

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 30326/22

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

Date: 21 November 2022


E van der Schyff

In the matter between:

JACOBUS JOHANNES NEL N.O.

FIRST APPLICANT

BRUNHILDA ELSE NEL N.O.

SECOND APPLICANT

TIELMAN CHRISTIAAN ROOL N.O.

THIRD APPLICANT

HENNIE DANIEL VERMAAK

FOURTH APPLICANT

FUCHSIA TRADING (PTY) LTD

FIFTH APPLICANT

and

ASTROTAIL 109 (PTY) LTD

RESPONDENT

and

THE EMPLOYEES OF ASTROTAIL 109 (PTY) LTD

INTERVENING PARTY

JUDGMENT

Van der Schyff J

Introduction

- [1] This is an application for the provisional winding-up of the respondent. The applicants are the trustees of the JJ Nel Junior Trust and a private company Fuchsia Trading (Pty) Ltd. The applicants issued an application seeking the provisional winding up of the respondent on 3 June 2022. A notice of intention to oppose the application was filed on 22 June 2022. Affidavits were exchanged, and the matter was subsequently set down for determination on 7 November 2022. On 2 November 2022, an application was filed with the applicant's attorney of record wherein the intervening party seeks leave to intervene in the liquidation application. The intervening party seeks to have the respondent placed under supervision and for business rescue proceedings as contemplated in s 131 (4)(a) of the Companies Act 71 of 2008 (the Act) to commence.
- [2] At the hearing, counsel for the applicants submitted that the intervention application does not constitute a bar to considering the liquidation application because s 131 (6) is only triggered once an application for business rescue is served in accordance with the prescripts of s 131(2). Counsel submitted that the business rescue application was not 'made' as is required in terms of s 131(6). In addition, counsel submitted, an application in terms of s 133(1)(b) may be launched from the bar, and the factual circumstances justify the court granting an order in terms of s 133(1)(b).
- [3] Counsel for the respondent submitted that he only had instructions to support the intervention- and business rescue application. He did not have any instructions to oppose the liquidation application on the merits.
- [4] Counsel for the intervening party moved the intervention and business rescue applications. He emphasised the plight of the employees and explained how they would be affected if a provisional liquidation order was granted *vis-à-vis* a business rescue.

- [5] Due to the nature of the intervening party's interest in the matter, they are allowed to intervene. It is subsequently necessary to consider whether a business rescue application was 'made' that will suspend the liquidation proceedings, since the business rescue application is not ripe for hearing due to the fact that the applicant could not file an answering affidavit.

Was the business rescue application 'made'?

- [6] The Supreme Court of Appeal dealt definitively with the question as to when a business rescue application is 'made' in *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others: African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others*.¹ Meyer AJA, as he then was, held in paragraph [28]:

'The business rescue application must be issued, served on the company and the Commission, and all reasonable steps must have been taken to identify affected persons and their addresses to deliver the application to them, to meet the requirements of s 131(6) in order to trigger the suspension of the liquidation proceedings.'

- [7] The Supreme court of Appeal stated in paragraph [39] of *Lutchman*:

'The service and notification requirements set out in s 131(2) of the Companies Act are not merely procedural steps. According to *Taboo*, [t]hey are substantive requirements, compliance with which is an integral part of making 'an application for an order in terms of s 131(1) of the Companies Act'. Strict compliance with those requirements is required because business rescue proceedings can easily be abused.'
(Footnotes omitted.)

- [8] In the current proceedings, a service affidavit was filed on behalf of the intervening party. It is explained in this affidavit that:

¹ 2022 (4) SA 529 (SCA).

- i. The documents were served on 2 November 2022 at approximately 15h03, on the applicants' and respondent's attorneys of record, respectively;
- ii. The documents were served on the Master of the High Court and SARS on 3 November 2022;
- iii. The documents were served on the CIPC on 4 November 2022 via email.

[9] It is not evident from the service affidavit that any other interested and affected parties, save for the applicant, the Master, and SARS, were notified of the application in the prescribed manner. There is no indication as to any steps that the intervening party took to identify any other interested parties, despite them referring to 'creditors of the respondent and its various stakeholders, which include shareholders, directors, employees, the South African Revenue Services and various others.' in the business rescue application.

[10] Due to the existing liquidation application, it seems, at first glance, pedantic to raise the issue that the business rescue application was served on the attorneys of record of the respondent, and not on the respondent at its registered address. However, the Supreme Court of Appeal unequivocally stated in *Lutchman* that a business rescue application is a ²

'substantive Form 2(a) application, **and not an ancillary or interlocutory application**, which in terms of rule 4(1)(aA), may be served upon an attorney representing a party in proceedings already instituted. In general, rule 4(1)(aA) applies to proceedings already instituted so that it in effect applies to ancillary and interlocutory applications.' (My emphasis.)

[11] In light thereof that the business rescue application was not served on the company at its registered address, and that the court is not informed of any steps taken by the intervening party to identify affected persons and their addresses for the court to determine whether all reasonable steps have been taken to identify affected persons and their addresses to deliver the application to them, I conclude that the business

² *Lutchman*, par [40].

rescue application was not 'made' within the meaning of s 131(6) of the Companies Act. As a result the suspension of the liquidation proceedings is not triggered in terms of the section. Factually, there is no business rescue application before the court. In line with the decision in the *Lutchman* case, the business rescue application is not considered on its merits and stands to be struck from the roll.

The liquidation application

- [12] The applicants only seek the provisional winding-up of the respondent at this stage. I am of the view that a proper case has been made out by the applicants for the relief to be granted. Even though the counsel for the respondent indicated that he was not briefed to oppose the liquidation application on its merits, I considered the application on the affidavits filed.
- [13] The liquidation application is premised on the basis that the respondent is unable to pay its debts in the manner contemplated by s 345 of the Companies Act, 1973, read together with item 9 of schedule 5 of the Companies Act, 2008. The respondent's indebtedness arose from a written acknowledgment of debt. The debt is secured by a mortgage bond registered on 15 March 2018. As a result, the respondent's view that the debt prescribed is ill-conceived. On the facts before the court, it is evident that the respondent is commercially insolvent.³

Conclusion

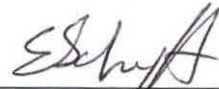
- [14] Because I am of the view that the business rescue application was not made, and as such, did not trigger the suspension of the liquidation proceedings as contemplated in s 131(6) of the Companies Act, and a case is made out for the provisional winding up of the respondent, the provisional winding-up order stands to be granted.

ORDER

³ *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* [2013] ZASCA 173 at paras [13] and [14].

In the result, the following order is granted:

1. The employees of Astrotail 109 (Pty) Ltd (the intervening parties) are granted leave to intervene in the main application for winding-up launched by the applicants under case number 30326/22;
2. The business rescue application is struck from the roll;
3. The respondent is placed in provisional liquidation in the hands of the Master of the High Court, with return date 16 January 2023, at 10h00 or as soon thereafter as the matter may be heard, for all interested parties to advance reasons why the provisional liquidation order should not be made final;
4. The applicants are to finally enrol the application to be heard on the return date;
5. A copy of the provisional liquidation order is to be served on the respondent at its registered office, upon SARS and the Master of the High Court, upon the Respondent's employees and trade unions (if any) and all known creditors, and be published in one issue of the Government Gazette and Citizen newspaper;
6. The costs of the application are costs in the winding-up.



E van der Schyff

Judge of the High Court

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 email.

For the applicants:	Adv. M. P. Van der Merwe SC
Instructed by:	MacRobert Attorneys
For the respondent:	Adv. H.P. West
Instructed by:	SPS Attorneys
For the intervening parties:	Adv. R de Leeuw
Instructed by:	Peters Attorneys
Date of the hearing:	7 November 2022
Date of judgment:	21 November 2022