Republic of South Africa
In the Western Cape High Court of South Africa

In the matter between:	Case No: 1110/2012
Shoprite Checkers (Pty) Ltd	Applicant
Versus	
M.G. Hi-Tech Surveys CC	Respondent

Judgment delivered: 27 February 2012

Louw J

[1] On Tuesday 24 January 2012 the applicant was granted orders by this court (per Saba, AJ) in terms whereof:

1. The applicant was authorised to take possession of the respondent's business, Seven Eleven, George, its stock in trade, book debts and all assets of the respondent as security for any amounts owing to the applicant in terms of a notarial covering bond (the notarial bond) that was registered one week earlier on 17 January 2012 and further, in terms of the powers granted to the applicant under clause 14.2 of the notarial bond, to conduct the business of the respondent and to exercise powers ancillary thereto; and

2. A Rule nisi was issued calling upon the respondent to show cause why the applicant should not be authorised to deal with the business and movable property in terms of clauses 14.3, 14.4, 14.5 and 14.6 of the notarial bond, i.e. to sell the business and/or assets and to exercise further powers ancillary thereto.

[2] The applicant's case is that the respondent is indebted to the applicant in the amount of R386 421.77. The applicant took possession of the respondent's business and assets pursuant to the first part of the order on 25 January 2012.

[3] The background to the application is briefly as follows.

[4] On 18 October 2005, the respondent concluded a franchise agreement with Metcash Seven Eleven (Pty) Ltd (Metcash) and pursuant thereto the respondent conducted a franchise business in George known as Seven Eleven, George.

[5] During 2011 the applicant bought part of the business of Metcash and in August 2011 the Competition Tribunal approved the sale of the Metcash franchise business including the business conducted by the respondent to the applicant, effective from 10 August 2011.

[6] The respondent was duly informed of the sale and of the transfer of Metcash's rights and obligations under the franchise agreement to the

applicant. The parties thereafter continued to do business in terms of the Metcash agreement until on 19 December 2011, through the signature on behalf of the applicant, they concluded a new franchise agreement. The agreement was signed by de Bruin on behalf of the respondent on 14 December 2011.

[7] The respondent fell into arrears in respect of its payments to the applicant both under the Metcash agreement and also, under the second agreement. On 29 November 2011 de Bruin wrote to the applicant on behalf of the respondent offering to pay off the arrears in instalments of R10 000.00 per week. On 7 December 2011 the respondent concluded an acknowledgement of debt agreement with the applicant wherein the respondent acknowledged that it was indebted to the applicant in the amount of R171 438.37 and undertook to repay the debt with interest in instalments of R10 000.00 per week. A reconciliation of the respondent's transaction history with the applicant which is annexed to the launching papers and which is not disputed shows that since August 2011 over a period of more than five months, the respondent progressively fell further behind in its obligations under both agreements and that by December 2011, the arrears had increased to R386 421.77, the amount alleged by the applicant.

[8] The respondent continued to fall further in arrears and despite its undertaking to pay off the arrears at R10 000.00 per week, the last payment made by the respondent was R11 995.00 on 19 December 2011. On 16

January 2012, the applicant sent an e-mail to the respondent's attorneys demanding payment of the arrears within 24 hours. When no further payment was received, the applicant exercised its right under the agreement and cancelled the second franchise agreement. The applicant informed the respondent by e-mail on 20 January 2012 of the cancellation.

[9] The respondent has filed opposing papers to which the applicant has replied. The respondent has also filed supplementary opposing papers. On the return day on 7 February 2012 the matter came before me in the motion court and stood down to Friday, 10 February 2012 when it could still not be disposed of because of the crowded roll. It came before me again on 21 February 2012.

[10] The applicant seeks a final order perfecting and giving effect to the notarial bond. In addition, the applicant seeks orders that

1. The applicant must institute action against the respondent within thirty days of date of the order for payment of the outstanding amounts in the aggregate of R386, 421.77, together with interest thereon.
2. The applicant is to keep a full and detailed record of the sales of any goods in pursuance of clauses 14.2 and 14.3 of the notarial bond and to make such available to respondent on five days' notice.

[11] The respondent has raised three issues in opposition:

1. De Bruin, the sole member of the respondent launched a business rescue application in terms of the Companies Act, 71 of 2008 (the Act) on 31 January 2012. That application is set down for hearing on 15 March 2012. The respondent contends that Sec 133 of the Act affords the respondent a moratorium against further legal proceedings and that the orders made on 24 January 2012 should be discharged. I will return to this ground.
2. The applicant relies for the relief sought on a notarial bond based on a franchise agreement concluded between the applicant's predecessor, Metcash and the respondent on 18 October 2005. However, after the sale of the franchise business was approved, the applicant concluded a new franchise agreement with the respondent, signed on behalf of the respondent on 14 December 2011 and by the applicant on 19 December 2011. The applicant contends that Clause 9 of the new agreement which does not in terms provide for security in the form of a notarial bond differs from clause 9 of the Metcash agreement, which specifically mentions a notarial bond as security. Although the bond was registered on 17 January 2012, the power of attorney to pass the notarial bond was executed by de Bruin on behalf of the respondent on 7 December 2011. Since the new agreement replaced the Metcash agreement, the contention is that the notarial bond is invalid in that the basis for the bond was the Metcash agreement which was no longer in place. There is no merit in this defence. It is clear that the notarial bond

was registered as security not only for debts which arose under the Metcash agreement but all future debts that may become owing to the plaintiff.

3. De Bruin contends that the new agreement was concluded after the Consumer Protection Act, 68 of 2008 (the CPA) came into operation and that the circumstances under which he signed the new agreement on behalf of the respondent contravened sections 40 and 51 of the CPA. The circumstances alleged by de Bruin are that the applicant caused him to sign various documents which he suspects included documents which *'could have been used in drafting and registering the Notarial Bond'*, the effect and legal consequences of which were not explained to him and copies of which were not received by him. In addition, de Bruin states that he succumbed to *'pressure (which) was applied to me in that I was informed that if ... I wanted to trade and have a credit facility with the Applicant, I had to sign various documents immediately and without further question and delay'*. It is doubtful that these circumstances constitute contraventions of the provisions of the CPA, but, in any event, the CPA is not applicable to the respondent. A cashflow breakdown for the period March to December 2011 annexed to the business rescue application, which is part of the papers in this application, shows that the respondent's sales turnover for that ten month period exceeded R2m, the monetary threshold determined under sec 5 (2)(b) of the CPA.

[12] The respondent is not only indebted to the applicant, but is also indebted to its landlord, the du Toit Family Trust in the total amount of R191 207.82. In addition, de Bruin admitted to Mr Jacobus Barnard of the applicant during a meeting in November 2011 that the respondent is indebted to Business Partners in the amount of R1,05m.

[13] Because of the cancellation of the second franchise agreement, the respondent cannot since the date of cancellation on 20 January 2012, trade as a Seven Eleven Store. Barnard, the deponent to the applicant's replying affidavit, has further stated in unequivocal terms that the applicant will not in future extend credit to the respondent nor supply goods and services to the respondent and that if the business rescue application should succeed, the applicant will use its voting interest to vote against any proposed business plan involving the respondent trading as a Seven Eleven Store.

[14] Section 133 of the Companies Act contains the following moratorium provisions which also apply to closed corporations:

> '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) With the written consent of the practitioner;
> (b) With the leave of the court and in accordance with any terms the court considers suitable; ...'

[15] Section 132 (1)(b) of the Companies Act of 2008 is applicable in this case and provides that

> 'business rescue proceedings begin when ... an affected person applies to court for an order placing the company under supervision in terms of section 131(1)'

[16] It is common cause that de Bruin is an affected person and that he applied on 31 January 2012 for the respondent to be placed under business supervision.

[17] Some argument was presented by counsel on both sides as to the meaning of section 132 (1)(b) and whether the moratorium takes effect immediately upon the application being made or only retrospectively once an order is made placing the company under business rescue. These are important and difficult questions of law which need to be decided by our courts. Logic dictates that this is not a question which should be answered in this case at this stage. The business rescue application is due to be heard

soon, as early as 15 March 2012. If the application should fail (and in my view, given the parlous state of the respondent's financial position and the attitude of the applicant in regard to future dealings with respondent, it seems not unlikely that the application will indeed fail), the question will become moot. In addition the applicant has already on 25 January 2012, that is, before the launch of the business rescue proceedings, taken possession of the business and the assets pursuant to the order made on 24 January 2012.

[18] In my view both the issue of the applicant's continued possession of the assets and the further relief sought on the return day, must stand over for determination until 15 March 2012 after the business rescue application has been determined.

[19] I consequently make the following order:

1. The application is postponed to 15 march 2012 and the return day of the rule nisi is extended to that date;
2. The costs shall stand over for later determination.

W.J. LOUW

Judge of the High Court