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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER 88079/14

In the matter between:

2001 MANAGEMENT SERVICES (PTY) LIMITED 1st Applicant

STANDARD BANK OF SOUTH AFRICA LTD Intervening Party and 2nd Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE

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

.....20/5/2016..... .....

DATE SIGNATURE

KUMARVASAN ANAPPA Respondent

JUDGMENT

THULARE AJ

[1] The business rescue practitioner, on behalf of the first applicant, applied for an order that the business rescue proceedings of the applicant be terminated and that the applicant be placed in final liquidation in terms of section 132 (2) of the Companies Act 71 of 2008 (the Act). As regards costs, it is prayed that the costs of the business rescue practitioner in the business rescue proceedings of the applicant including all disbursements and legal costs incurred by him, be costs in the winding-up of the applicant.

[2] The second applicant, the Bank, applied for leave to intervene in the application, and an order that the business rescue proceedings of the applicant be terminated and the applicant be placed in final liquidation in terms of section 132 of the Act. In the alternative, the second applicant seeks an order granting them leave to institute liquidation proceedings against the applicant in terms of section 133 of the Act and an order placing the applicant into final liquidation in the hands of the Master, and that the costs of the application, including costs of intervening, be costs in the liquidation.

[3] Before me, the business rescue practitioner did not pursue its motion, opting instead to support the application by the Bank. His interest and his submissions, only related to the costs. His prayer was that the court order, in relation to costs, be that the costs incurred by him in employing attorneys and counsel, in either defending or bringing interlocutory applications pending the winding-up application, are to be regarded as administration costs in the winding up and further that the question of his fees are to be reserved. The Bank did not support this stance of the business rescue practitioner. In its view this court cannot be asked to deal, in the main with costs related to the application brought in the matter before another court in another province, and as regards fees the Bank's view is that this must be left up to the liquidator to decide which claims are to be admitted and which are not to be admitted.

[4] The Bank only pursued its alternative motion before me.

[5] In his founding affidavit in support of the application brought by first applicant, Thomas Hendrick Samons (Samons) says he deposed to the affidavit in his capacity as the business rescue practitioner appointed as such on 11 July 2014 in terms of a resolution dated 1 July 2014, passed by the sole director of the applicant, Walter Frederick Stephen Ward (Ward), in terms of the provisions of section 129 of the Act. The applicant commenced business rescue proceedings on 7 July 2014. He took effective control of the applicant on 11 July 2014.

[6] In the sworn affidavit obtained from Ward, it is said that the applicant's primary business activity is that of property investment. Ward confirmed that the applicant is in financial distress due to the following factors:

(a) applicant, as part of a group of companies, bound itself as surety for overdraft facilities of the group which the banks have called up;
(b) the applicant owns one residential property in La Lucia, Kwa-Zulu Natal;
(c) the property was then vacant and not generating any income but had considerable expenses;
(d) Ward subsidized the expenses of applicant from funds borrowed from banks which funds were no longer available

[7] Ward goes on to indicate that the assets of the applicant were far in excess of its liabilities although it is unable to pay its debts as and when they became due. In his view, the applicant would be in a position to rectify the problem within six months due to the following possibilities:

(a) Samons would be able to find suitable tenants to lease the property.
(b) Samons would be in a position to entertain offers to purchase the property of a value much higher than the current covering bond and/or the banks' exposure

(c) the residual amount generated from the sale of the property would be utilized to debts.

The applicant had 3 employees, nil turnover, two million rands third party liabilities and 1 individual with an interest.

[8] Arising out of meetings that Samons held with the director of the applicant and the shareholders, he concluded that the applicant was in distress due to the fact that its major creditor, Standard Bank, could not be paid.

[9] The property that the applicant owns is situated at 38 Lady Ellen Crescent, Umhlanga Rocks, KwaZulu- Natal, more fully described as Erf […] La Lucia Extension 2, Local Authority Ethekwini, Registration Division FU, Province of KwaZulu Natal, in extent: 1209 square metres. It is a coastal house (the property). It is valued at a maximum market value of R4 million.

[10] Standard Bank Limited (the Bank) is a creditor of the applicant in an amount of not less than R5 milllion, which debt is secured by two covering bonds which are registered in its favour over the property.

[11] After discussions with the Bank, Samons decided to sell the property by means of a public auction. His view was that this would have enabled him to conclude the business rescue proceedings within the prescribed three months period. Samons instructed Aucor Auctioneers to proceed with the auction which was scheduled and advertised to take place on 26 September 2014.

[12] Samons had to cancel the auction in the light of a court order which was obtained by Kumarvasan Annappa (Annappa), who was then occupying the property in terms of an arrangement between him and the applicant's director in terms of which Annappa

allegedly purchased the property, alternatively shares in the applicant. The order interdicted Samons from selling the property pending an application to set aside the business rescue proceedings which Annappa was yet to institute. The application to set aside the business rescue proceedings has not been served on Samons. As a result of the obstruction by Annappa, Samons was unable to conclude the business rescue proceedings within the prescribed three month period.

[13] Samons submits that it would be best for all parties if the applicant is wound up, and then the liquidators can investigate the Annappa transaction and set it aside if they deem it to be impeachable. The liquidators can still sell the property.

[14] Barry Terrence Wenke (Wenke) is the manager in the business support-rescue and recoveries, personal and business banking credit division of the bank who brings the application by the Bank on the authority granted by the Board of Directors of the Bank. The bank gave notice of its intention to participate and intervene in this matter in terms of section 145(1)(b) of the Act. The Bank supports the application by Samons to have the business rescue of the applicant set aside on the basis that there is no prospect of rescuing the applicant and to seek the winding up of the applicant, alternatively, the Bank seeks the liquidation of the applicant, in its own right.

[15] A copy of the electronic print-out from the records of the Companies and Intellectual Property Commission in respect of the applicant, attached to the Bank's application, dated 16 March 2015, indicates that Ward had resigned as a Director and that Annappa is the sole active director with an appointment date of 23 July 2013.

[16] According to Wenke, applicant is a property owning company and does not trade. It is the registered owner of the property, and this is the applicant's only immovable property. The property is mortgaged to the Bank. The mortgage bonds were registered over the property by the applicant in favour of the Bank on 1 August 2005 and 14

August 2006 respectively under Bond numbers B43084/2005 and B48579/2006. The bonds were registered as continuing covering security, for amongst others, the obligations of the applicant to the Bank as surety for amounts owing by Ward to the Bank, which suretyships were limited to R4 million and R1 million respectively, R5 million in aggregate.

[17] The Bank afforded Ward a facility known as a "Liberator Facility" in terms of which a line credit of R12 million was made available to him. Ward availed himself of the facility, but fell in arrears with his payments and as at 12 April 2012 the aggregate arrears amount was R862 066-89. The Bank instituted action against Ward for the full amount owing. As at date of the affidavit, Ward is indebted to the Bank in respect of the facility in the sum of R13 638 352-43 together with interest on the aforesaid amount at the prime rate from time to time, then 9.25% less a concession of 2.25% i.e. 7% per annum, which interest is calculated daily and compounded monthly in arrears from March 2015.

[18] The applicant was cited as third respondent to the action pursuant its obligations to the Bank as surety. Against the background of the two suretyships referred to earlier and the limitation thereon, the Bank claimed payment in the amount of R5 million together with interest thereon at the prime rate as at 12 April 2012, which was 9% less 2.25% i.e. 6.75% per annum, calculated from 12 April 2012 to date of payment. The applicant, according to Wenke, is indebted to the Bank, jointly and severally with Ward's insolvent estate, as Ward has subsequently been sequestrated, for payment of that amount.

[19] On 23 June 2013 Ward informed the Bank's attorneys that he was selling the shares he held with the applicant to Annappa. A copy of the sale of shares agreement in terms of which Ward sold the shares he owns in the applicant to Annappa for the consideration of R5 million was availed to the Bank's attorneys on 15 July 2013 by Ward, and he requested the attorneys to confirm that the bonds registered in the Bank's favour would be cancelled. Ms Aphsana Yusuph (Yusuph) also engaged with the Banks's attorneys

regarding the sale of shares agreement and the requirements of the Bank for the cancellation of the bonds registered in its favour.

[20] The sale of shares agreement was concluded on the basis that the property formed part of the assets of the applicant and that same was encumbered to the Bank to the capital amount of R5 million and this is the reason both Ward and Annappa were advised of the Bank's requirement for it to consent to the cancellation of the bonds registered in its favour.

[21] The Bank agreed to the cancellation of the bonds registered in its favour, subject to conditions, mainly that the cancellation would only take place upon payment of the amount of R4 715 000-00 to the Bank, which amount had to be secured by an acceptable guarantee by not later than 16 August 2016. These were communicated to both Ward and Yusuph. The bank agreed to the delay in the furnishing of the guarantees. The Bank received payments of R200 000-00 on 21 and 23 October 2013 respectively from Annappa, which amounts were taken on account of Ward's indebtedness at the time to the Bank, pursuant to the sale of shares agreement. No further payments were forthcoming, despite some commitments made and not honoured. The Bank communicated to Annappa, through his attorneys that the indulgences granted to him had fallen away due to the fact that the conditions for the Bank to consent to the cancellation of the bonds and the release of the company as surety had not been fulfilled. This was also communicated to Ward, and also that that the Bank was proceeding with its action.

[22] On the 7th of July 2014, prior to his provisional sequestration, Ward passed a resolution, referred to earlier in this judgment, to enter business rescue in terms of section 129 of the Companies Act. Ward was provisionally sequestrated on 22 July 2014 pursuant an application brought by ABSA Bank. The provisional order was made final on 1 October 2014. Due to Ward's sequestration, the Bank was unable to pursue the action against

him. The bank was also unable to continue its action against the applicant as a result of the business rescue proceedings.

[23] The Bank's view is that applicant is unable to pay its debts when they become due and payable, and stands to be liquidated. The amount of at least R5 million is due and payable to the Bank. Its view is that it is just and equitable for a liquidator to be appointed, as he or she would investigate the affairs of the company and subpoena witnesses in order to ascertain what the true position regarding the affairs of the company are, and he or she may also engage with the trustees appointed in Ward's insolvent estate in order to investigate the sale of shares transaction and any payments made pursuant thereto.

[24] The Bank's application as an intervening party was served on the applicant. Annappa filed an intention to oppose the Bank's application. In his affidavit, he indicates that he is the sole director and shareholder of the applicant. The shareholding and directorship of the company has changed and passed through to him.

[25] He is aware that the Bank held a mortgage bond over the property and that he had purchased the shares of the applicant for the sum of R5 million. Ward had agreed to settle any indebtedness owed by the applicant to the Bank. His arrangement with Ward was that he would pay Ward R5 million and Ward would in turn pay the Bank. In terms of the agreement and arrangement with Ward, he paid the sum of R2 698 750-00 for the shares, which was used to partly release the applicant from the limited suretyships agreement with the Bank. This amount of R2 698 750-00 was paid to Ward. Ward transferred the shares to him in terms of his arrangement with Ward. Ward had informed him that he (Ward) was selling other properties and that would also have the effect of settling the indebtedness to the Bank. The applicant had given limited suretyship in favour of the Bank for the indebtedness of Ward. He believed that the property was not encumbered. He believed that the applicant has stood surety for Ward

and that at the time that he took transfer of the shares he believed that the company had been released from the suretyship. For this reasons he holds the view that the applicant's indebtedness to the Bank is in dispute. As a result, his view is that the Bank cannot utilize the mechanism of liquidation as an instrument *in terrorem* to compel the applicant to pay a disputed debt.

[26] His view is that the cancellation of the bonds had nothing to do with the sale of the shares. The Bank can easily rely on its mortgage bond which affords the Bank security so there can be no concern that the Bank is prejudiced or compromised in any way. The change of ownership of the shares will have no impact on the security held by the Bank. The sale of the shares in the company will not affect its indebtedness to third parties.

[27] When he became aware of the of the business rescue proceedings against the applicant, he brought an application in the KwaZulu-Natal High Court in respect of which he sought to set aside the business rescue proceedings. Samons opposed the application. Samons failed to provide a report to the KwaZulu-Natal High Court and instead he brought this application in the North Gauteng High Court for the liquidation of the applicant. His view is that Samons is working in cahoots with the Bank and that they are attempting to prevent matters from being dealt with in due course and following due process, in respect of the action which is still pending and his application which is due to be set down and argued on the opposed roll.

[28] Furthermore, aside from the claim by the Bank, the applicant has no other major creditors and in the circumstances the Bank standing alone as a single creditor must satisfy the court that it will not obtain the redress required through simple execution rather than the expensive route of liquidation.

Furthermore, according to him, Samons has failed to file any report to establish what enquiries he has conducted on the financial ability of the applicant. Because of his inadequate conduct, his conclusions must be disregarded by the court.

[29] He denies that the applicant is indebted to the Bank in the amount claimed as pleaded. He also denies that the applicant is insolvent. As the director and shareholder, upon any proven claim, he will be liable on behalf of the applicant to the Bank. The amount owing in terms of the sale agreement is R2 301 250.00 and he undertakes to pay this amount to the Bank in the event that the Bank obtains judgment for its claimed indebtedness. The property is valued at approximately R4 750 000-00. If the claim of the Bank is intact and sound in spite of his payment, then the Bank has the security of the bond over the property.

[30] The Bank will be levying interests on all amounts it alleges are owed to it, and as a result will not suffer any prejudice if it waits for due process and allows the action and application to be determined. In the event of the applicant being liquidated, he will have no recourse to obtain repayment of the sum of R2 698 750-00 from Ward, who is now sequestrated. The Bank has the security of a mortgage bond over the property, which means that he cannot dispose of the property to anyone, so the Bank shall have security until the rights of all parties are fully determined.

[31] The issue is whether the Bank, as the intervening creditor, should be granted leave to institute liquidation proceedings against the applicant in respect of a debt that is subject to business rescue proceedings.

[32] Section 133(1)(b) of the Companies Act, 2008 (Act No. 71 of 2008) provides as follows:

> *"133. General moratorium on legal proceedings against company.- (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the*

company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except - …
(b) with the leave of the court and in accordance with any terms the court considers suitable;"

[33] *Henochsberg on the Companies Act, 71 of 2008,* in his discussion of section 133, under General Note, comments as follows:

"The moratorium granted by this section is designed to provide the company with a breathing space while the business rescue practitioner attempts to rescue the company by designing and implementing a business rescue plan. This is a crucial element of any corporate rescue mechanism, as it allows the company sufficient breathing space to be able to find a solution to the financial problems it is experiencing at that time."

[34] Samons, the business rescue practitioner delivered an application to this court to have the business rescue proceedings terminated. The Bank also delivered such an application to this court. Annappa does not want the business rescue proceedings either. In his effort to stop them, he filed an application in the High Court in KwaZulu-Natal. All three parties with an interest before me, have one thing in common, and that is, they do not support the business rescue proceedings and do not want that to go ahead. It is of course for different reasons. The attitude and approach of the interested parties to the business rescue proceedings, is a factor to be taken into account, when leave is sought to allow legal proceedings to commence against a company under business rescue proceedings.

[35] Against that background, Ward signed a resolution, as a sole director, passed by the applicant, to place the applicant under voluntary business rescue and to appoint Samons as the business rescue practitioner on 1 July 2014. Ward filed for the applicant's

business rescue on 6 July 2014. Ward purportedly sold his shares to Annappa. Annappa is purportedly registered as the only active director of the applicant.

[36] The extracts of the records from the Companies and Intellectual Property Commission are not very helpful to the court as regards to who was the director of the applicant at the time that Ward filed for the business rescue of the applicant. Samons was able to retrieve what appears to be a company report on the applicant, with the date of request being 14 November 2014. In terms of that extract, Ward was the only active director of the applicant. Annappa's name does not feature at all on that extract. The Bank did its own search of the company report on the applicant on 16 March 2015. According to that extract, Annappa is registered as the sole director of the applicant, with his appointment date being 23 July 2013. According to that report, Ward already purportedly resigned as the director of the applicant on 27 July 2013. Ward sought to transfer shares in the applicant to Annappa, and Annappa sought to receive those shares, when both were aware that the condition set by the Bank for the cancellation of the bonds in its favour were not satisfied.

[37] Where an applicant did not file for business rescue because there was a reasonable prospect of a successful business rescue which existed at that time, but instituted the business rescue proceedings for an ulterior and improper motive, that is a factor to be considered, which in my view weighs in favour of the court granting leave for legal proceedings to commence against a company which was under business rescue proceedings. The *bona fides* of the initiator of business rescue proceedings, Ward, or any other relevant person, in this case Annappa, when leave is sought to lift the moratorium, in my view, is an important consideration.

[38] Both Ward and Annappa were aware that the Bank held a mortgage bond over the property. Both were aware that the Bank agreed to the cancellation of the bond registered in its favour, subject to conditions, in the main, that cancellation would only

take place upon payment of the amount of R4 715 000-000 to the Bank, which amount had to be secured by an acceptable guarantee. The condition was not met, and both are aware of this fact.

[39] Annappa's bare denial of the applicant's indebtedness, beyond the common cause payment of R200 000-00 twice, is not supported by any evidence presented to prove that the debt of the Bank was or is being met. The reasons upon which he relies to say that the Bank has been paid are flimsy. He does not make full disclosure of the material facts on which his claim that the Bank has been paid, rests. On the papers, Annappa does not raise a real and *bona fide* dispute of fact. On the papers, the applicant is not only indebted to the Bank. It is also unable to pay its debts and is in consequence, commercially insolvent. *(ABSA Bank v Hammerle Group* 2015 (5) SA 215 (SCA) at paragraph 12).

[39] In *Chetty v Hart* 2015 (6) SA 424 (SCA) at paragraphs 40 and 45 the following is said respectively:

> *"[40] … Thus s 133 (1)(b), which is to be read disjunctively with s 133(1)(a) because of the use of the word 'or' in exceptions (a) – (e), permits a creditor to seek the court's imprimatur to initiate or continue legal proceedings against the company in the event of a practitioner's refusal to give consent, or directly, even without the permission of the practitioner having been sought. …*
>
> *[45] … So, as I have pointed out earlier, during the moratorium there is no absolute bar against legal proceedings. A creditor may ask for the practitioner's written consent and, if refused, approach the court under s 133(1)(b). In addition a creditor may approach the court directly under this provision for leave to institute legal proceedings, without having asked for the practitioner's consent."*

[40] Section 133(1)(b) allows the Bank to approach the court directly, to seek the court's leave, to initiate legal proceedings against the company that is under business rescue,

even without the permission of the business rescue practitioner having been sought. The Bank, in its alternative motion, upon which it relied and proceeded before me, is well within its right to seek such leave.

[41] The Bank seeks leave to institute liquidation proceedings. In *Richter v ABSA Bank* 2015 (5) SA 57 (SCA) Dambuza AJA gave the meaning of liquidation proceedings as follows at paragraph 9:

> *"[9] … Generally, in law and in business, liquidation is the exhaustive process by which a company is brought to an end and the assets thereof, if any, are redistributed. The authors of Cilliers & Benade Corporate Law describe liquidation as follows:*
> *'The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realizing its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue (if any) among the shareholders of the company in accordance with their rights, is known as the winding-up or liquidation of the company."*

[42] In my view, to position the court to exercise its discretion judiciously, in considering the leave sought, it is incumbent upon an applicant who seeks such leave of the court, to take the court into his/her confidence and disclose to the court the legal proceedings which he or she intends initiating. This is to allow the court to determine whether the facts as set out may stand as valid grounds to sustain such recourse. It will also assist the court to ensure that the process of seeking leave is not abused for ulterior purposes.
This will also assist the court to determine whether it is just and equitable, under the circumstances, to exercise its discretion in favour of the leave sought. In my view, liquidation is an appropriate recourse, and it is just and equitable in this case, that it be engaged as a process to deal with the affairs of the applicant.

For these reasons I make the following order:

1. The intervening creditor, The Standard Bank of South Africa Limited, is granted leave to institute liquidation proceedings against the applicant, 2001 Management Services (Pty) Limited.
2. The costs of the application, including the costs of intervening, are costs in the liquidation.

D.M. THULARE
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	12 May 2016
Counsel for the First Applicant:	Adv MH van Twisk
Attorney for the First Applicant:	K Maharaj Attorneys
Counsel for the Second Applicant and Intervening Party:	Adv X Stylianou
Attorney for the Second Applicant and Intervening Party:	RamsayWebber Attorneys
Counsel for the Respondent:	
Attorney for the Respondent:	
Date of Judgment:	20 May 2016