date of the sequestration order; under s 40 a meeting of creditors must be convened immediately the Master receives a sequestration order. If the noting of an appeal suspended the operation of the sequestration order, effect could not be given to these provisions until the conclusion of the appeal. Section 65 gives wide powers to the officer presiding at a meeting called under the Insolvency Act, the trustee and a proven creditor to conduct interrogations in relation to the insolvent, his affairs and his property. The policy underlying s 150(3) is, amongst other things, to ensure that

---

5 Subsection 150(3) of the Insolvency Act reads as follows: "When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned."

the consequences envisaged by the Insolvency Act and the exercise of the trustee's powers are not delayed by appeal processes.

19 In *Visser v Coetzer; GTR Investments and Others v Coetzer* 1982 4 SA 805 W, the court followed the reasoning in *Foley* and *De Villiers v Miller and Co.* The court referred to s 20(1)(a) of the Insolvency Act, under which a sequestrated estate vests in the Master and thereafter the trustee[6] and held that the insolvent was immediately divested of his assets despite the noting of an appeal. This divesting and vesting is a legal rule which has operated in this country for well over a century.[7]

20 I think that the divesting and vesting is of importance in this context. Historically, upon the granting of a sequestration order the consequences which I have described followed immediately. If the noting of an appeal suspended the operation of a sequestration order, the highly undesirable consequence would be that the insolvent's estate once more vested in the insolvent. As I have shown, this weighed with the court in *Foley* and must be taken to have done so

---

6 Section 20(1)(a) of the Insolvency Act reads: "The effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him".

7 See the cases collected in Mars, *The Law of Insolvency in South Africa*, 9th ed 181 fn 2.

when s 150(3) of the Insolvency Act was enacted. It must also have weighed with the legislature that the exercise of the powers conferred by and pursuant to the Insolvency Act should as a matter of policy not be delayed, except in relation to the realisation of the property of the estate. I shall enlarge on this theme when I deal with the present problem.

21 Before the enactment of s 18 of the Superior Courts Act, the noting or prosecution of an appeal against an order winding up a company on the ground that it was unable to pay its debts did not suspend the operation of the winding-up order. In *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd and Others* 2001 SA 2 SA 768 W, the court held that the provisions of s 339 of the Companies Act, 61 of 1773, ("the previous Companies Act") rendered the provisions of s 150(3) of the Insolvency Act applicable to windings-up.[8] The court in *Choice Holdings* found the reasoning in *Foley*, which dealt with sequestrations, substantially to be applicable to companies ordered to be wound up for inability to pay their debts.[9]

---

8 Section 339 of the previous Companies Act reads:" In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act."

9 The position is otherwise where a company is wound up for reasons of justice and equity under s 344(h) of the previous Companies Act but is able to pay its debts. *Rentekor (Pty) Ltd and Others v Rheeder and Berman NNO and Others* 1988 4 SA 469 T.

22 Winding up under the previous Companies Act had important consequences, many of them equivalent to those under the Insolvency Act in regard to sequestrations. There are differences between the two regimes: notably, a winding-up order does not destroy a company or divest it of its rights[10] or divest it of its property.[11] But the winding-up commences retrospectively (s 348) at the time the application for winding-up is duly lodged with the registrar of the court. And the need for a liquidator immediately to enter upon and carry out his duties is no less pressing than those of a trustee in sequestration.

23 Under s 361 of the previous Companies Act, all the property of the Company in respect of which a winding-up order is made is deemed to be in the custody and under control of the Master until a provisional liquidator is appointed and has assumed office. The property is then in the custody and under the control of the liquidator. Unless the court so orders under s 361(3) of the previous Companies Act, the property of the company does not vest in the liquidator. But the consequence of a winding-up order is that, except for certain exceptions not presently relevant, on winding-up the powers and duties of the

---

10 *Letsitele Stores (Pty) Ltd v Roets and Others* 1958 2 SA 224 T 227H

11 *Soane v Lyle NO* 1980 3 SA 183 D 186E.

directors of the company terminate and the directors are deprived of all control of the company's property.[12]

24 The enactment of the new Companies Act signalled a significant break with the past in respect of companies in financial difficulties. One of the purposes of the Act, as described in s 7(h), is to

> ... provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

25 To this end Chapter 6 of the new Companies Act was enacted to provide, amongst other things, for business rescue of what are termed financially distressed companies. *Financially distressed* is defined in s 128(1)(f) to mean, in reference to a particular company at any particular time:

> (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall 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.

---

12 *Attorney-General v Blumenthal* 1961 4 SA 313 T 314-315

26 Business rescue is defined in s 128(1)(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 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.

27 There are two ways business rescue proceedings can be begun. Under s 129(1) the rescue process can, subject to certain easily effected formalities, be begun by a resolution of the board of the company that the company begin business rescue proceedings. The resolution takes effect when it has been "filed".[13] Within a relatively short period after the resolution has been filed, a company voluntarily

---

13 As defined in s 1: ie delivered to the Companies and Intellectual Property Commission in the manner and form, if any, prescribed for that document.

beginning business rescue proceedings must publish a notice of the resolution to every *affected person*[14] together with a sworn statement of the facts relevant to the grounds on which the board resolution was founded. The company must also appoint a business rescue practitioner and file a notice to that effect and give notice of the practitioner's appointment to every affected person. A failure to comply with the formalities prescribed by s 129 will cause the resolution to lapse and become a nullity.

28 The other way to begin business rescue proceedings is by application to court under s 131(1). Any affected person may bring such proceedings. This procedure is not relevant to the case before me and need therefore not be analysed.

29 During business rescue proceedings, as I mentioned earlier, there is a general moratorium on commencing or proceeding with legal proceedings against the company (s 133). Restrictions operate on the disposal by a company of property and the use of property in the possession of the company (s 134). The practitioner has power to

---

14 "affected person", in relation to a company, means-

(i) a shareholder or creditor of the company;

(ii) any registered trade union representing employees of the company; and

(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives

suspend the obligations of the company but not, except in the normal course, obligations arising from any employment contract (s 136).

30 During business rescue proceedings, the directors of the company continue to exercise their functions, but subject to the authority of the practitioner (s 137). However the practitioner is vested by the new Companies Act with full management control of the company in substitution of its board and pre-existing management with powers of delegation to members of the board and pre-existing management (s 140).[15] The directors must cooperate with the practitioner, provide him with all the books and records of the company and submit to him, within a time effectively determined by the practitioner, a statement of the assets and liabilities of the company, legal proceedings in which it is involved, its employees, debtors and creditors.

31 Creditors must be kept informed of developments in and be consulted about the rescue proceedings (ss 145). Holders of the company's securities have similar rights (s 146).

---

15 The practitioner may also under s 140(1)(c) remove a pre-rescue manager or appoint someone of his own choosing as part of the management of the company. But the practitioner takes office at a time when the company is by definition in financial difficulties, is intended to hold office for a relatively brief time and must form a view on the company's prospects urgently. So the scope for management independent of the pre-rescue managers must in practice be quite limited.

32 Only persons who qualify for appointment under s 138 may be appointed as practitioners. Amongst other things, they must be licensed as such by the Commission.

33 The practitioner must upon his appointment (s 141) investigate the affairs of the company with a view to considering whether there is any reasonable prospect of the company's being rescued. This means, with reference to provisions defining business rescue in s 128(1)(b)(iii), maximising the possibility of the company's continuing in existence on a solvent basis or, if this is not possible, achieving a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

34 To this end the practitioner must develop a business rescue plan and submit it for consideration at a meeting of creditors and other holders of voting interests in the company (s 150). No time period is prescribed within which the plan must be developed and presented. However, if the rescue proceedings last longer than three months, the practitioner must prepare a report on progress and update it each month (s 132(3)). If at any stage during the process the practitioner concludes that there is no reasonable prospect of rescuing the company, the practitioner must, after notice to specified parties and institutions, apply to court for the discontinuation of the rescue and the

liquidation of the company. If on the other hand, the practitioner concludes that the company is no longer financially distressed, the practitioner must take steps to terminate the rescue process (s 141).

35 The potential for abuse of the business rescue process initiated by resolution is obvious.[16] To mitigate this mischief, the Act empowers an affected person to apply to court for an order setting aside the resolution (s 130(1)(a)). The court may do this on the merits, ie on the ground that there is no reasonable basis for believing that the company is financially distressed or that there is no reasonable prospect of rescuing the company, or on the ground that there was no compliance with the procedural requirements in s 129. The company, the Commission, the practitioner and all affected persons must receive notice of the application and may thus place their views before the court.

36 The court hearing an application to set aside a resolution has wide powers to do justice. It may set aside the order both on the grounds I have mentioned in the preceding paragraph and if it is otherwise just and equitable to do so (s 130(5)(a)). It may afford the practitioner time

---

16 For example, the directors and pre-rescue managers can use the moratorium imposed on creditors to dispose of or dissipate company assets and conceal or destroy evidence. The practitioner, who comes into the business from the outside and is dependent on those very directors and managers for information and cooperation will often have little capacity to prevent this happening.

to determine whether the company is financially distressed or whether it can be rescued (s 130(5)(b).

37 Section 130(5)(c)(i) reads:

> if it [the court] 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 ...

38 Section 130(5)(c)(i) was, as I have explained, the legal foundation for the liquidation order made by Thlapi J. This power to undo the rescue process and place a company in liquidation is an essential counterweight to address the mischief caused by a company, to its creditors particularly, which has no reasonable prospect of being rescued from its financial distress but has achieved an undeserved moratorium by a stroke of the company pen in passing and filing a s 129(1) resolution.

39 The begin and end of the rescue process initiated by a s 129(1) resolution are catered for in s 132. Under s 132(1)(a), business rescue proceedings begin when the company files the s 129(1) resolution. Under s 132(2)(a)(i), business rescue proceedings end when the court sets aside the s 129(1) resolution. Section 132(2)(a)(i) provides:

> Business rescue proceedings end when ... the court ... sets aside the resolution or order that began those proceedings.

40 Counsel for the liquidators urged me to give s 132(2)(a)(i) its literal meaning. Their submission was that this provision ultimately supplies the answer to the question before me for consideration: the legislature, counsel say, has pronounced that business rescue proceedings end when the court sets the s 129(1) resolution aside.

41 The case for the practitioner, however, is that s 18 of the Superior Courts Act governs the position. Counsel argued the case for the practitioner on the basis that a sequestration order and an order winding up, for inability to pay its debts, a company that is not under business rescue are not suspended by s 18. I think that this concession was correctly made. This case, however, concerns a company unable to pay its debts which was placed under business rescue pursuant to a s 129(1) resolution in respect of which thereafter the resolution is set aside and liquidation ordered under s 130(1)(a)(i) or (ii) read with s 130(5)(c)(i).

42 Counsel for the practitioner pointed out that a practitioner is an officer of the court, independent of those who controlled and managed the company before the rescue process began, who has duties to report to the court and to report to and consult with interested parties in the

wide sense. One of the mischiefs which the pre-section 18 dispensation sought to counter was a situation where, merely by filing a notice of application for leave to appeal, a company, found to be unable to pay its debts by a court, could remove control of the company from the Master and thereafter the liquidator until the completion of the appeal process. This, submitted counsel, would not happen in the case of a business rescue because a practitioner has the attributes and qualifications to which I have referred. I think that there is merit in this submission, as far as it goes. But it must also be born in mind that the practitioner may, and in practice often will, act cooperatively with the pre-rescue management and will be subject to influence from the management and from the directors of the company who, under s 137(2), must continue to function as such, subject to the practitioner's authority, and, to the extent reasonable, perform management functions within the company in accordance with the instructions or directions of the practitioner.

43 Counsel for the practitioner pointed out that the court per Thlapi J had made orders both setting aside the resolution and liquidating the company. An order setting aside the resolution is not a winding-up or liquidation order and thus, submitted counsel, would not have qualified for exemption from the provisions of rule 49(11) before the advent of the Superior Courts Act. Therefore, submitted counsel, there is no

good reason to hold that the order setting aside the resolution was not suspended now that s 18 regulates these matters pending appeals.

44 Although the previous Companies Act was repealed by s 224(1) subject to s 224(3) of the new Companies Act, the winding-up and liquidation of insolvent companies[17] continue, because of s 224(3) and Schedule 5 of the new Companies Act, at present to be governed by Chapter 14 of the previous Companies Act.

45 Counsel for the practitioner submitted that the present problem arises because there is an ambiguity between the previous and new Companies Acts. I think that this characterisation is too narrow. The problem arises because of the following. Firstly, under the common law, noting of appeals did not suspend the operation of sequestration orders. Secondly, by operation of s 339 of the previous Companies Act, this common law rule, as codified by s 150(3) of the Insolvency Act, was made applicable to an order winding up a company unable to pay its debts. Thirdly, under s 18 of the Superior Courts Act, the legislature has on the face of it created a situation in which (subject to the provisions of ss 18(2) and (3) which are of no present relevance) the operation and execution of *all* court "decisions" (which must include court orders) are suspended upon the lodging of an

---

17 As I have said, this judgment does not deal with the winding-up and liquidation of companies which are able to pay their debts.

application for leave to appeal. Fourthly, s 132(2)(a)(i) of the new Companies Act provides that business rescue proceedings end when a court sets aside the resolution or order which began those proceedings.

46 The problem is not that there is an ambiguity but that these measures must be interpreted to determine whether, when a court makes an order setting aside a s 129(1) resolution beginning a business rescue and placing the company under liquidation and that order is under appeal, the business rescue process ends immediately upon the order or does not end until the appeal process is finally exhausted and the appeal or appeals adjudicated.

47 To my mind there is an inconsistency between s 18 of the Superior Courts Act and s 132(2)(a)(i) of the new Companies Act. In these circumstances I find, against the submission of counsel for the practitioner, that s 5(4)(ii) of the new Companies Act is of application in the interpretation process. Section 5(4) reads:

> If there is an inconsistency between any provision of this Act and a provision of any other national legislation-
>
> (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second-

(i) any applicable provisions of the-

(aa) Auditing Profession Act;

(bb) Labour Relations Act, 1995 (Act 66 of 1995);

(cc) Promotion of Access to Information Act, 2000 (Act 2 of 2000);

(dd) Promotion of Administrative Justice Act, 2000 (Act 3 of 2000);

(ee) Public Finance Management Act, 1999 (Act 1 of 1999);

(ff) Securities Services Act, 2004 (Act 36 of 2004); or

(gg) Banks Act,

prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in section 49 (4); or

(ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118 (4).

48 In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16, the modern approach to the interpretation of documents, whether contractual or statutory or otherwise, was articulated:

> *Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* ... make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose

> to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. [Footnotes omitted]

See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 17-26.

49 Counsel for the practitioner pointed to the social policy articulated in the new Companies Act, by which the object to rescue distressed companies was given considerably greater emphasis than had previously been the position. Counsel pointed to the fact that in the present circumstances a suspension of the order made by Thlapi J would not place the administration of the company back in the hands of its pre-rescue board and management but in the hands of the practitioner, an officer of court vested with the duties I have described.

50 Counsel for the practitioner further submitted that the unqualified language of s 18 of the Superior Courts Act points to a legislative intention to regulate the whole field of the law, without exception. Under these circumstances, counsel submitted, the legislative canon

that a later Act abrogates an earlier one so that s 339 of the previous Companies Act was impliedly repealed, is of application..

51 However, if the practitioner were to be revested with control of the company, one may legitimately ask what the functions of the practitioner could be. The main duty of a practitioner is to determine whether a company can be rescued and, if so, develop and propose a business plan or, if not, to take steps to liquidate the company. For a practitioner to propose a business plan in these circumstances would verge on an absurdity. It is hardly conceivable that the creditors of the company which objected to the rescue and sought the company's liquidation would vote in favour of any such plan.

52 Another highly undesirable consequence of the approach proposed by counsel for the practitioner is that during the appeal process, the vesting of control over the company could swing from the practitioner to the liquidators and back again. After the order setting aside the s 129(1) resolution and ordering liquidation is granted and a provisional liquidator was appointed, control of the company vests in the liquidator. On the first applicant's approach, control of the company then passes again to the practitioner upon the lodging of an application for leave to appeal - again, by a mere stroke of the company pen. If the applicant for leave to appeal or appellant allows

the appeal to lapse, control once again vests in the liquidator. If condonation is granted for the conduct which led to the lapsing of the appeal and the appeal is reinstated, control reverts to the practitioner. In each case, the person in control would have to take steps to fulfil the duties imposed upon him by statute, only to find that he can no longer continue to do so when by a procedural decision relevant to the conduct of the appeal process, control of the company passes from him.[18]

53 Balancing these considerations, I think that the submissions of counsel for the liquidators must prevail. The approach implicit in the propositions of counsel for the practitioner would lead to highly undesirable, indeed remarkable, consequences. Over more than a hundred years a legal policy has been developed and operated in relation to the processes created by the Insolvency Act and the previous Companies Act for the administration of sequestrated estates and companies wound up for inability to pay their debts. Pursuant to that policy, these processes fall to be administered immediately by trustees and liquidators despite pending appeals. If the purpose of s 18 had been to undo all that, one would have expected that measures would have been put in place to deal with or mitigate such consequences and that s 339 of the previous Companies Act would

---

[18] This was recognised and discounted in *Rentekor, supra* 504F. As I have said, this judgment does not deal with the position of companies able to pay their debts.

either have been expressly repealed or amended. None of that was done. Furthermore, the process initiated pursuant to the s 129(1) resolution takes only the interests of the company into account. A s 130 order setting aside the resolution is made after a hearing in court in which the interests of all parties who wished to advance their views have been considered.

54 For practical reasons, always subject ideally to the facts, I think that it is safer to vest control of a company in the circumstances I have described in the liquidators rather than the practitioner. I have described the position of the practitioner above. A liquidator, on the other hand, acts on creditors' instructions and is quite independent of the board of the company and the pre-liquidation managers of its business, if any. There is, in general, under a liquidator less potential for disposing of or dissipating company property and concealing evidence than under a practitioner. Furthermore, to vest control in a liquidator would be consistent with a practice that has, as I have said, operated over many years and been developed and refined by the courts.

55 Another factor supporting the view I have taken is the inherent urgency of insolvency proceedings. In *Absa Bank Ltd v De Klerk and Related Cases* 1999 4 SA 835 E 838J-839A, the court said:

> There is frequently a large body of creditors whose rights are affected by sequestration, who may wish to be heard on the return day, and who may be prejudiced by delay. This inherent urgency leads Meskin to make the following recommendation in *Insolvency Law* at 2.1.7 at 2-34, a recommendation which I endorse and which the Courts in this Division have in fact applied:
>
> 'It is respectfully submitted that any application for sequestration merely as such contains an element of urgency: if a case for sequestration can be made, ex hypothesi, *a removal of his property from the control of the debtor* and a suspension of enforcement of creditors' rights of action and execution in the ordinary course as soon as possible." [my emphasis]

56 In these circumstances, I consider that the purpose of the legislation I have considered will be better served if the provisions of s 132(2)(a)(i) of the new Companies Act are applied in their literal sense. I am fortified in the conclusion to which I have come by the application of s 5(4) of the new Companies Act because the interpretation of the legislation which I prefer causes a provision of the new Companies Act to prevail over s 18 of the Superior Courts Act.

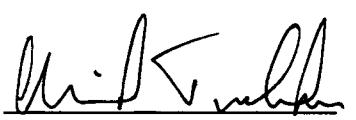
57 I make the following order:

1 Notwithstanding the application for leave to appeal lodged against the order of Thlapi J granted under case no. 30779/2014 on 27 May 2014 and subject to any order otherwise which may be made pursuant to the provisions of s 18(1) of the Superior Courts Act, 10 of 2013, or rule 49(11), it is declared that:

1.1 the provisions of the Insolvency Act, 24 of 1936, and Chapter 14 of the Companies Act, 61 of 1973, apply and operate as if no application for leave to appeal had been made and whether or not any appeal pursuant to any application for leave to appeal against the order of 27 May 2014 is in due course noted and prosecuted;

1.2 the assets of Filapro (Pty) Limited fall under the control of the joint liquidators of that company and will remain so controlled unless and until the order of Thlapi J is set aside or varied on appeal.

2 The costs of all of the applicants as between attorney and own client will be costs in the liquidation of Filapro (Pty) Limited.



NB Tuchten
Judge of the High Court
28 July 2014

For the first applicant:
Adv Charles E Thompson
Instructed by VFV Attorneys, Pretoria

For the second and third applicants:
Adv DTvR du Plessis SC and Adv M Reineke
Instructed by DRSM Attorneys
Johannesburg