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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 10396/21

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED:NO

Date:10 May 2021

In the matter between:

PFC PROPERTIES (PTY) LTD
(REG.NO.: [...])

APPLICANT

and

THE COMMISSIONER FOR
THE SOUTH AFRICAN REVENUE
SERVICES

FIRST RESPONDENT

TIANJIN PENGBO WEIYE SA (PTY) LTD SECOND RESPONDENT

(previously 21 PORTLAND

ROAD PMB (PTY) LTD)

(REG. NO.: [...])

THE REGISTRAR OF DEEDS, PRETORIA THIRD RESPONDENT
CLOETE MURRAY N.O. FIRST INTERVENING PARTY

ROSELYN CHANTAL NOEL N.O. SECOND INTERVENING PARTY

(In their capacities as joint
provisional trustees of the
Insolvent estate of
Paul de Robillard
Identity Number [...])

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Van der Schyff J

[1] The applicant applies for leave to appeal against the whole of the judgment handed down on 13 April 2021 under the above case number. The facts of the case at hand are set out in the judgment that is the subject of this application for leave to appeal, as are the reasons underpinning the order granted. It is not repeated herein. The parties are referred to as they are cited in this application for leave to appeal.

[2] The applicant relies on two grounds of appeal. The first ground of appeal is that the court erred in finding that when liquidation proceedings have commenced, business rescue proceedings begin when an affected person applies to the court for an order placing the company under supervision in terms of s 132(1)(b) of

the Companies Act, No. 71 of 2008 ('the Act'), and because the applicant's ('PFC's') business rescue proceedings had begun, s 133 of the Act applied. The court subsequently erred in granting leave to proceed with the liquidation application. Counsel submitted that when liquidation proceedings have commenced against a company as in the matter at hand, business rescue proceedings can only be said to begin when a court makes an order placing the company under supervision in terms of s 132(1)(c). Hence, the argument was that s 132(1)(b) does not apply to the facts of the matter.

- [3] The second ground of appeal is that the court erred in finding that because of the pending business rescue application and despite the granting of a final winding-up order, the liquidation proceedings will be suspended. I understand the applicant's argument to be that the implication of granting a final winding-up order in the face of a pending application for business rescue is that business rescue proceedings that commenced were now converted to liquidation proceedings under s 132(2)(a)(ii). This, the argument goes, is a consequence of the order granted even though the judgment expressly states that the court did not consider the business rescue application nor pronounced on its merits. The argument continues that Chapter 6 of the Act does not allow for the pending business rescue application to remain extant after PFC was placed in final liquidation. This renders the business application moot, and there is no statutory suspension under s 131(6) that applies to the liquidation process.

- [4] The applicant contends that the liquidation application could not properly have been decided because it was statutorily suspended. In the result, leave to appeal must be granted because the applicant has reasonable prospects of success on appeal. It is also submitted

that there are compelling reasons to grant PFC leave to appeal the judgment as the issue is of substantial importance, not only to the parties but also to the public. Important and novel questions of law arise from interpreting the relevant provisions of the Act that require legal certainty.

[5] The first respondent submits that the applicant's claim that when liquidation proceedings have commenced against a company, business rescue proceedings can only be said to begin when a court makes an order placing the company under supervision in terms of s 132(1)(c) of the Act (the first ground of appeal), is in conflict with the express wording of the section. The first respondent's highlights that the procedure followed in this case was in line with the procedure followed in *Safari Thatching v Misty Mountain Trading*¹ ('Safari Thatching') and *ABSA Bank Limited v Zwahili Game Lodge (Pty) Ltd, ABSA Bank v Nylstroom Wildplase (Pty) Ltd, ABSA Bank v Smartspec Property Investments (Pty) Ltd*² ('ABSA Bank').

[6] As far as the second ground of appeal is concerned, the first respondent submits that the order granted did not end PFC's business rescue proceedings. They can continue in parallel. The order did also not convert the business rescue proceedings to liquidation proceedings. In granting a final liquidation order, the court followed *ABSA Bank*. Counsel for the first respondent again emphasised the finding of the Supreme Court of Appeal in *GCC Engineering and Others v Maroos and Others*.³ The SCA, in interpreting the provisions of s 131(6), found that an application for business rescue proceedings does not terminate the office of provisional liquidators, nor does it result in the

¹ 2016 (3) SA 209 (GP).

² (97831/15, 97982/15, 97832/15) [2019] ZAGPPHQ 419 (5 September 2019).

³ 2019 (2) SA 379 (SCA).

assets and management of the company in liquidation re-vesting in the directors of the company in provisional liquidation. It is the process of winding-up and not the legal consequences of a winding-up order that is suspended. Reliance was placed on *Richter v ABSA Bank*⁴ where the SCA held that ‘What is suspended is the process of continuing with the realisation of the assets of a company in liquidation with the aim of ultimately distributing them to various creditors.’ In light of the fact that there already two judgments in this Division that contain the same reasoning, and the SCA’s ruling that it is the process of winding-up and not the legal consequences of a winding-up order that are suspended, counsel for the first respondent contended that there are no important or novel questions of law that require legal certainty.

[7] The intervening parties echoed the first respondent’s view. They also attached the judgment of Van der Westhuizen J in the application for leave to appeal in the *ABSA Bank* matter where leave to appeal was denied. The subsequent application for leave to appeal lodged with the SCA was also dismissed. I agree with counsel for the applicant that Van der Westhuizen J’s judgment is indicative that certain aspects were not adequately argued before him in the court *a quo*, hence he refused the application for leave to appeal. Van der Westhuizen J’s judgment and SCA’s dismissal of the application do not take this application for leave to appeal any further.

[8] The applicant raised three pertinent issues that it contends constitute novel and important issues that need to be dealt with by the SCA to obtain legal certainty. In coming to the order granted on 13 April 2021, I followed the principles set out in two judgments

⁴ 2015 (5) SA 57 (SCA).

emanating from this Division. My attention has not been drawn to, neither did I find, any other decision emanating from this Division that s 133(1)(b) cannot be utilised by an applicant who wants to continue with a liquidation application where the liquidation application was launched before business rescue proceedings were instituted. In fact, I found that the position as set out by Davis AJ, as he then was, in *Safari Thatching* was referred to with approval, in *Razzmatazz Trading Investment 19 (Pty) Ltd v Q- Civils (Pty) Ltd (CPMS Civil Road Rehabilitation (Pty) Ltd and Another as intervening parties)*,⁵ and the *ABSA Bank* matter.

- [9] I disagree with the applicant's submission that is supported by the view proffered in *Meskin's Insolvency Law*,⁶ that in the factual context of this matter s 133(1) only applies 'once the company has actually been placed under business rescue and not when an application for business rescue has been made and is pending'. This view is not supported by the clear wording of s 132(1)(b) where it is stated that 'Business rescue proceedings begin when an affected person applies to the court for an order placing the company under supervision in terms of s 131(1)'- as is the position in *casu*. In *Standard Bank of South Africa v A-Team Trading CC*⁷ Ploos van Amstel J remarked *obiter* that 'it is arguable that the liquidation application may in any event not proceed as a result of the moratorium on legal proceedings in s 133, which took effect when the business rescue application was made'. Although he did not express a firm view on this issue, the line of reasoning accords with this court's view.

- [10] The remaining issue revolves around the consequence following

⁵ [2018] JOL 39925 (FB).

⁶ Ch 18.6.

⁷ 2016 (1) SA 503 (KZP) para 21.

the final winding-up order granted by this court. This court's view as stated in the judgment that is the subject matter of this application, that the granting of the final liquidation order will ensure that the company's assets are secured for the benefit of the body of creditors and that the liquidators will be able to investigate the possible dissipation of assets in the near future, but not be able to realise any of the company's assets, is founded on the SCA's decisions in *Richter* and *Maroos*.⁸ Although I am not convinced that another court will come to a different view than the view expressed in the judgment and order granted on 13 April 2021, I have to consider that in both *Richter* and *Maroos*, the business rescue applications were launched after the companies were either provisionally or finally liquidated. The factual context wherein those matters were decided differs from the factual context of this matter. I believe that the question regarding the effect and consequences following a final winding-up order being granted when a business rescue application is pending due to the interaction of ss 131(6) and 133(1)(b), is a novel and important question of law that needs to be dealt with by the Supreme Court of Appeal to provide legal certainty.

ORDER

In the result, the following order is granted:

- [11] Leave to appeal is granted.
- [12] Leave is granted to appeal to the Supreme Court of Appeal.
- [13] The costs of the application are costs in the appeal.

⁸ I must indicate that the reference to 'provisional liquidator' in the last line of paragraph 7 on p 6 of the judgment of 13 April 2021 is an error and should read 'liquidator'.

E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by e-mail. The date for hand-down is deemed to be 10 May 2021

Counsel for the applicant:	Adv. P Stais SC
With:	Adv J Brewer
Instructed by:	Smit Sewgoolam Inc
Counsel for the 1 st respondent:	Adv. MP Van der Merwe SC
With :	Adv. L Kilmartin
Instructed by :	MacRobert Attorneys
Counsel for the intervening applicants:	Adv. APJ Els
Instructed by:	JI Van Niekerk Ing.
Date of the hearing:	23 April 2021
Date of judgment:	10 May 2021