IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 11982/2013

In the matter between:-

TRISH WILMA SUZANNE EVELEIGH	Applicant
And	
DOWMONT SNACKS (PTY) LTD	First Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
KARL JOHANNES GRIBNITZ	Third Respondent
DH BROTHERS INDUSTRIES (PTY) LTD	Intervening Creditor

JUDGMENT

Delivered on 22 January 2014

Vahed J:

[1] On 9 April 2013, under case no. 3878/2013 in this Court, the intervening creditor (as applicant) commenced urgent proceedings concerning, *inter alia*, the setting aside of a purported resolution placing the first respondent under supervision by a business rescue practitioner (the third respondent) and seeking also the winding-up of the first respondent. Those proceedings ultimately served before *Gorven* J on 26 September 2013 and on 21 October 2013 he delivered a judgment which concluded in the following order:

'a. Leave is granted to the applicant to institute this application in terms of

s 133(1)(b) of the Companies Act, 71 of 2008.

b. The resolution purported to have been made by the board of directors of [Dowmont Snacks (Pty) Ltd] in terms of s 129 of the Companies Act, adopted on 16 November 2012, placing [Dowmont Snacks (Pty) Ltd] under supervision by a business rescue practitioner, which resolution was filed with the third respondent on 22 November 2012, is set aside in terms of s 130(1)(a) read with s 130(5)(a) of the Companies Act.

c. [Dowmont Snacks (Pty) Ltd] is placed in provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg.

d. A *Rule Nisi* is issued calling upon all interested parties to show cause, if any, to the above Honourable Court on 27 November 2013, at 09h30 or as soon thereafter as the matter may be heard, why [Dowmont Snacks (Pty) Ltd] should not be finally wound up.

e. A copy of this order shall be served on the Master of the High Court, Pietermaritzburg forthwith.

f. A copy of this order shall be published, on or before 6 November 2013, once in The Witness newspaper and once in the Government Gazette.

g. The Master of the High Court, Pietermaritzburg, is directed to appoint a provisional liquidator for [Dowmont Snacks (Pty) Ltd] forthwith.

h. The costs of the application shall form part of the costs of administration of [Dowmont Snacks (Pty) Ltd] in the winding up.'

[2] Although marked reportable *Gorven* J's judgment, as best as I can tell, has not yet been reported but it can be found at *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* (3878/2013) [2013] ZAKZPHC 56 (21 October 2013). A proper understanding of the issues that served before *Gorven* J is necessary for a fuller appreciation of that which served before me

in the present application. In the course of this judgment I will attempt a brief summary of salient aspects of that judgment but anything I do in that regard would do offence to *Gorven* J's comprehensive, detailed and erudite labours and for that reason I commend that judgment to the reader.

[3] This application concerns a further attempt to have Dowmont Snacks (Pty) Ltd placed under supervision by a business rescue practitioner.

[4] In this judgment I will refer to:

a. the applicant as "Eveleigh";
b. the first respondent as "Dowmont";
c. the third respondent as "Gribnitz";
d. the intervening creditor as "DH Bros"; and
e. the Companies Act, 71 of 2008 as "the Act".

[5] As will have been noted, Dowmont was provisionally wound-up on 26 September 2013. The return day of that provisional order (27 November 2013), in the interim, has been extended to 27 January 2014.

[6] On 28 October 2013 Eveleigh commenced the present application, citing Dowmont, Gribnitz and the Companies and Intellectual Property Commission ("the CIPC") as the only respondents, in terms of which she sought an order, in the following terms:

‘1. An order placing the First Respondent under supervision and commencing business rescue proceedings in terms of Section 131(1) of the Companies Act 71 of 2008 (“the Companies Act”).

2. Appointing JAN HELM DE WET being a person who satisfies the requirements of Section 138 of the Companies Act and who was nominated by the Applicant, as an interim practitioner.

3. Costs of this application from those Respondents who oppose the relief sought herein.

4. Further and/or alternative relief.’

[7] In the event of there being no opposition, the Notice of Motion indicated that the matter would be heard on 3 December 2013.

[8] On 22 November 2013 DH Bros, under cover of a Notice of Motion dated the same day in which it referred to itself as the *intervening creditor*, sought an order in the following terms:

‘A. **FIRST ORDER**

1. The Intervening Creditor’s failure to comply with the form and notification requirements of Uniform Rules of Court be and is hereby condoned and that application is enrolled in terms of Rule 6(12).

B. **SECOND ORDER**

1. That leave be and is hereby granted to DH Brothers Industries (Pty) Ltd (the Intervening Creditor) to intervene in the application in Case No 11982/13.

C. **THIRD ORDER**

1. That the application in Case No 11982/13 be dismissed with costs.

2. That the First Applicant pay the Intervening Creditor's costs of this application.

3. That further or alternative relief be granted to the Intervening Creditor.'

[9] The Notice of Motion indicated that that application was enrolled for hearing on 10 December 2013.

[10] Although Eveleigh's affidavit dealt with some of the background and history of the matter, the founding affidavit in the intervention application also contains a crisp summary of the relevant events.

[11] Those affidavits disclose some of the relevant background and history as being the following:

a) Dowmont is a manufacturer and purveyor of snack foods.

b) D H Bros is a manufacturer and distributor of edible oils and related products.

c) During the period September to November 2012 D H Bros sold and delivered edible oils to Dowmont for a total purchase price R3 420 696,30, on credit and D H Bros is thus a creditor of Dowmont.

d) Dowmont was founded in 1994 by Mark Kenneth Montgomery and Haden Dowdal.

e) During 1997 the business was sold to Afribrand, a listed snacks company. Afribrand subsequently sold the business back to Mark Kenneth Montgomery, Stephen Du Plessis and Rene Cilliers.

f) During 2008 the shareholders changed in Dowmont and David Costello Kelly ("Kelly") acquired a shareholding, Cilliers having sold his shareholding.

g) On 16 November 2012 a resolution was purportedly passed by the directors of Dowmont and filed with the CIPC on 22 November 2012 placing Dowmont under business rescue.

h) At the time that resolution was purportedly passed there were allegedly two directors of Dowmont, Kelly and Du Plessis.

i) At the time Kelly deposed to an affidavit indicating that Dowmont was solvent but illiquid. He mentioned that Dowmont owed more than R30 million to its creditors and would not be able to pay them within the ensuing six months. That affidavit also indicated that the value of Dowmont's assets exceeded the value of its liabilities.

j) On 16 November 2012 Gribnitz was appointed as the business rescue practitioner.

k) I pause to mention that Gribnitz's personal estate was provisionally sequestrated on 14 October 2013. He accordingly became

disqualified to be appointed or act as a business rescue practitioner.

l) A Business Rescue Plan ("BRP") was published on 25 March 2013. It will be noted, as *Gorven* J found in his judgment, that the BRP was not published within 25 business days of the appointment of the business rescue practitioner as is required in section 150(5) of the Act.

m) A meeting of the affected parties was convened on 3 April 2013 to consider the BRP.

n) On 3 April 2013 Wesbank, one of Dowmont's creditors, objected to the meeting on the basis that they were not afforded sufficient notice and the meeting was adjourned to 10 April 2013.

o) On 9 April 2013 DH Bros commenced the application referred to above.

p) At the meeting on 10 April 2013 that application was discussed and Gribnitz adjourned the meeting so as to table a revised plan in terms of which an increased dividend payable to concurrent creditors would be included. No formal vote was taken at that meeting.

q) An amended BRP was published by electronic mail on 11 April 2013 by Gribnitz.

r) On 19 April 2013 the amended BRP was put to the vote. It appears that some creditors voted in favour thereof and others against it. It appears also that only some 66% voted in favour of the amended BRP.

s) At that point Eveleigh indicated that she was tabling an offer in terms of section 153(1)(b)(ii) of the Act. That offer was put forward as a “binding offer” for the voting interest of the dissenting creditors.

t) Eveleigh’s offer was to pay R100,00 or the liquidation value whichever was the highest.

u) Gribnitz accepted the offer and thereafter adjourned the meeting for five business days to request an expert to determine a value or dividend if Dowmont was liquidated which would accrue to the dissenting creditors.

v) The next meeting was convened and 25 April 2013 and a report was tabled thereat indicating that no dividend would be payable to concurrent creditors. As a result Eveleigh offered each of the dissenting creditors R100,00 which was rejected.

w) Gribnitz then ruled that Eveleigh had acquired the claims of the dissenting creditors and a vote was taken to adopt the BRP. It appears that that vote achieved a 98% approval of those creditors allowed to vote. The dissenting creditors were excluded from the vote.

x) In terms of the amended BRP creditors were indicated that they would receive a cash payment equal to 12,25% of the face value of their claims, that creditors would cede 75,75% of the value of their claims to the Kleinntjie Share Trust ("the Trust") which was described as a post commencement investor in Dowmont, the creditors would agree to write off a further 12% of the face value of their claims for no additional consideration and that those creditors who held sureties against the directors would be entitled to pursue the sureties for 12% of the face value of the claims.

y) In his judgment *Gorven* J held that it was not established that a resolution complying with section 129(1) of the Act had been passed and accordingly found that the procedural requirements of that section had not been satisfied.

z) *Gorven* J also found that it was just and equitable to set aside the resolution. Firstly, he found that the requirements of section 150(5)(b) had not been satisfied in that the creditors had not granted an extension of time for the publication of the BRP and that accordingly the business rescue proceedings came to an end after the lapse of the 25 day period referred to in that section. Secondly, *Gorven* J held that in failing to follow the provisions of section 153 of the Act at the meeting on 10 April 2013 what unfolded on that date resulted in a rejection of the proposed business rescue plan. Thirdly, *Gorven* J held that the rejection of Eveleigh's "binding offer" resulted in her not acquiring the voting interest of the opposing

creditors. The effect of that finding, he held, was that Eveleigh ought not to have been allowed to vote at the creditors' meeting on 25 April 2013 using those voting interests and that the dissenting creditors ought not to have been excluded from that vote. That resulted, he said, in the vote on that day not being a vote in terms of section 152 of the Act, and that the proposed BRP was accordingly not adopted.

aa) In addition, and in also considering that it was just and equitable to set aside the resolution, *Gorven* J examined the proposed amended BRP in its terms and concluded that whether they voted for against proposed amended BRP creditors were precluded from taking action to recover the balance due to them from sureties and this deprived them of certain rights.

bb) The resolution was accordingly set aside and the order placing Dowmont into provisional liquidation was made.

cc) It appears that on 22 October 2013 Attorney Usher addressed letters to some or all of Dowmont's creditors seeking support for the appointment of the provisional liquidators. On that day Eveleigh's attorneys, who then indicated that they were representing Dowmont, wrote to Usher indicating that Dowmont intended applying for leave to appeal against *Gorven* J's judgment and requesting that Usher await the outcome of the appeal

process. No such application for leave to appeal has ever been launched.

dd) On 28 October 2013, i.e. the very same day that the present application was launched by Eveleigh, provisional liquidators were appointed for Dowmont. The provisional liquidators appointed were Usher, M N Naidoo and M Michael.

ee) On 19 November 2013 attorneys acting for DH Bros wrote to the provisional liquidators requesting a report on the then current position of Dowmont. On 22 November 2013 Usher responded in the following terms:

> '1. On being advised of my appointment as one of the provisional liquidators by the Master, Pietermaritzburg on Friday, 25 October 2013, at approximately 13h30, I made a telephone call to one of the directors of Dowmont, David Kelly, and requested a meeting with him. I advised him that I was required by law to *inter alia* "lay a hand of control" on the company, which would require me doing an inventory and valuation of assets, making sure that the assets are insured and taking control of the trading activities, if the company was still trading. He refused to meet with me saying that the Provisional Liquidation Order was be appealed and that as such the Provisional Liquidation Order was suspended until the hearing of the appeal and that the provisional liquidators had no authority to take control of the company and its affairs. A short while later he phoned me back and agreed to meet with me at the Dowmont premises on Tuesday morning the 29th of October 2013, at 09h00.
>
> 2. On Tuesday, 29 October 2013 at 09h00, I together with Peter Maskell, from Peter Maskell's Auctions, met at the premises with David Kelly. At the meeting he advised us that:

2.1 The business and all the assets have been sold to the Kleintjie Share Trust, which is represented by one Roberto Vasconcelos, who has an agreement with the Business Rescue Practitioner to trade of the company for his profit or loss. I requested a copy of the sale agreement which has not been provided to date;

2.2 All orders of product and payments are being made from Vasconcelos' office in Johannesburg;

2.3 Some deliveries are being made on a COD basis;

2.4 There is an Invoice Discounting Agreement in place with Investec for an amount of R3m at 75% of the book value of R4.5m and further lease agreements of R1m Investec;

2.5 The company's old bank accounts have been closed but the Standard Bank Deposit Account is still open;

2.6 The wages are paid up to date;

2.7 Anglo Rand provided post Commencement Finance;

2.8 There is a Special Notarial Bond registered in favour of the directors over one of the production lines, in exchange for the directors advancing money during Business Rescue;

2.9 The landlord has not been paid any rental since November 2012;

2.10 The company is currently doing between R2m and R2.5m turnover per month;

2.11 The Management Accounts are being prepared in Johannesburg;

2.12 An application has been brought by one of the employees to place the company back into Business Rescue and as such order liquidation proceedings are suspended, including the provisional liquidators' powers, in terms of Section 131(6) of the Companies Act, 71 of 2008.

3. I requested that the liquidators, at least, be allowed to ensure that all of the assets are insured until the issue of effect of Section 131(6) has been clarified, he agreed and showed us around the factory and explained the manufacturing process. I left Peter Maskell to carry out an evaluation and inventory of the assets for insurance purposes. I attach a copy of the said valuation and confirm that insurance has been placed by the liquidators with Brokersure Insurance Brokers. Whether the liquidators have an insurable interest at this stage is another question.

4. A number of letters were exchanged between the writer and David Kotzen, copies of which are attached for your ease of reference. A proposal was made by the liquidators that they be allowed to assume control of Dowmont until such time as the Business Rescue Application is dealt with or a Final Liquidation Order is granted. To date the parties in control of Dowmont have refused to hand over control to the liquidators. Copies of the aforementioned correspondence is attached.

5. On Wednesday the 13th November 2013 the writer met with David Kotzen and Roberto Vasconcelos at Lotz SC's Chambers where a possible Section 155 Compromise or a purchase of the business by the Kleintjie Share Trust were discussed. The proposal was made on the same basis as the offer made in the Business Rescue Proposal. The parties were informed that a valuation of the assets would have to be carried out first in order to ascertain if the offer is reasonable in the circumstances. They were advised that the creditors would have to agree to the compromise or to a sale and either would

have to be fully reasonable price in the circumstances. It was proposed that, by consent, the liquidators would bring an application to trade and take control of the company from the Kleintjie Share Trust, but any profit or loss during the trading period would be for the Kleintjie Share Trust. The parties agreed that Ian Wyles, who carried out the valuation in Business Rescue, be appointed to provide an updated valuation. Ian Wyles was subsequently appointed to do a revised valuation but has advised that the writer that he has been prevented from getting access to the premises. I attach a copy of an email received from his office in support of the aforementioned.

6. The writer subsequently had a telephone discussion with Kotzen to discuss the proposed application to trade. Kotzen advised that they require an undertaking from the liquidators that his client will be the successful buyer before they consented to hand over control of the company to the liquidators. The writer advised Kotzen that the liquidators cannot agree to bring an application on the basis that the Kleintjie Trust be given an undertaking that it will be the successful purchaser. There is accordingly no agreement had pleasant in place between the liquidators and the Kleintjie Share Trust. I attach a copy of my letter to Kotzen regarding the above.

7. The liquidators subsequently sent a circular to creditors, requesting any creditors were prepared to assist the liquidators, with funding in order to obtain a Declaratory Order or an application to gain control of the company, to contact the liquidators urgency. I attach a copy of the circular for your edification.'

ff) I point out that Kotzen is also Eveleigh's attorney in the present application.

[12] Section 131(6) of the Act provides as follows:

'(6) If liquidation proceedings have already been commenced by or against the company at 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.'

[13] In *Absa Bank Limited v Makuna Farm CC* (unreported South Gauteng High Court, Johannesburg Case No. 2012/28972, 30 August 2013) *Boruchowitz* J examined the section and concluded:

'[6] The pivotal question for determination is whether the words "*liquidation proceedings*" as they appear in the section is a reference to the substantive application taken by creditor to obtain a winding up order, or to the liquidation proceedings and processes that follow the grant of such order. If the reference in the section is to the application proceedings to obtain a winding up order, then clearly the suspension envisaged therein would apply to the grant of a final winding up order.

[7] The express wording of the section makes it plain that the stay contemplated applies to "*liquidation proceedings*" that "*have already been commenced by or against the company at the time an application is made in terms of subsection (1)*". Winding up proceedings only commence, albeit with retrospective effect in terms of s 348 of the Act, once a winding up order is granted (see *Vermeulen & Another v Bauermeister and Others* 1982 (4) SA 159 (T) at 162A-B). In my view, the aforegoing is an indication that the words "liquidation proceedings" in s 136(1) refer to the winding up proceedings that follow the grant of a winding up order, and not to the application proceedings taken to obtain a winding up order. See also in this regard, *Absa Bank Limited v Earthquake Investments (Pty) Ltd* (unreported Case No 2012/63190), where a similar view is expressed by Makoba J.

[8] The launch of business rescue proceedings does not alter the legal status of the company in liquidation but merely stays the implementation of the winding up order. The manifest purpose of the s 131(6) suspension is to delay implementation of the winding up order pending the outcome of the business rescue

application, but the company remains under winding up, whether finally provisionally. Support for this view is to be found judgment of Van der Bijl AJ in *Absa Bank Limited v Summer Lodge (Pty) Limited and Others* (unreported Case No 2012/63188), where the learned Judge said the following at para [19]:

> "[19] It is not the intention of the section to render a liquidation order to be set aside or to be discharged by the issue of the business rescue application in terms of section 131(6), but to rather suspend the order so as to delay the implementation of the order, and it can also not have the effect that the company can proceed carrying on business. The company remains to be finally provisionally liquidated, as the case may be, until such time as the business rescue proceedings have been finalized.".'

[14] I am in respectful agreement with those views.

[15] In seeking to intervene and to have Eveleigh's business rescue application dismissed DH Bros contends that the application is nothing more than an abuse of the process of court because nothing has materially changed with regard to the proposed Business Rescue Plan that served before *Gorven* J. In addition DH Bros relied also for contending for a dismissal of the application upon the contention that the application papers had not been served upon all affected persons. In this latter regard it was wrong and nothing more needs to be said on that score.

[16] In opposing the relief sought by DH Bros Eveleigh has adopted a rather technical approach. Notwithstanding the fact that the Judge President had allowed the matter proceed as an opposed matter on 10 December 2013, and notwithstanding the fact that DH Bros' Heads of Argument had been delivered on 5 December 2013, Eveleigh's answering affidavit was only delivered at the commencement of the hearing of the application in court. That affidavit was deposed to the day before. There was no explanation for the late

delivery of that affidavit, but because Mr *Hartzenberg* SC, who with Mr *Gani* appeared for DH Bros, did not object, I received same.

[17] In her affidavit Eveleigh contended that it was premature for DH Bros to move for the dismissal of the business rescue application. The submissions made in her affidavit in that regard have their foundation in a letter addressed by Kotzen to DH Bros' attorneys on 4 December 2013 wherein, *inter alia*, he stated:

'We note ... that your client's application for leave to intervene has been brought on an urgent basis. Your client has, however, failed to justify the urgency of this application in its founding affidavit, as it was required to do so. Our client accordingly requires your client to withdraw its application from the motion court roll for 10 December 2013, failing which, our client will file an affidavit in opposition thereto to have your client's application struck from the roll.

Furthermore, we point out that until such time as the Court grants your client's application for leave to intervene in our client's business rescue application ... your client is not a party to the business rescue application and it is accordingly not entitled to file an answering affidavit in those proceedings and it is not appropriate for your client to pre-empt whether the Court will grant your client's application by filing an answering affidavit before the Court has pronounced whether your client is, in fact, entitled to do so. It is accordingly evident that, as the matter presently stands, there is no answering affidavit before the Court in the business rescue application.

If, however, your client is indeed granted leave to intervene in the business rescue application, our client will be entitled to file a replying affidavit at that stage. The business rescue application therefore cannot be ripe for hearing by 10 December 2013 as your client is not before the Court in those proceedings and our client will (if your client's intervention is granted) be entitled to file a reply thereto in accordance with the time periods prescribed by the Rules of Court.'

[18] I pause to mention that in its affidavit in support of the application for intervention and the dismissal of the business rescue proceedings DH Bros indicated that that affidavit served the twofold purpose of being in support of the intervention and in answer to the business rescue application.

[19] Eveleigh (and for that matter Kotzen as well) loses sight of the fact that DH Bros, as creditor, is an *affected person*, which term is defined in section 128 of the Act as including a creditor of the company. Indeed, recognising DH Bros as an affected person, Eveleigh gave the required notice of the application to DH Bros. As section 131(3) of the Act indicates, "[e]ach affected person has a right to participate in the hearing of an application in terms of the section". Given the wording of section 131(3) of the Act it seems to me that DH Bros did not have to apply to intervene but instead is before the court as of right. The fact that DH Bros did apply for leave to intervene appears to me to be nothing more than a step taken in the exercise of caution.

[20] In support of her application for business rescue Eveleigh put up the very same BRP that served before *Gorven* J. It will be recalled that the cornerstone of that plan was the rescue funding to be injected by the Trust and the acquisition by the Trust of the shares in Dowmont and the claims of its creditors.

[21] In launching the business rescue application Eveleigh assumed that the BRP had been objected to and eventually rejected by *Gorven* J on technical grounds only. Indeed, in her founding affidavit she, *inter alia*, says:

‘8.8.8 The only point of concern about the business rescue plan was that it precluded the creditors from pursuing their claims against the sureties and in that way it was a plan which was not permitted in terms of the Companies Act.

8.8.9 There is still scope to see the BRP which has already been published to be amended to an acceptable form for creditors.

8.8.10 So for example instead of a compulsory session the BRP can be reformulated to allow a dividend to all creditors subject to them retaining the rights to proceed against sureties for the balance of their claim. Sections 152(4) and Section 154 of the Companies Act will allow for such a business rescue plan and afford proper protection to the Company so that it is not open to any further attack by creditors once the plan is adopted properly in accordance with the Companies Act.’

[22] Eveleigh also relied on a statement made by *Gorven* J in his judgment (paragraph 13) to the effect that “... it was conceded by [DH Bros] that, if it is competent to adopt it and it is in fact adopted, the plan would form the basis for concluding that there is a reasonable prospect for rescuing Dowmont”. DH Bros denies that any such concession was made by it or on its behalf during the proceedings before *Gorven* J. The oral argument that unfolded before *Gorven* J has been transcribed and was placed before me during the hearing of this application and I have had regard to Heads of Argument that served before *Gorven* J. I have been unable to find any such concession in any of those documents. Indeed, and when I asked Mr *Rudolph*, who appeared for Eveleigh at the hearing, to point me to where such concession was made he was unable to do so. I must conclude that that recordal in his judgment was made by *Gorven* J in error. Indeed a fine reading

of the entire judgment lends support to the submission made by DH Bros that that statement is at odds with the general tenor of the judgment.

[23] In her answering affidavit Eveleigh states that the BRP put up with the founding affidavit is a draft and that "... the only issue for consideration in [the business rescue proceedings] is whether there is a reasonable prospect that a proposed business rescue plan prepared along the lines of the draft .... would rescue [Dowmont]".

[24] It is now settled law as to the meaning of "reasonable prospect" as that concept is referred to in the sections of the Act dealing with business rescue. It is something less than a reasonable probability but on the other hand, "... it requires more than a mere prima facie case or an arguable possibility. Of even greater significance ... it must be a reasonable prospect – with the emphasis on 'reasonable' – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough". See *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kayalami)(Pty) Ltd & Others* 2013 (4) SA 539 (SCA) at para [29].

[25] Prior to the hearing of the application on 10 December 2013 the provisional liquidators delivered affidavits for the assistance of the court. They confirmed all of that set out in Usher's letter quoted above. They indicated that in their view, it was extremely urgent that the matter be dealt with because the current situation could not be allowed to continue.

[26] The landlord of the business premises occupied by Dowmont also delivered an affidavit for the assistance of the court. That affidavit disclosed that at the time Dowmont first went into business rescue in November 2012, it was in arrears with its rental to the tune of approximately R500 000,00. The current arrear rental has since escalated to the sum of R3 871 171,29. The landlord went on to say that not only is it not currently receiving rental, but in addition is incurring further losses because of ongoing obligations with regard to rates, electricity, water and other charges attaching to the premises occupied by Dowmont.

[27] Dowmont is at present trading in insolvent circumstances. That much was found to be the case by *Gorven* J and he also found that it was hopelessly insolvent. It is at present also apparently under the control of the Trust.

[28] Against that background the question that arises for consideration is whether the present application meets the test.

[29] It seems to me that given that the BRP was subjected to such close scrutiny and criticism, firstly by DH Bros in the earlier application and secondly by *Gorven* J in his judgment in that application, no purpose is served by merely putting up the same BRP with the vague and empty assertion that it can be amended to meet creditors' needs. Something more is required so as to elevate that BRP into a 'reasonable prospect'. At present Eveleigh's treatment of the BRP amounts to nothing more than a 'speculative suggestion'

particularly when regard is had to the fact that nowhere in the papers is there even a suggestion that the Trust is willing and able to still provide the necessary “the rescue finance” if the BRP is amended in any form.

[30] The view that the current proposal based on the old rejected BRP is nothing more than a ‘speculative suggestion’ is reinforced when regard is had to the following concerns:

a) Notwithstanding the assertion that Dowmont is currently, and has been, generating a turnover of some R2m to R2,5m Eveleigh discloses that it has further debts of R10 559 316,67. These debts are not explained in any detail except that they are all post business rescue debts. However this is the same figure as that contained in the rejected BRP (i.e. March 2013). There is no disclosure of why, if Dowmont is trading profitably, these debts have mounted. On the contrary there is every reason to believe that that figure has increased significantly even if one only takes into account the fact that the rental has not been and remains unpaid.

b) Although there is a reference to a turnover figure there is no suggestion whatsoever in the papers as to whether that turnover is in fact producing a profit, no matter how modest, or indeed any cash surplus of any kind.

c) The rejected BRP contained information about Dowmont's financial position and performance up to and including November 2012. For the purposes of the current application no audited financial statements or even management accounts for any of the subsequent time has been put up. The liquidation view of Dowmont remains the one discussed in the rejected BRP.

[31] Eveleigh took the considered view to put up the rejected BRP as forming the foundation and cornerstone of the present business rescue application. That document was put up with the founding affidavit in its full and complete form as it was when it served before *Gorven* J. Having taken the decision to rely on that document it is insufficient in my view to suggest that it would meet the test of providing a 'reasonable prospect' for rescue, if amended, without going in into similar and sufficient detail about such amendments. In my view, what was required also was a disclosure about the extent such amendments would be tolerated by the Trust.

[32] It follows that I am not satisfied that the current proposal for business rescue has any prospects of success.

[33] I am additionally of the view that the current situation must be brought to a head. If liquidated finally the liquidators will have the investigative powers necessary with regard to interrogations as well as the powers relating to assets recovery and those relating to the setting aside of undue

preferences. None of those powers are available to a business rescue practitioner.

[34] I make the following order:

a) Leave be and is hereby granted to DH Brothers Industries (Pty) Ltd ("the Intervening Creditor") to intervene in the application in Case Number 11982/2013.

b) The application in Case Number 11982/2013 is dismissed with costs.

c) The Applicant (Trish Wilma Suzanne Eveleigh) is directed to pay the Intervening Creditor's costs of the application, such costs to include those consequent upon the employment of two counsel.

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Vahed J

CASE INFORMATION

Date of Hearing:	10 December 2013
Date of Judgment:	22 January 2014
Applicant's' Counsel:	E Rudolph
Applicants' Attorneys:	David Kotzen Attorneys Locally represented by Lister & Lister Suite 101, 1st Floor 161 Pietermaritz Street Pietermaritzburg (Ref: Mr R Stretch/DAV1/001/05/D090/001) Tel: 033 345 4530
Respondents' Counsel:	C J Hartzenberg SC (with H S Gani)
Respondents' Attorneys:	Venns Attorneys 270 & 281 Pietermaritz Street Pietermaritzburg (Ref: M Motala/Nadia/21120457) Tel: 033 355 3100