IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: A932/14

In the matter between:

23/8/2016

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE Appellant

(Intervening Party *a quo*)

and

DELETE WHICHEVER IS NOT APPLICABLE

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

23/08/2016 .....

DATE SIGNATURE

PRIMROSE GOLD MINES (PTY) LTD

(In Business Rescue) First Respondent

WERNER CAWOOD N.O. Second Respondent

JOHAN BEER N.O. Third Respondent

JUDGMENT

MURPHY J

1. The second and third respondents ('the respondents") were appointed as business rescue practitioners in respect of Primrose Gold Mines (Pty) Ltd ("Primrose") on 3 June 2013. In early August 2014, having concluded that there was no reasonable prospect for Primrose to be rescued, they applied *ex parte,* as a matter of urgency, in terms of section 141(2)(a)(ii) of the Companies Act 71 of 2008 ("the Act"),for an order discontinuing the business rescue proceedings and placing the company into liquidation. On 18 August 2014, the Commissioner for the South African Revenue Service ('the Commissioner"), the appellant, filed an application applying for an order joining it as a respondent in the *ex parte* application. In addition the Commissioner sought an order declaring that the respondents did not have *locus standi* to bring the application for the liquidation of Primrose and made a counter-application for the liquidation of Primrose. The Commissioner contended that the business rescue proceedings had terminated prior to August 2014 and hence the respondents did not have standing to bring the application for liquidation. The court *a quo* held that Primrose was still under business rescue proceedings, that the respondents accordingly had *locus standi* to make the application and dismissed both the application to intervene and the counter-application.

2. The Commissioner appeals to this court with the leave of the court *a quo* and seeks orders declaring that the respondents lack *locus standi*, granting him leave to intervene and declaring that he has *locus standi* to bring the application for the liquidation of Primrose.

3. The single and narrow issue in this appeal is whether the respondents still held office, and hence had *locus standi,* when they brought the application for the liquidation of Primrose in August 2014. If the business rescue proceedings were still in place at that time the respondents would have had *locus standi.* If the business rescue proceedings had terminated before that time, then they lacked *locus standi.*

4. The relevant facts are common cause and can be summarised as follows. The respondents, as mentioned, were appointed as the business rescue practitioners of Primrose on 3 June 2013.The first meeting of creditors was held on 14 June 2013 and the second meeting of creditors on 22 July 2013, 17 September 2013 and 8 October 2013. During the second meeting of creditors the proposed business rescue plan was put to a vote and rejected by the creditors of Primrose. After the business rescue plan was rejected by the creditors, none of the affected parties, including the respondents, took any steps as envisaged in section 153(1) of the Act in the applicable time period. The relevant part of section 153(1) provides that if a business rescue plan has been rejected the business rescue practitioner or any affected person may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan or may advise the meeting that the company will apply to court to set aside the result of the vote on grounds that it was inappropriate. Section 153(5) of the Act reads:

> "If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings."

5. In the light of the failure by the respondents and the affected parties to take steps in terms of section 153(1) of the Act, on 16 October 2013 the respondents filed a notice of termination with the Companies and Intellectual Property Commission ("the CIPC"). It was headed - "Notice of Termination of Business Rescue Proceedings Primrose Gold Mines (Pty) Ltd" and read:

> "The above mentioned company commenced business rescue proceedings by resolution on 29 May 2013.
>
> In terms of section 152 of the Companies Act 71 of 2008, the business plan was rejected by the majority of the holders of voting interests.
>
> In terms of section 153 of the Act no affected party took any action within 5 days from the date the business plan was rejected.

This notice stands to confirm that business rescue proceedings are terminated in terms of section 132(2)(c)(i)."

6. Section 132(2) of the Act governs the termination of business rescue proceedings. It reads:

"Business rescue 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.

(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

(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan."

7. After the respondent filed the notice of termination on 13 October 2013, the directors of Primrose proceeded to issue a resolution to place Primrose in business rescue again. The notice of termination filed by the respondents was also not accepted as a valid termination of the business rescue proceedings by the CIPC. The CIPC informed the respondents that in its view they remained the business rescue practitioners for Primrose and that the new resolution was regarded as non-existent. Due to the confusion caused by the attitude of CIPC, the respondents approached the court for a declaratory order in respect of their status as business rescue practitioners. A declaratory order was granted by Bam J on 30 May 2014 in the following terms:

"... declaring that business rescue proceedings only end in circumstances where a rescue plan has been proposed to, and rejected by the creditors of the entity in rescue, in terms of Part D of Chapter 6 of the Act, and none of the effect (sic) persons/parties has acted in order to extend the proceedings in any way or manner as contemplated in Section 153 of the Act and a practitioner(s) takes action as envisaged in Section 132(2)(a)(ii), read together with Section 141 or 132(2)(b)."

8. In terms of the order, business rescue proceedings end when a business rescue plan has been proposed and rejected by the creditors and no party has taken any further steps as contemplated in section 153 of the Act and the business rescue practitioners take action in terms of s 132(2)(a)(ii) of the Act, read with s 141 or section 132(2)(b) of the Act. The respondents interpreted the order to confirm that they remained the appointed business rescue practitioners and that the business rescue proceedings in respect of Primrose were still pending. For reasons which will appear in what follows, their interpretation was misplaced. They then proceeded to launch the *ex parte* application for the liquidation of Primrose, which is the subject of this appeal.

9. In deciding that the business rescue proceedings were still subsisting, the court *a quo* had regard to section 141 of the Act. Section 141(1) requires a practitioner, as soon as practicable after being appointed, to investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued. Section 141(2)(a) and (b) are of particular relevance. They read:

"If, at any time during business rescue proceedings, the practitioner concludes that –

(a) there is no reasonable prospect for the company to be rescued, the practitioner must –

(i) so inform the court, the company and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;

(b) there are no longer reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company and all affected persons in the prescribed manner, and –

(i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or

(ii) otherwise, file a notice of termination of the business rescue proceedings..."

10. The court *a quo* held that the business rescue proceedings were still subsisting at the relevant time because in its view business rescue proceedings only end after the process set out in sections 141(2)(a) and (b) of the Act have reached finality in terms of sections 132(2)(a) of the Act when the court sets aside the resolution or order; or when under section 132(2)(b)of the Act the business rescue practitioner files a notice of termination with the CIPC. Such filing, the court held, could only occur in the circumstances envisaged in section 141(2)(b) of the Act, i.e. when the company is no longer financially distressed.

11. The court *a quo* reasoned that in order to reach the finality contemplated in section 132(a) and (b) of the Act, the practitioner must either apply for the discontinuing of the business rescue proceedings or file a notice of termination. The action taken by the practitioners in terms of section 141(2)(a)(ii) of the Act, applying for orders discontinuing the business rescue and placing the company in liquidation, will result in the state of affairs (the end of business rescue proceedings) contemplated in section 132(2)(a)(ii) of the Act. While the action taken in terms of section 141(2)(b)(ii) of the Act will culminate in the state of affairs contemplated in section 132(2)(b) of the Act. To repeat, the situation contemplated in section 141(2)(a)(ii) of the Act is where the practitioners conclude that there is no reasonable prospect of the company being rescued, while section 141(2)(b)(ii) of the Act, on the other

hand, pertains to a situation where the practitioners conclude that the company is no longer financially distressed. In other words, in the opinion of the court *a quo*, business rescues in all cases end either in a liquidation under section 142(2)(a) or a notice of termination under section 142(2)(b) on the basis that there are no reasonable grounds to believe the company is financially distressed. The learned judge thus concluded that notice in terms of section 132(2)(b) can only be given where the company is no longer in distress. It was common cause before her that the company was still financially distressed and as such section 132(2)(a)(ii) read with section 141(2)(a)(ii) was applicable. The court thus held that the respondents accordingly had *locus standi* to bring an application for liquidation and the CIPC was correct to regard the filing of the notice of termination by the practitioners as invalid.

12. The Commissioner's main ground of appeal was that the court *a quo* overlooked the fact that the possibility of a notice of termination is not restricted to the circumstances envisaged in section 141(2)(b)(ii) of the Act. Section 132(2)(b) covers another case. A notice of termination is also required in the different circumstances contemplated in section 153(5) of the Act. It was common cause that the situation provided for in section 153, the rejection of a business plan and the failure of the practitioner or affected parties to take the steps referred to in section 153(1), had in fact arisen and a notice in terms of section 153(5) of the Act had been filed on 16 October 2013, some 10 months before the application by the respondents was brought.

13. Section 132 of the Act regulates the duration of business rescue proceedings. Section 132(1) outlines the circumstances under which business rescue proceedings begin; and section 132(2) delineates when they end. Section 132(2)(b) states in general terms that business rescue proceedings end when a practitioner has filed a notice of termination with the CIPC. It does not say that they end only when a notice of termination is filed in terms of section 141(2)(b)(ii) of the Act on the grounds that the company is not financially distressed. A notice of termination filed in terms of section 153(5) of the Act

must be filed on account of the business rescue plan having been rejected and none of the affected parties taking any further steps as contemplated in section 153. Section 141(2)(b)(ii) of the Act, by contrast, requires a business rescue practitioner to file a notice of termination, when the company is no longer financially distressed. In terms of section 132(2)(b) of the Act, once a notice of termination has been filed, either in terms of section 153(5) or section 141(2)(b)(ii) of the Act, it will end the business rescue proceedings.

14. The interpretation of the Act by the court *a quo* is accordingly untenable and unduly restrictive. It would mean that all business rescue proceedings end either in liquidation at the instance of the business rescue practitioner or when the company is no longer financially distressed. That is not the correct legal position. The proposition ignores the purpose and intended effect of section 153 of the Act, namely that where a business rescue plan has been rejected, affected persons, including the creditors, and not only the business rescue practitioners, should be allowed to pursue their rights against the company.

15. In terms of section 141(2)(a) of the Act a business rescue practitioner has a duty to apply for liquidation only once he concludes that "there is no reasonable prospect for the company to be rescued". His conclusion in that regard, being a condition precedent to bringing the application for liquidation, does not equate with the scenario contemplated in section 153 of the Act arising on the failure to adopt a business rescue plan. It does not axiomatically follow from the failure to adopt a particular business rescue plan that there is no reasonable prospect for the company to be rescued. Nonetheless, once the practitioner files the notice of termination in terms of section 153(5) of the Act, the business rescue proceedings end in accordance with the general provisions of section 132(2)(b) of the Act. That is what happened in this case. The business rescue proceedings ended on 16 October 2013 when a notice of termination was filed in terms of section 153(5) of the Act. The submission of the Commissioner that the business

rescue practitioners had no *locus standi* to apply for the liquidation of Primrose after that date is accordingly correct.

16. Much was made in argument about the interpretation and effect of the declaratory order of Bam J. The respondents submitted that the order stands (until rescinded) to confirm that the business rescue proceedings remain until a necessary further step is taken in terms of section 132(2)(a)(ii), read together with section 141 or section 132(2)(b) of the Act. I do not read the order of Bam J to be inconsistent with the interpretation of the relevant provisions in this judgment. But even if it were, that would be neither here nor there. This court is not bound by the declarator handed down in that application.

17. Finally, the respondents maintained that the business rescue proceedings did not terminate with the filing of the termination notice on 16 October 2013 because this was merely an "attempted filing" and not an effective filing because the CIPC refused to recognise the notice. Section 153(5) of the Act requires the practitioner, in the circumstances there set out, to "promptly file a notice of the termination of the business rescue proceedings." The term "file", when used as a verb, is defined in section 1 of the Act as meaning:

> "to deliver a document to the Commission in the manner and form, if any, prescribed for that document."

No regulation prescribes the form of the notice of termination contemplated in section 153 of the Act or the manner of delivery. Moreover, the respondents stated on affidavit more than once that the notice of termination was filed with the CIPC; and the CIPC did not file any affidavit contradicting these allegations. In the circumstances, there are uncontested and repeated allegations in the affidavits that the notice of termination was filed with the CIPC. The CIPC in correspondence did state that it had not received any

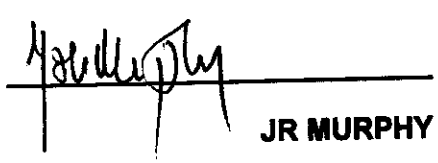
prescribed notice of termination, thereby indicating that it regarded the initial business rescue proceedings as still in effect. The attitude of the CIPC has not been fully explained. Whatever its position, the CIPC's comment does not detract from the fact that the notice of termination was filed and *ipso facto* became effective. The CIPC has no adjudicative function in this regard. Its role is simply to receive and deposit documents required to be filed in terms of the Act. The notice was delivered and that is sufficient.

18. In the result, the appeal must be upheld. The applicant has not sought any order as to costs. The order of the court *a quo* is consequently set aside and substituted with orders declaring that:

(i) the business rescue in respect of the first respondent (Primrose Gold Mining (Pty) Ltd) ended when the notice of termination was filed by the business rescue practitioners on 16 October 2013;

(ii) the respondents do not have *locus standi* to proceed as business rescue practitioners of the first respondent Primrose Gold Mines (Pty) Ltd;

(iii) the application to intervene is granted and the appellant has *locus standi* to bring an application for the liquidation of Primrose Gold Mines (Pty) Ltd.



JR MURPHY

JUDGE OF THE HIGH COURT

I agree

P MABUSE

JUDGE OF THE HIGH COURT

I agree

H FABRICIUS

JUDGE OF THE HIGH COURT

Heard on:	27 July 2016
For the Appellants :	Adv MD Kuper SC Adv C Louw SC
Instructed by:	Maponya Incorporated
For the Defendant:	Adv L van der Merwe
Instructed by:	Cawood Attorneys
Date of Judgment:	23 August 2016