REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 85778/19

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

21 May 2021
DATE SIGNATURE

In the matter between:

MERCHANT WEST (PTY) LTD APPLICANT

and

CRESTAR PRINTERS & PUBLISHERS (PTY) LTD RESPONDENT

JUDGEMENT

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[1] On the 29th of April 2021 I handed down the following order: (1) The application of the Applicant in terms of section 131(1)(b) of the Companies Act no 71 of 2008 is dismissed, no order as to costs is

made. (2) The liquidation application of the Applicant is postponed *sine die*, costs reserved. [The reference to "section 131(1)(b)" is incorrect and should have read "section 133(1)(b)". The order is hereby revised accordingly.]

[2] The Applicant applied for the final winding-up of the Respondent. These are the reasons for the order.

[3] At the commencement, counsel for the Applicant pointed out that a shareholder of the Respondent made an application for business rescue proceedings to be commenced in respect of the Respondent as envisaged in Section 131(1) of the Companies Act, 71 of 2008, ("the Act"). This application was placed on case lines shortly before the commencement of argument.

[4] Earlier in 2020, some 22 employees of the Respondent intervened in the application for liquidation, opposing it in an endeavor to save their employment. Almost all of the said employees are now supporting the business rescue application (BR Application). There was no appearance for any one of the parties in the BR application.

[5] Counsel for the Respondent and counsel for the employees submitted that the BR application was properly made and that Section 131(6) of the Act suspended the liquidation proceedings. Consequently, the

liquidation application cannot be considered on the merits and should be postponed.

[6] Counsel for the Applicant concurred that the BR application was properly made and suspended the liquidation application, but relying on **Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd 2016 (3) SA 209 GP** and **ABSA Bank v Zwahili [2019] ZAGPHC 419**, he indicated that the Applicant would make an application from the bar in terms of Section 133(1)(b) of the Act to obtain leave from the Court to uplift the suspension and proceed with the liquidation application.

[7] The intervening fact of the business rescue application raises the following issues: Whether a business rescue application has been made, which incorporates the question of how the court assesses whether it has been made; when the business rescue proceedings commenced; if liquidation proceedings include proceedings pre- and post the granting of a provisional or final liquidation order; whether there should be appearance on behalf of any of the parties in the BR application; whether the applicant in the BR application should apply to be joined in the liquidation application; whether the BR application can be brought at any time (at such a late stage); whether a properly made business rescue application suspends the liquidation proceedings in terms of section 131(6) of the Act; and whether, notwithstanding the suspension of the liquidation proceedings, a court may grant leave for

the liquidation application to proceed in terms of section 133(1)(b) of the Act.

[8] A related sub-issue is how an application for leave to proceed should be made, whether in a separate, substantive application or simply from the bar. I will deal with each of these issues in turn.

Has a business rescue application been made?

[9] Section 131(1) of the Act allows an affected person to apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. As per section 128(1)(a) of the Act, for purposes of this provision, an "affected person" means a shareholder or creditor of the company; any registered trade union representing employees of the company; and, if there are employees who do not belong to a registered trade union, each of those employees or their respective representatives.

[10] An applicant in terms of section 131(1) must serve a copy of the application on the company, the Commission and notify each affected party of the application in the prescribed manner (section 131(2) of the Act).

[11] In ***Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metals CC & Others*** 2013 (6) SA 141 (KZP), at 11.4, Hartzenberg AJ held that a business rescue application is only regarded as having been made once the application has been lodged with the registrar, has been duly issued, a copy thereof served on the company, the Commission and each affected person has been notified of the application. Where liquidation proceedings have already been initiated, a notice of application must also be served on the provisional liquidator (***Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd*** 2017 (2) SA 56 (GJ) at para. 26). This matter is different as in both the Gas 2 Liquids and Taboo Trading cases the court concluded that section 131(6) has not been triggered because the applications for business rescue in those matters were not properly made.

[12] It appears from the founding papers that the Applicant was not on the list of affected parties that have been notified, but the BR application came to the knowledge of the Applicant. In my view notice to substantially all the affected persons would be sufficient as it cannot be the intention of the section that the omission to notify one affected party would render the BR application void. I find that there has been proper service and notification as set out in the relevant affidavit of service of the BR application.

[13] In determining whether a business rescue application has been made there is a further separate inquiry, that is whether the BR application has a reasonable prospect of success. This is to be determined by evaluating the allegations in the founding affidavit of the BR application which is at this stage, the only affidavit regarding the merits before this court. The question whether there is a reasonable prospect that the company may be rescued was considered in Oakdene Properties Pty Ltd V Farm Bothasfontein Pty Ltd 2013 (4) SA 539 SCA at par 29. This was at the time when the court had to decide if the company had to be placed in business rescue or not.

[14] The applicant in the BR application is a 30% shareholder in the Respondent. He alleges that the Respondent has a huge printing press that took months to install and is used for special printing purposes. It will be difficult to sell and to remove it. The creditors would probably not get more than 33 cent in the rand if the company is liquidated. The deponent will provide R5 million in loan funding that would bring the arrears up to date. That would require that the inflated claim of the Applicant in the liquidation application be corrected. The pandemic caused a slump in business but he listed the current customers and states that the company is in the process of trading itself out of financial distress. There is a reasonable prospect that all the creditors will be paid in full after 3 to 4 years. The deponent alleges also that financial distress should rather be determined at business rescue level than in

liquidation. In an effort to save their employment, almost all the employees are supporting the application for business rescue and opposing the application for liquidation. He also mentioned that there are two other creditors that launched liquidation applications.

[15] I find that there is a prima facie case that there is a reasonable prospect of success based on the allegations in the founding affidavit. If I am wrong in deciding that based on the founding affidavit of the BR application alone, then this court has to exercise a discretion with reference to the alleged facts and also take into account the fact that almost all the employees are supporting the BR application, in reaching a finding that there is a reasonable prospect that the BR application will succeed. Then considerations like fairness, convenience and the interests of justice should be taken into account. This is on the same basis that a court has the discretion to refuse a liquidation application even if a proper case has been made out.

[16] I find that there is a reasonable prospect of success based on the allegations in the founding affidavit, alternatively in terms of the discretion I exercised. The BR application has thus been properly made and section 131(6) automatically becomes applicable and suspends the liquidation proceedings.

[17] If a business rescue application has been made which suspends the liquidation proceedings and the affected parties had opportunity to file their papers, a court is then required to apply the criteria set out in section 131(4)(a)(i) to (iii) and determine based on all the papers filed, whether there is a reasonable prospect for rescuing the company. Based on a consideration of the application that is properly before it, the court may make an order placing the company under supervision and commencing business rescue proceedings, or dismiss the application, together with any further necessary and appropriate order, including an order placing the company under liquidation (section 131(4)(b)).

May it be brought pre and post a provisional or final liquidation order?

[18] In this matter, the BR application has been made during the course of liquidation proceedings. No order has yet been made for the final or provisional winding-up of the company. The Supreme Court of Appeal ruled that the phrase "if liquidation proceedings have already been commenced by or against the company" in section 131(6) refers both to the liquidation proceedings that precede the granting of a winding-up order, as well as the liquidation proceedings which followed thereafter, which relate to the administration of the estate. See: ***Richter v ABSA Bank Ltd*** 2015 (5) SA 57 (SCA) at par.1, 17 and 18. The reference to liquidation proceedings in section 131(6) of the Act therefore includes

proceedings before the granting of a provisional or final liquidation order and proceedings after the granting of such orders.

May it be brought at a late stage?

[19] It was remarked in par 7 of the **Zwahili** judgment that the applicant in the business rescue application in that matter did not offer an explanation why the application was brought at such a late stage. As a business rescue application can be made at any time during liquidation proceedings, there is in my view no need for an explanation why the BR application in this case is brought at such a late stage before the liquidation application is scheduled to be heard.

Is joinder a requirement?

[20] In par 2 of the **Zwahili** judgment supra it was remarked that the business rescue applicant in that matter, one Mr Els, did not apply to be joined in the liquidation proceedings, he only made copies of the business rescue application available. As appears from the wording of section 131(1) read with section 131(6), liquidation proceedings that have already commenced by or against the company will be suspended at the time the BR application is made in terms of section 131(1).There is thus no need to be joined in the liquidation proceedings as the

liquidation proceedings are automatically suspended by the mere fact that the BR application is made.

[21] I find, as also submitted by all three counsel that competently argued and submitted in their supplementary heads, that the BR application has been properly made in terms of section 131(1) of the Act, that it has accordingly suspended the liquidation proceedings and that the business rescue proceedings commenced when the BR application was made.

May a court grant leave for the liquidation application to proceed in terms of section 133(1)(b) of the Act?

[22] Counsel for the Applicant, nevertheless relied on the provisions of section 133(1)(b) of the Act to resurrect the suspended liquidation proceedings and sought leave from the court to bring an application from the bar in terms of section 133(1)(b) in order to argue the merits of the liquidation proceedings. I granted leave to proceed and this issue was properly argued as well as the merits of the liquidation application by all three counsel.

[23] Section 131(6) of the Act reads as follows:

"If liquidation proceedings have already been commenced by or against the company by the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.

"Section 133(1)(b) of the Act reads 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 –

(a) …

(b) with the leave of the court, and in accordance with any terms the court considers suitable."

[24] This moratorium on legal proceedings against a company during business rescue proceedings is of cardinal importance as it provides a breathing space to enable a company to restructure its affairs and also allows the practitioner together with the company's creditors and affected parties an opportunity and time to formulate a business rescue plan (See: ***Murray & Another NNO v FNB t/a Wesbank*** 2015 (3) SA

438 (SCA) at par.14; ***Cloete Murray and Another NNO v Firstrand Bank Limited t/a Wesbank*** 2015 (3) SA 438 (SCA) at 14.) The general moratorium facilitates the rehabilitation of the company in financial distress either to maximize 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, result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. (See also: **Safari Thatching** para. 26.)

[25] Thus, if the application of the Applicant is granted as well as the liquidation order, the purpose of the moratorium and section 131(6) is defeated. A creditor still has the opportunity to ask for the *liquidation* when the properly ventilated business rescue application is adjudicated.

[26] The general moratorium applies "during business rescue proceedings", which is also a phrase used in other sections of the Act (see, for example, sections 133(2), 134(1), 134(3) and 135(1). In terms of section 132(1)(b) of the Act business rescue proceedings begin when a business rescue application is made in terms of section 131(1), as is the case in this matter. The intention of the Act cannot mean that business rescue proceedings commence only once the company has been placed under business rescue. The effect would be that that there is no moratorium in place from the date the application is made to the date when the company is placed under business rescue.

[27] The conditions marking the end of business rescue proceedings are specified in section 132(2). The phrase “during business proceedings” must refer to any point of time between the beginning and ending of business rescue proceedings, as statutorily-defined.

[28] In deciding whether section 133(1)(b) can be used to resurrect suspended legal proceedings, there is a related sub-issue dealing with how the leave application should be made. In both **Safari Thatching** and **Zwahili** supra the court found that, it is legally competent for a litigant such as the present Applicant to request the leave of the court to continue with the already commenced legal proceedings from the bar; i.e. without the need to lodge a substantive leave application. I agree with this view.

[29] It is possible however that in certain circumstances a proper substantive application should be made. As held in *Booysen v Jonkheer Boerewynmakery* 2017 (4) SA 51 (WCC) at para. 54 there “is no one-size-fits-all approach to be followed and what will be required, and what will be sufficient, will depend on the circumstances of each particular matter. It will in each case be a matter for the court's discretion to be exercised judicially on the basis of considerations of convenience and fairness, and what will be in the interests of justice.” This sub-issue does apply to legal proceedings but this court is urged to find that

section 133(1)(b) does not apply to suspended liquidation proceedings envisaged in s 131(6).

[30] On my reading of the Safari Thatching and Zwahili judgments, it appears as if it was held that the business rescue applications were made and that the liquidation proceedings were suspended. If it was not so then there would have been no need to entertain the applications in terms of section 133(1)(b). Then based on substantive grounds or special conditions as listed in the judgements, the applications in terms of section 133(1)(b) were granted and the companies liquidated.

[31] In establishing the substantive grounds or special conditions upon which a court should exercise a discretion to grant leave for suspended liquidation proceedings to proceed, the question of the reasonable prospects of success arise again. In **Safari Thatching** supra at par 10 the court found that the business rescue application was incomplete, some of the proposals apparently came to naught and at par 29 the court remarked that there was no evidence of reasonable prospects that the company could be rescued. In **Zwahili** supra the court considered the business rescue application and found that the merits were vague. See paragraphs 8 and 12.

[32] The courts' criticism relating to the merits of the business rescue applications is probably part of the ratio to have granted the section

133(1)(b) applications and the consequent liquidation orders. The courts also referred to special conditions which relate mainly to the merits of the liquidation applications and probably considered fairness, convenience and what would be in the interests of justice. The result of the liquidation orders made in those matters is that the moratorium ended abruptly and there was no breathing space to allow the companies to restructure their affairs.

[33] Counsel for the employees submitted that on a purposive interpretation:

[33.1] Section 131(6) of the Act prescribes that the pending liquidation proceedings are suspended until the business rescue application is adjudicated upon by the court (i.e. the court adjudicating the business rescue application and not the court seized with the liquidation application) or until it ends, if the court makes the order applied for;

[33.2] section 131(6) does not contain any provision that the court (i.e. the one before which the liquidation application is pending) is empowered to grant an order for leave that the already suspended liquidation proceedings can be proceeded with;

[33.3] section 131(6) contains no reference to the effect that section 133(1)(b) has on pending legal proceedings;

[33.4] section 131(6) is a provision that deals exclusively with what follows upon an application in terms of section 131(1) where liquidation proceedings have been commenced with;

[33.5] section 131(3) affords a right to each affected person to participate in the hearing of an application in terms of section 131(1). Consequently, a court hearing a liquidation application and faced with a properly-issued business rescue application, cannot deal with the liquidation application as if the business rescue application has not been made as this will be to the detriment of the rights afforded to the affected persons who can now participate in the business rescue application;

[33.6] section 133 can only find application once a company has been placed under business rescue and a business rescue practitioner has been appointed. This is so because section 133(1)(a) provides that during business rescue proceedings no legal proceedings may be commenced or proceeded with except with the written consent of the practitioner as the first proviso. Section 133 does not apply to the suspension of liquidation proceedings which has already been dealt with specifically in section 131(6). The provisions of section 131(6) would be rendered nugatory should section 133 be interpreted to also find application in the pending liquidation proceedings.

[34] Counsel for Respondent, submitted that the Companies Act, neither authorises, nor permits a court to grant leave to proceed with liquidation proceedings, if such liquidation proceedings have been suspended by operation of section 131(6).

See: ***Others v Leveton*** 1999 (2) SA 32 (SCA)

[35] In order not to render nugatory section 131(6) of the Act it has been held, that business rescue is a process aimed at avoiding the liquidation of a company if it is feasible to do so.

See: ***Panamo Properties (Pty) Ltd v Nell & Others NNO*** 2015 (5) SA 63 (SCA) at par.8

[36] Section 131(6) is accordingly a special provision that deals exclusively and specifically with the effect of a section 131(1) application on pending liquidation proceedings that have already commenced by or against the company at the time the application for business rescue is made.

[37] The special and unique provisions of section 131(6) thereby provide impetus to the specific aim of business rescue in order to avoid the liquidation of a company if it is feasible to do so.

[38] Section 133(1) is set out in wide and general terms. It places a general moratorium on all legal proceedings, without making any distinction.

[39] The special and specific provisions of section 131(6) can, however, not be considered to have been indirectly altered merely by force of the general words employed in section 133.

[40] The specific (or special) provisions in section 131(6) prevail over the general provisions of Section 133. However, inclusive the terms employed in section 133 may be, it does not apply to the suspension of liquidation proceedings, which is a matter specifically dealt with in special terms in section 131(6).

[41] The special and specific mechanism designed in section 131(6) does not provide for a remedy that a court may grant an order for leave to proceed with the liquidation proceedings notwithstanding their suspension. It follows therefore that the provisions of section 133(1)(b) – providing in wide and general terms that the Court may grant leave for legal proceedings to be commenced with or to proceed – does not find application in respect of liquidation proceedings.

[42] If the import and effect of section 133 are to be interpreted to find application also in pending liquidation proceedings then:

[42.1] The provisions of section 131(6) would be rendered superfluous and nugatory. The subsection could then very well have been omitted from the legislation.

[42.2] The stated purposes of sections 130 and 133 would not be achieved thereby.

[42.3] The consequences would be impractical, unbusinesslike and oppressive and would stultify the aim of business rescue, namely to avoid as far as possible the liquidation of a company if it is feasible to do so.

[43] Counsel submitted that neither of the courts in the Safari Thatching and Zwahili matters dealt in decisive terms with the interpretation of sections 131(6) and 133. It appears that in both matters it was simply assumed, without the matters having been decided upon, that section 133(1)(b) applies also in respect of liquidation proceedings.

[44] Those two judgments can therefore clearly be distinguished, on the basis that they contain no ratio decidendi whereby the Courts grappled with the two provisions and made a binding and definitive determination. It appears that it was simply so assumed in both cases and the matters focussed more on the question whether the application under section 133(1)(b) can be brought from the bar or whether it ought to be a substantive application.

[45] As a result of the fact that it was apparently assumed in both those matters that section 133(1)(b) can be invoked even in the face of pending liquidation proceedings, the two cases are clearly distinguishable.

[46] Given the fact that the matters are distinguishable for the reasons set out above, they have no binding authority on any subsequent court in which it is then pertinently raised for the first time and where the need actually arises for the first time only before this court whether in the first place it is even competent for a court to consider any application, whether from the bar or otherwise, to invoke section 133(1)(b) in order to do away with the fact that the liquidation have been suspended.

[47] It appears furthermore that section 133 was more focussed on a situation where there was a commencement of the business rescue proceedings themselves. That possibly explains why section 133(1)(a) refers to possible consent for the upliftment of the moratorium to be given by the business rescue practitioner, something which happens only after there is an actual commencement of the business rescue proceedings.

[48] The purpose of affording a court the power to uplift a moratorium is to enable a creditor to make a specific recovery or to obtain specific relief

against a company whilst it is otherwise in business rescue and whilst enforcement is otherwise prohibited against it.

[49] Therefore, in both the judgments relied upon by the Applicant the two completely different concepts were simply conflated as if the moratorium on the one hand and the suspension of the liquidation proceedings on the other hand are one and the same concept.

[50] Based on Section 133 a creditor is not entitled to even commence with ordinary legal proceedings and recovery steps against a company in business rescue, unless it procures the consent provided for in the section. However, the Act gives a specific right to any affected party to bring an application to Court (in which there is no need to ask for the upliftment of the moratorium) in order to set aside a business rescue resolution that has been adopted voluntarily.

[51] The legislation seems to draw a sharp contrast between liquidation proceedings, for which separate and special provisions are made, and other general legal proceedings and in particular enforcement action, for which a different regime applies.

[52] In the result Counsel for the Respondent respectfully suggested that the winding-up application has been suspended, that it cannot be

entertained on the merits and that the only solution is to postpone the application sine die and for the costs to be reserved.

[53] In the result and for all these reasons I find that the liquidation proceedings may not proceed until such stage as the business rescue application has been decided upon.

[54] I find that section 133(1)(b) of the Act on a purposive interpretation, does not provide that an application may be made (whether it is made from the bar or otherwise) to uplift the liquidation proceedings suspended in terms of section 131(6). In the result the application in terms of section 133(1)(b) made by the Applicant is dismissed.

[55] If I am wrong in finding that such an application may not be made, then I exercise my discretion on the basis set out above and dismiss the application in terms of section 133(1)(b) made by the Applicant, (which may be made from the bar or otherwise). The application for business rescue has been properly made and the liquidation proceedings remain suspended.

[56] Accordingly, I made an order as set out in paragraph 1 above.

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C N Van Heerden
[Acting Judge of the High Court, Gauteng Division, Pretoria]

DATE OF HEARING: 2 March 2021

DATE OF JUDGEMENT: 29 April 2021

DATE OF THE JUDGEMENT: 21 May 2021

APPEARANCES:

COUNSEL FOR APPLICANT: ADV AJ VENTER

INSTRUCTED BY: UYS MATYEKA SCHWARTZ ATTORNEYS

COUNSEL FOR RESPONDENT: ADV MP VAN DER MERWE SC

INSTRUCTED BY: JAFFER INC ATTORNEYS

COUNSEL FOR THE EMPLOYEES: ADV MH VAN TWISK

INSTRUCTED BY: JAFFER INC ATTORNEYS