REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 84122/2017

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

Date: Signature:

In the matter between

MATTHYS ISAK CRONJE N.O	APPLICANT
AND	
B AND S MATERIAL HANDLING (PTY) LTD	1ST RESPONDENT
VINCENT BASIL SCROOBY	2ND RESPONDENT
GRANT STEYTLER	3RD RESPONDENT
VINCENT BASIL SCROOBY N.O	4TH RESPONDENT
JOHN GEORGE SIEBERT SCROOBY N.O	5TH RESPONDENT
AMORICOL (PTY) LTD	6TH RESPONDENT

CASE NO: 57449/18

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA	APPLICANT
AND	
B AND S MATERIAL HANDLING PROPRIETARY LIMITED	1ST RESPONDENT
MATHYS ISAK CRONJE N.O	2ND RESPONDENT
VINCENT BASIL SCROOBY	3RD RESPONDENT
GRANT STEYTLER	4TH RESPONDENT
JOHN GEORGE SIEBERT SCROOBY	
VINCENT BASIL SCROOBY N.O	
Cited in their capacities as the trustees	
For the time being of the Teal and Red Trust	5TH RESPONDENT
AMORICOL PROPRIETARY LIMITED	6TH RESPONDENT
JANUARY JOSEPH MABENA	7TH RESPONDENT
COMPANIES AND INTELLECTUAL	
PROPERTY COMMISSION	8TH RESPONDENT

JUDGMENT

THOMPSON, A

[1] Two applications seeking the liquidation of B and S Material Handling (Pty) Ltd ("the company") is enrolled before me. First in time, is the application brought by the business rescue practitioner ("the BRP") of the company in terms of Section 141(2) of the Companies Act 71 of 2008 ("the New Act"). I will refer to this application as "the first application". Second in time, is the application brought by the Standard Bank of South Africa ("SBSA"), the majority creditor of the company, in terms of Section 131(1)(a)(ii) as read with Section 131(5)(c)(i) of the New Act. I will refer to this application as the second application.

[2] In the first application the BRP is the applicant and the company is the first respondent. By virtue of an order for intervention, Messrs V B Scrooby, G Steytler, V B Scrooby N.O. and J G S Scrooby N.O., together with Amoricol (Pty) Ltd was joined as second to sixth respondents to the first application. The first application is opposed by the second to sixth respondents.

[3] In the second application, SBSA is the applicant with the company as the first respondent and the BRP as the second respondent. The second to sixth respondents in the first application is the third to sixth respondents in the second application with a Mr J J Mabena, a former director of the First Respondent being the seventh respondent in the second application. The second application is opposed by the third to sixth respondents

[4] In order to avoid confusion, I will refer to the applicant in the first application as the BRP and the applicant in the second application as SBSA. In so far I refer to the respondents in this judgment, I refer to the opposing respondents, who are in identity the same in both applications.

[5] Due to the overlapping nature of the relief sought and the parties involved in the first and second applications, the parties agreed that the applications are to be heard simultaneously before me. There was mention made, during the course of argument, to a consolidation application brought by the respondents. However, save for the mention, in passing, of the consolidation application, the consolidation application was not moved or addressed before me. In light of the overlapping nature of the relief sought, allegations made and the parties involved, I deemed it expeditious and cost effective to hear the argument pertaining to both applications at the same time.

[6] In opposing the first application, the respondents elected not to deliver an answering affidavit. Their opposition was limited to two separate Rule 6(5)(d)(iii) notices wherein they sought to raise only points of law. In the first rule 6(5)(d)(iii) notice the respondents disputed the *locus standi* of the BRP on the basis that he had terminated the business rescue proceedings prior to seeking the liquidation of the company. In this regard the respondents relied on the averment in the founding affidavit to the first application wherein the BRP stated "*I attach hereto. . .my notice to terminate business rescue proceedings.*" The second rule 6(5)(d)(iii) notice placed in issue whether the BRP complied with the provisions of Section 141(2)(a)(i)[1] of the Act. In addition hereto,

[1] *"(2) 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-

at the hearing, Mr Steyn, appearing for the respondents also raised the additional point of the absence of a Section 346(4A)(b)[2] of the Companies Act 61 of 1973 ("the Old Act") affidavit that may be furnished to the court either before *or during* the hearing of the liquidation application. Mr Louw, appearing for the BRP, indicated that he intends to argue the application on the papers at is stands and holds no instructions to hand up any further affidavit, either at the commencement of the proceedings or at any time during the course of the proceedings.

[7] In opposing the second application, the respondents delivered an answering affidavit. In this regard they raised two defences. The first defence is one of a purely technical nature, in that SBSA did not have the written consent of the BRP to launch the second application during the course of the existing business rescue proceedings.[3] The second defence is premised thereon that SBSA is precluded from seeking and/or obtaining a final winding up order against the company as SBSA did not come to court with clean hands. In this regard the submission was refined during the course of argument, in that SBSA did not act *bona fide* during the course of the business rescue proceedings and should thus be precluded from being allowed to seek or obtain a final winding up order. I will revert to this issue later on in this judgment.

(i) ***so inform the court, the company, and all affected persons in the prescribed manner;"*** [***my emphasis***]

[2] *"(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with."*

[3] *See section 133(1) of the New Act:*

"(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-

(a) with the written consent of the practitioner;"

[8] Contrary to the first rule 6(5)(d)(iii) notice in the first application, the respondents accepted in their answering affidavit in the second application that the BRP had not terminated the business rescue proceedings prior to launching the first application. At the commencement of the hearing I enquired from Mr Steyn whether the respondents are persisting with this point in the first application and he appropriately conceded that the point is not being persisted with. This concession, in my view, was proper to have been made.

[9] The BRP states nothing more in his founding affidavit in the first application that he relies on a "*notice to terminate business rescue proceedings*". No manner of reasonable interpretation can lead any reasonable reader to arrive at the conclusion that the business rescue proceedings are terminated by virtue of the notice referred to by the BRP. In any event, the most unreasonable interpretation accorded to the mentioned statement is unequivocally gainsaid if only cursory regard is had to the express wording of the notice relied upon. The wording in the notice is, simply put, unambiguous in nature, in that it reads as follows "*Section 141(2)(a) of the Companies Act 2008 is clear as to the direction I must follow in this situation. I can confirm that I* ***will bring*** *an application for liquidation of* [the company] *in terms of this section*."[4]

[9] Much of the argument before me related to which application should be granted, in the event that I am inclined to grant a winding up order on either of the first or second applications. It was contended on behalf of the BRP that the first application has substantially complied with the requisite procedures set out in Section 141(2)(a)(i) of the New Act and, as the BRP's application was first in time I should make an order in the

[4] [***my emphasis***]. It must be pointed out that the founding affidavit refers to Annexure 'MIC5" whilst the correct annexure the BRP intended to refer to was Annexure "MIC4". This mistake is common cause between the parties.

first application. The difficulty with this submission is that even if I were to find substantial compliance has taken place in relation to the procedural formalities, there still is no Section 346(4A)(b) of the Old Act affidavit before me and there seems to be no intention to place such affidavit before me.

[10] The BRP did, however, allege in this founding affidavit to the first application that the company had retrenched its employees. But for the further allegation made in the BRP's founding affidavit, it would seem as if the allegation regarding the retrenchment of the company's employees may have been sufficient to satisfy the requirements of Section 346(4A)(a) as read with Section 346(4A)(b) of the Old Act. I stress, for the reasons to follow, that I make no finding as to whether the allegations in the founding affidavit may have been sufficient to satisfy the aforesaid requirements.

[11] In addition to the retrenchment allegation, the BRP went further and alleged that the employees have only received a small portion of the retrenchment package that was agreed to. It is thus evident that the employees, or the former employees as the case may be, retains a vested interest in the liquidation of the company. Motived, no doubt by this premise, the BRP further alleged in his founding affidavit that "*the sheriff will be instructed to . . .serve a copy on the Association of Mineworkers and Construction Union, being the union representing the majority of employees*." There is simply no affidavit or return of service to confirm that this, in fact, occurred. Although there is no requirement in terms of Section 346(4A)(a) of the Act that service must be effected on a trade union, the BRP has seemingly formed the opinion that the best manner to comply

with the purpose of Section 346(4A)(a) of the Old Act is to serve a copy on the relevant trade union.[5]

[12] Proceeding from the presupposition that the BRP was motivated in his allegation that service will take place on the union due to the employees retained vested interest, I must, although substantial compliance with Section 346(4A)(b) is sufficient and there need not be strict compliance, remain mindful that there must be emphasis on achieving the statutory requirements, in particular bringing the application to the attention of the employees.[6] The return of service relief upon for service on the employees indicated that the first application was served by affixing it to the principal entrance at the principal place of business as the premises were found locked. In large block letters the sheriff then also indicated that "*no responsible persons could be found and the premises appears to be abandoned*". There can be no clearer evidence that the statutory purpose of bringing the application to the attention of the employees had not been met through this service. Again, I remain alive to the fact that this situation may arise must be the reason why the BRP elected to make the allegation that the application will be served on the union. For fear of over-repitition, the need to serve on the union must have been motived by the BRP's acceptance that the employees retain a vested interest in the liquidation of the company.

[13] In the absence of this court being satisfied that the statutory purpose of bringing the application to the attention of the employees having been met, this court is

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[5] See ***EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd*** (979/2012) [2013] ZASCA 167 (27 November 2013) ". . . it is accepted that the purpose of the section is, so far as reasonably feasible to bring the application to the attention of the employees""

[6] ***EB Steam,*** supra at para 23
"Throughout the emphasis must be on achieving the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees."

precluded from granting a final order of winding up.[7] I may, however, grant a provisional winding up order and order the BRP to show compliance with Section 346(4A) of the Old Act. However, in light of the compliant second application, I see no reason why the funeral of the company must be postponed for any reason whatsoever.

[14] It is common cause between SBSA and the respondents, and the BRP for that matter, that SBSA has complied with the procedural formalities as statutorily required. I am equally satisfied that the procedural formalities have been complied with and satisfied. In my view the winding up of the company should be determined on the second application.

[15] The technical defence raised by the respondents in terms of Section 133 of the Act can be succinctly disposed of. As is evidenced by Annexure "FA38" to SBSA's founding affidavit in the second application, the BRP provided the necessary written consent as contemplated in terms of Section 133(1)(a) of the New Act to SBSA to proceed with the second application.[8] In any event, this point was not seriously pursued during argument and, in fact, was not persisted with as argument proceeded.

[16] In further opposing the second application, the respondents have not disputed that the company is factually and commercially insolvent. They do, however, by virtue of a counter-application to the second application, seek the removal of the BRP and, by implication, seek to retain the company under supervision and in business rescue. This

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[7] ***EB Steam,*** *supra* at para 25
"*The fact that the requirement that these persons be furnished with the application papers is peremptory means that it is not permissible for the court to grant a final winding-up order without that having occurred. Does that mean that it is equally impermissible for the court to grant a provisional winding-up order? In my view it does not.*"

[8] See, however, also ***Booysen v Jonkheer Boerewynmakery (Pty) Ltd & Another*** (10999/16) ZAWCHC 192; [2017] 1 All SA 862 (WCC); 2017 (4) SA 51 (WCC) (15 December 2016) at para 27 and the authorities cited at fn 45 for the contention that no consent in terms of Section 133(1)(a) of the New Act is necessary in relation to applications in terms of Section 130(1) and (5) of the New Act.

is part-and-parcel of the *bona fides* argument. The argument went as follows: SBSA flouted the purpose of business rescue proceedings by insisting on collecting the security of debtors ceded in its favour and thereby bled the company dry. The BRP, instead of convincing SBSA that they should allow their security to be utilised for business rescue proceedings, paid SBSA their security as and when it was collected and, in doing so, failed in his duties as BRP to achieve the objects of business rescue. As a result, it would be proper to refuse SBSA the final winding up of the company, remove the BRP as business rescue practitioner and allow a new business rescue practitioner to be appointed to achieve the objects of business rescue.

[17] This argument must fail on various grounds. It is common cause that the company has not traded for almost two years. The company has no work force, as all employees have been retrenched since, at least, December 2017. All of the equipment that the company utilised in its operations have been returned to the relevant financial institutions. Save for a vague allegation that the "*newly appointed business rescue practioner. . . may be in a position to recover possession of the equipment and vehicles returned to the supplies*", there is no evidence suggesting that any of these pieces of equipment are still, or will still, be made available to the company. This is the least of the respondents' difficulties. All contracts that the company had by which to generate income has been cancelled and save for a vague allegation relating to "*previous and potential new sites*" no evidence is presented on what basis the company will return to previous sites or how it will acquire new sites to operate from. In addition, no debtors' exist which can be collected in order for the company to meet its day-to-day obligations should it remain in business rescue and attempt to commence business operations.

There is similarly no suggestion of post-commencement finance being available for any business rescue proceedings.

[18] That the respondents' counter-application for the removal of the BRP and the continuation of business rescue proceedings is unreasonable, cannot be doubted. After the BRP formed the opinion that the company cannot be rescued, the respondents did not seek the BRP's immediate removal as business rescue practitioner on the basis that they now contend for. As a matter of fact, on their own version they adopted a "*passive resolution to acquiesce to the instructions given*" to them by the BRP.

[19] In so far the respondents seek to contend that SBSA received undue preferences, flouted the object of business rescue proceedings and bled the company dry, those allegations are dangerously made and, in my view, are vexatious, malicious and/or unreasonable. SBSA acted within the realms of the law by insisting on receiving its ceded security[9] and there is no challenge as to the correctness of the present law as it stands. In the absence of any challenge to this legal position, the BRP was lawfully obligated to give effect to the ceded security provisions and the BRP cannot be faulted for his conduct. Similarly, SBSA cannot be criticised that it elected to enforce its contractually held security in circumstances where they were rightfully entitled to do so in terms of the law.[10]

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[9] ***BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others*** (34716/2016) [2016] ZAGPJHC 310; 2017 (4) SA 592 (GJ) (25 November 2016) at para 42 to 47

[10] See ***Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others*** 2017 (3) SA 539 (GJ) para 18 as quoted with approval in ***Diener N.O. v Minister of Justice and Others*** (926/2016) [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA) (1 December 2017) at para 44

"*From the sections of chapter 6 that deal with security, it is apparent that security is treated in the same way as it is in the law more generally. There is, in other words, no indication that, in business rescue proceedings, security is to*

[20] The respondents' contention that "*it is not al all far-fetched or implausible that the business of* [the company] *may still be sold*" is premised on nothing more than mere conjecture and speculation. No factual basis is established by the respondents that there is a reasonable prospect of achieving any of the goals of business rescue.[11] It bears mentioning that it is not even disclosed that a potential buyer exists and what the potential buyer would be willing to pay for the company.

[21] The respondents simply had to defence to the second application and their opposition of the second application was nothing more than a dilatory design to postpone the inevitable. Their opposition was dilatory, unreasonable with various allegations being made against the BRP and SBSA solely for the intention to harass and annoy without any real expectation that the serious allegations levelled against them has any basis in law. A punitive costs order is warranted against the respondents to show this court's displeasure at their conduct. The company has died a natural death as far back as October 2017. There is no reasonable prospect that any life can be forced back into the company that would enable its resuscitation. The time has come for finality to be reached. In my view the time has come to issue the final death certificate of the company, in order for the necessary funeral to be held by way of the final winding up of the company.

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be diluted or undermined in any way. For instance, s 134(3) provides that if a company wishes, during business rescue proceedings, to dispose of property that is held as security by another person, it may only do so with that person's prior consent, unless the proceeds of the disposal 'would be sufficient to fully discharge the indebtedness protected by that person's security'; and then the company must pay the person promptly up to the company's indebtedness to him or her, or provide satisfactory security for that amount. This is consistent with what was held in Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others, namely that the 'purpose and context' of business rescue 'are not aimed at the destruction of the rights of a secured creditor'." [footnote omitted]

[11] ***Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*** (609/2012) [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) (27 May 2013) at para 29 to 31

[22] In the premises I make the following order:

A. In the first application under case number 84122/2017:

1. the matter is removed from the roll;
2. no order as to costs;

B. In the second application under case number 57449/2018:

1. The resolution placing the first respondent under supervision and in business rescue is hereby set aside;
2. The first respondent is placed under final winding up and in the hands of the Master of the High Court;
3. The applicant's costs are costs in the winding up of the first respondent;
4. The third to sixth respondents, jointly and severally, are to pay the applicant's costs arising from the opposition of the application on the attorney and client scale, which costs are joint and several with the costs in paragraph 3;
5. The third to sixth respondent's counter-application is dismissed, with costs to be paid jointly and severally by the third to sixth respondents on the attorney and client scale.

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C E THOMPSON

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT (SBSA)	**: ADV B M GILBERT**
APPLICANT'S ATTORNEYS (SBSA)	**:WERKSMANS ATTORNEYS**
COUNSEL FOR APPLICANT (BRP)	**: ADV M LOUW**
APPLICANT'S ATTORNEYS (BRP)	**: MATTHYS KROG ATTORNEYS**
COUNSEL FOR RESPONDENTS	**: ADV B STEYN**
RESPONDENT 'S ATTORNEYS	**:SCHOEMAN ESTERHUYSEN ATTORNEYS**
DATE OF HEARING	**: 20 JUNE 2019**
JUDGMENT DELIVERED ON	**: 25 June 2019**