



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: **17068/23**

In the matter between:

DIRK JACOBUS VILJOEN First Applicant

DANIËL ALBERTUS VILJOEN Second Applicant

DJD BELEGGINGS (PTY) LTD Third Applicant

DAJ BELEGGINGS (PTY) LTD Fourth Applicant

and

CHRISTIAAN FINDLEY BESTER, N.O. First Respondent

JOCHEN ECKHOFF, N.O. Second Respondent

AZWIFANELE RAMBEVHA, N.O. Third Respondent

STERKWATER HOLDINGS (PTY) LTD

Fourth Respondent

STERKWATER ESTATE (PTY) LTD

t/a STERKWATER BOERDERY

Fifth Respondent

STANDARD BANK LIMITED

Sixth Respondent

POMEGRANADE DEJUICING COMPANY (PTY) LTD

Seventh Respondent

SYDNEY FARO, N.O.

Eighth Respondent

**THE COMPANY AND INTELLECTUAL PROPERTY
COMISSION**

Ninth Respondent

AND CASE NO: **19457/2022**

In the matter between:

STERKWATER HOLDINGS (PTY) LIMITED

Applicant

THE STANDARD BANK OF SOUTH AFRICA LTD

Intervening Applicant

and

VV4 AGRI (PTY) LIMITED

Respondent

DJD BELEGGINGS (PTY) LTD

First Intervening Party

Heard: 9 October 2023

Delivered: 20 October 2023

JUDGMENT

LESLIE AJ:

Introduction

1. The two applications that served before me under the above case numbers concern VV4 Agri (Pty) Ltd ("**VV4 Agri**"), a company under provisional liquidation which carries on business as a cold storage and packaging facility, in addition to offering services in relation to transport and storage bins and crates.
2. On 16 November 2022, Sterkwater Holdings (Pty) Ltd ("**Sterkwater Holdings**")¹ brought an application for the provisional liquidation of VV4 Agri,² on the ground that it

¹ The applicant under case number 19457/22 ("the liquidation application") and the fourth respondent under case number 17068/23 ("the business rescue application").

² The respondent in the business rescue application.

was unable to pay its debts. Sterkwater Holdings is a creditor of VV4 Agri. VV4 Agri's indebtedness to Sterkwater Holdings arises as a result of various loans advanced to VV4 Agri, in an amount of approximately R3.8 million.

3. The provisional liquidation order was granted, per Wille J, on 7 February 2023. At the same time, a rule *nisi* was issued calling on interested parties to show cause, if any, why VV4 Agri should not be placed under final liquidation.
4. The Standard Bank of South Africa Limited³ ("**Standard Bank**") sought leave to intervene as an applicant, having its own claim as a creditor against VV4 Agri, in an amount of approximately R12 million. On 23 July 2023, Standard Bank was granted leave to intervene. No opposing papers were filed in respect of Standard Bank's claim, which remains undisputed.
5. The return day was set for Monday, 9 October 2023, when Sterkwater Holdings' opposed application, as well as Standard Bank's unopposed application, for the final liquidation of VV4 Agri were to be determined.
6. On Thursday, 5 October 2023, the applicants brought an urgent application under case number 17068/23 in terms of section 131(1) of the Companies Act 71 of 2008 ("**the 2008 CA**") to place VV4 Agri under supervision and to commence business rescue proceedings ("**the BR applicants**" and "**the business rescue application**").

³ The intervening applicant in the liquidation application and the sixth respondent in the business rescue application.

7. The business rescue application, which is opposed by Standard Bank; Sterkwater Holdings; and Sterkwater Estate (Pty) Ltd t/a Sterkwater Boerdery (**“Sterkwater Boerdery”**), was enrolled for the same day as the liquidation application, namely, 9 October 2023.
8. Section 131(6) of the 2008 CA provides that if, as here, liquidation proceedings have already been commenced by or against the company at the time a business rescue application is *“made in terms of section 131(1)”*, the business rescue application will suspend the liquidation proceedings until – (a) the court has adjudicated the business rescue application; or (b) the business rescue proceedings end (in the event an order placing the company in business rescue is granted).
9. Under section 131(4) of the 2008 CA, after considering a business rescue application, the court may grant the order if it is satisfied that the requirements of the section have been met, or it may dismiss the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.
10. The BR applicants allege that they are affected persons as defined in section 128(1)(a) of the 2008 CA since they are creditors and shareholders of VV4 Agri and that, as such, they are entitled to initiate this application under section 131(1). The first and second

applicants are directors of VV4 Agri and the third and fourth applicants⁴ are shareholders of VV4 Agri.

11. The first, second and third respondents in the business rescue application are cited in their capacities as the duly appointed joint provisional liquidators of VV4 Agri.

Was the business rescue application properly “made”?

12. The first ground of opposition to the business rescue application raised by *Mr Muller*, who together with *Mr Engelbrecht* appeared for the fourth and fifth respondents (collectively, “**Sterkwater**”), was that it had not been properly made within the meaning of section 131(6) read with 131(1) of the 2008 CA. As such, so it was argued, the application did not have the effect of suspending the liquidation proceedings, including the final liquidation application set down for 9 October.

13. Section 131(2) stipulates that an applicant in terms of subsection (1) must:

- 13.1. serve a copy of the application on the company and the Company and Intellectual Property Commission (“the Commission”); and

- 13.2. notify each affected person of the application in the prescribed manner.

⁴ Who are also cited as intervening respondents in the liquidation application.

14. Section 131(3) provides that *“Each affected person has a right to participate in the hearing of an application in terms of this section”*.

15. In *Lutchman NO v African Global Holdings*⁵ the SCA considered when a business rescue application could be said to have been “made” within the meaning of section 131(6). The court held that:⁶

“... a business rescue application must be issued, served on the company and the Commission, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of s 131(6) in order to trigger the suspension of liquidation proceedings that have already commenced.”

16. Where a company is in provisional liquidation, service on the company will only have been effected when each of the provisional liquidators has been properly served with notice of the application.⁷ Knowledge of the business rescue application is insufficient.⁸

17. The SCA in *Lutchman* held that:⁹

“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

⁵ 2022 (4) SA 529 (SCA).

⁶ Paragraphs 24 and 28.

⁷ *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) para 10.

⁸ *Lutchman* (supra) para 37.

⁹ Para 39, with reference to *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC* 2013 (6) SA 141 (KZP) para 22.

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." (footnote omitted)

18. In finding that the business rescue application had not been properly made, the court *inter alia* held that service was required by the sheriff on each joint liquidator:

"... the business rescue application ought to have been served by the sheriff on each joint liquidator of each of the six Bosasa companies in the manner provided for in rule 4(1)(a) of the Uniform Rules of Court. It is a substantive form 2(a) application, 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."
(footnotes omitted)

19. Applying these principles in the present matter, the BR applicants were required to effect service in one of the manners provided for in Rule 4(1)(a) on: (a) each of the joint provisional liquidators; and (b) the Commission.
20. This was not done. The BR applicants purported to serve the application on the third respondent (one of the joint provisional liquidators) and the Commission by way of email. This was insufficient.

21. Moreover, the BR applicants were required to notify each affected party of the application, including the employees of the company and its creditors, in the prescribed manner. This must be read with regulation 124 of the Companies Regulations, 2011,¹⁰ which provides that:

“An applicant in court proceedings who is required, in terms of either section 130(3)(b) or 131(2)(b), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant.” (emphasis added)

22. The BR applicants have not set out how many affected employees there are or their identities. This information should have been readily ascertainable by the first and second applicants. The high watermark for the BR applicants is an averment by the eighth respondent (Mr Faro, who is a line manager employed at VV4 Agri) that he *“informed all the employees of the business rescue application that Vv4 Agri is applying for”*. Again, this is inadequate.¹¹

23. As far as the creditors are concerned, the joint provisional liquidators issued an initial report on 1 June 2023 which *inter alia* identified SARS as a preferent creditor of VV4

¹⁰ GN R351 in GG 34239 of 26 April 2011.

¹¹ Mr Faro did not disclose to the court how many employees there are, or their identities, when he allegedly informed them of the application and the manner in which he allegedly informed them. The bald allegation that Mr Faro is the “representative of all the employees at Vv4 Agri” is similarly unsubstantiated. He does not allege who appointed him as their representative or give any detail as to how this came about. Having regard to the founding affidavit it appears that the employees themselves have not selected Mr Faro as their representative – he has simply been nominated to give employees notice of the relief sought in the application by the BR applicants. This is not what section 128(1)(a)(iii) contemplates.

Agri in an estimated amount of R1,100,000. Although the first and second applicants are aware of this report, they have failed to notify SARS of the business rescue application, as required of them.

24. The BR applicants may well dispute the SARS claim, but it was not open to them to simply ignore the contents of the liquidators' report. At the very least, the BR applicants were required to disclose and address the SARS claim in the business rescue application, which they failed to do.
25. There was also no indication that another creditor cited in the business rescue application itself, namely, Louw Redelinghuys Accountants, was notified of the application.
26. In light of what is set out above, the business rescue application is materially defective on several grounds. It does not meet the requirements of section 131. As held by the SCA in *Lutchman*, these are not merely procedural requirements but are substantive issues that are integral to the initiation of business rescue proceedings.
27. I accordingly find that the application was not properly "made" within the meaning of section 131(6). As such, it did not have the effect of suspending the final liquidation application.

The merits of the business rescue application

28. If I am wrong in finding that the business rescue application was not properly made, I would in any event dismiss the application on its merits, for the reasons set out below.

29. Section 131(4)(a) of the 2008 CA provides that, after considering an application in terms of s 131(1), a court may grant the relief sought if the court is satisfied that:

“(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company.” (emphasis added)

30. The BR applicants relied on sub-section 4(a)(i) in this application. It is not in dispute that the company is financially distressed.

31. However, the BR applicants were also required to satisfy the court that there is a reasonable prospect of rescuing the company.

32. The meaning of the phrase “reasonable prospect for rescuing the company” was considered in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC), where the following was held:¹²

“While every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis, unless it addresses the cause of the demise or failure of the company’s business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, ie by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice.”

33. As to what an applicant must establish, the court added that, at minimum the following would be required:¹³

“One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of:

[24.1] The likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

¹² At para 24.

¹³ Para 24.

[24.2] the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

[24.3] the availability of any other necessary resource, such as raw materials and human capital;

[24.4] the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.”

34. I accept that there will be cases where affected parties bringing a business rescue application (who may be creditors, trade unions or employees) will not necessarily have detailed knowledge of a company's affairs and will thus not be in a position to formulate, with any reasonable degree of specificity, how it is intended to rescue the business. However, the present matter is not such a case. The BR applicants are not outsiders to the business. The first applicant is intimately involved in the management of the business. He was (re-)appointed as the CEO in August 2022. Under these circumstances, it was incumbent on the BR applicants to motivate the business rescue application with a reasonable degree of particularity.

35. It is clear that VV4 Agri is currently unable to pay its debts. Sterkwater Holdings has a claim for R3.8 million – which is disputed by VVF4 Agri primarily on the ground that it

has a “counter-claim” (in an amount of R7.2 million). It seems that this “counter-claim” does not in fact lie against Sterkwater Holdings but against Sterkwater Boerdery. Be that as it may, Standard Bank’s claim against VV4 Agri, which is uncontested, is in the order of R12 million. As set out above, the BR applicants have failed to join SARS or mention its potential claim against VVF Agri, which is estimated by the provisional liquidators to be R1.1 million.¹⁴

36. The primary basis for the BR applicants’ case that there is a reasonable prospect of rescue, rests on their treatment of the Standard Bank debt of R12 million. It was submitted by *Mr Benade*, who appeared for the BR applicants, that in the event of Standard Bank’s claim no longer being due and payable, VV4 Agri would be in a position to continue trading. It follows that the converse of that proposition is also true. This aspect was therefore central to the business rescue application.
37. In the BR applicants’ founding affidavit, it was asserted that, as far as Standard Bank’s claim was concerned, “*we have obtained the necessary funds in order to settle its full outstanding claim, together with interest and costs*”. Proof of these funds was said to have been annexed to the affidavit as annexure “V7”. However, there was in fact no such attachment to the affidavit.
38. Subsequent to the founding papers being delivered, it appears that a document was simply included in the court file as annexure V7. This never formed part of the founding

¹⁴ In addition, Louw Redelinghuys Accountants have a claim of R161077.

affidavit. It was not initialled by the deponent or the commissioner of oaths when the affidavit was deposed to. *Ex facie* the document, it did not exist at the time of the founding affidavit being deposed to (4 October 2023). The document included as V7 is a letter dated 6 October 2023. Despite this being pertinently raised as an issue at the hearing, no discernible explanation was forthcoming by *Mr Benade*.

39. In the event, there is no material properly before the court substantiating the allegation that the BR applicants have obtained the necessary funds to settle Standard Bank's claim against VV4 Agri.
40. If some form of evidential value were to be ascribed to the contents of "V7", this would still not assist the BR applicants. The document itself does not bear out the submission that the BR applicants have obtained funds to settle the Standard Bank debt. It is a letter from attorneys representing the seventh respondent in the business rescue application ("**Pomegranade**") to Standard Bank's attorneys, containing an offer to buy Standard Bank's debt against VV4 Agri. Standard Bank is requested by Pomegranade's attorneys not to pursue its liquidation application in light of the offer and it is recorded that "*the details of this purchase [of Standard Bank's debt] could then be negotiated with the intervention of the BRP [business rescue practitioner] during the period for which Section 132 makes provision for.*"

41. This offer, such as it is, has not been accepted by Standard Bank. The bank persists in opposing the business rescue application and moving for a final liquidation order. As such, its uncontested claim stands.
42. Even if Pomegranade's offer were acceptable to Standard Bank, it is by no means clear that this would resolve VV4 Agri's financial predicament. It would merely have the effect of substituting one creditor for another, without affecting the company's overall indebtedness.
43. Quite apart from the BR applicants' unsatisfactory response to the Standard Bank claim, there is a conspicuous absence of detail or concrete plan to rescue the business set out in the founding affidavit. In essence, the BR applicants lay the blame for the poor performance of VV4 Agri with its erstwhile CEO (Mr Wille Gibson ("Gibson")), who operates his farming enterprise through Sterkwater Boerdery. The BR applicants allege that Gibson intentionally sabotaged the business of VV4 Agri and suggest that, now that he has withdrawn from the business, it will return to profitability.
44. The papers reveal, however, that Gibson resigned as CEO of VV4 Agri on 1 July 2022. The first applicant was appointed as CEO on 3 August 2022. The BR applicants allege that they have been "inundated" with requests from other farms in the area to *inter alia* make use of VVF Agri's packing facilities for their fruit harvests. Yet there is little to substantiate this.

45. It is alleged, for example, that the 2023/2024 fruit season commences in November 2023 and that “signed contracts” for the cold storage, packing of vegetables and fruit bin rental have been finalised in the order of R4.5 million. The deponent alleged that supporting documents were annexed to confirm this. Again, the annexures do not bear out the BR applicants’ allegations.
46. A single contract, between VV4 Agri and Du Toit Vrugte was attached, in respect of the rental of bulk containers. This document was apparently signed by the parties in September 2023 – but in respect of the period 1 February 2022 to 30 June 2023. The contract period has accordingly come and gone (and had already come and gone by the time it was signed).
47. The BR applicants also attached an email dated 28 September 2023 from a Mr Pieter Du Toit of Du Toit Vegetables, indicating an intention for Du Toit Vegetables to make use of VVF Agri’s packing facilities for its onion crop this season. However, this does not constitute a binding contract. Mr Du Toit states in his email that the parties will get together to discuss this in more detail in December once there is more information available. No explanatory or confirmatory affidavit was filed by Mr Du Toit.
48. In short, there is nothing attached to the founding affidavit in the business rescue application that supports the allegation that *“signed contracts for the cold storage, packing of vegetables and fruit bin rental have been finalised and must be honoured and which amounts to an approximate amount of R4 500 000,00 and which does not include*

other contracts which have been negotiated.” If there were any such contracts, as alleged, it would have been a simple matter to annex them to the founding affidavit. Their omission warrants an adverse inference.

49. Furthermore, the provisional liquidator’s report dated 1 June 2023 identified several material issues that have simply not been addressed by the BR applicants. These include the estimated SARS liability of R1.1 million referred to above, as well as the following:

49.1. Since the packaging facility has not been accredited by the British Retail Consortium, it is no longer suitable for the packaging and exporting of fruit; and

49.2. The condition of the immovable property does not comply with the standards required by the company’s insurer. Compliance will require substantial remedial work for which there are currently no funds.

50. Again, the BR applicants are in possession of the provisional liquidators’ report and it was incumbent on them to at least identify and address the issues raised in the report as part of their motivation for business rescue. They have elected instead to ignore the report. They did so at their peril.

51. The BR applicants have thus fallen woefully short of making out a case that there is a reasonable prospect for rescuing the company within the meaning of section 131(4)(a).

52. The fact that the assets of VV4 Agri outweigh its liabilities does not change this position.¹⁵ The company remains commercially insolvent. It is unable to pay its debts as they fall due.¹⁶
53. In light of these findings, it is not necessary to express a view on the further grounds of opposition raised by *Mr Muller*, including that the business rescue application is an abuse of process.

Final winding-up

54. As set out above, there is no opposition to Standard Bank's intervening application for a final winding-up order. It is clear, at least in relation to Standard Bank,¹⁷ that VVF Agri is in default of its obligations and that it is unable to pay its debt in the cumulative amount of R12,009,984.48, which is currently due, owing and payable. The company is commercially insolvent on this ground.¹⁸

¹⁵ Accepting the applicants' allegations on this point at face value, the company's assets (including a claim against the fifth respondent in an amount of R7.2 million) and immovable property valued at R18.8 million, total R37.184 million and its liabilities total R15.990 million, resulting in a nett asset position of R21.194 million.

¹⁶ It is undisputed that VV4 Agri cannot pay its debts. A company is commercially insolvent if it has insufficient liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading (*Murray NO v African Global Holdings (Pty) Ltd* 2020 (2) SA 93 (SCA) paras 28 and 31; *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) 440F.

¹⁷ Since Standard Bank's claim is established and its intervening application unopposed, the opposition to Sterkwater's application is essentially moot.

¹⁸ Section 344(f) read with section 345(1)(c) of the 1973 Companies Act and item 9 of the 2008 CA.

55. The 2008 CA has not altered the principles applicable to whether a commercially insolvent company should be wound-up. As confirmed by the SCA in *Afgri Operations v Hambs Fleet*¹⁹:

“... generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt. ... in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a ‘very narrow one’ that is rarely exercised and then in special or unusual circumstances only.” (footnotes omitted)

56. There are no such exceptional circumstances present in this matter.

Orders

In the premises, I make the following orders:

Case number 17068/23:

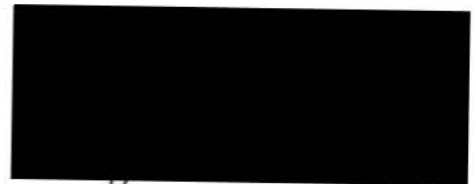
1. The application is dismissed.

¹⁹ 2022 (1) SA 91 (SCA) para 12.

2. The applicants shall pay the costs of the fourth, fifth and sixth respondents, including the costs of two counsel where so employed, jointly and severally, the one paying the other(s) to be absolved.

Case number 19457/22

1. The respondent, VV4 Agri (Pty) Ltd, is placed under a final winding-up order;
2. The costs of the applicant and the intervening applicant shall be costs in the winding-up.



G.A. LESLIE

Acting Judge of the High Court

Appearances:

For the applicants (17068/23):

T Benade

Instructed by Jacques Van Niekerk
Attorneys

For the fourth and fifth

respondents (17068/23)

and applicant (19457/22):

J Muller SC and J Engelbrecht

Instructed by Edward Nathan Sonnenbergs
Inc.

For the sixth respondent (17068/23)

and intervening applicant (19457/22):

B Manca SC

Instructed by Edward Nathan Sonnenbergs
Inc.