



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 2021 / 4629

(1) REPORTABLE: Not
(2) OF INTEREST TO OTHER JUDGES: Not
(3) REVISED.
6 June 2022
Date signature

In the matter between:

NEDBANK LIMITED

Applicant

and

LIBERTY MOON INVESTMENTS 82 (PTY) LTD

Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in which the applicant seeks a final winding-up order of the respondent. The order is sought in terms of section 69 of the Close

Corporation Act 69 of 1984, read with section 345 (1) (a) of the Companies Act, 61 of 1973 (“the Company's Act”).

- [2] The respondent opposed the application on the basis that it is not indebted to the applicant. It further submitted, that the applicant was not entitled to the relief sought because the liquidation application has been suspended consequent the business rescue application.

The parties.

- [3] The applicant, Nedbank Limited, is a company incorporated in terms of the Companies Act, a bank established in terms of the Banks Act 24 of 1994, and a credit provider registered in terms of the National Credit Act, 54 of 2005 (“the NCA”).

- [4] The respondent Liberty Moon Investment 82 Property Limited (“Liberty Moon”), is a company registered in terms of the Companies Act. It is also part of the association of entities that conducted their banking business with the applicant. The group consist of the following:

1. Eldo Supermarket SA CC;
2. Midnight Star Trading 437 CC;
3. Boundary Supermarket SA CC;
4. Alamo Square Trading 62 CC
5. Alamo Square trading 63 CC; and
6. Ennerdale Super SA CC.

Background facts

[5] It is common cause that the respondent and the associated entities operated various accounts and, from time to time, had overdraft facilities with the applicant.

[6] According to the applicant, the respondent and the other entities exceeded their overdraft limits at some point. In seeking to address this problem, the applicant offered to restructure the overdraft facility of the respondent. The offer, which was an overdraft facility, was in the sum of R730 000. 00. The facility was made available subject to the conditions set out in clauses 7 and 9 of annexure FA3. The essential terms of the agreement as set out in the founding affidavit are as follows:

“18.1. An overdraft facility of R730 000.00 (Seven Hundred and Thirty Thousand Rand) was approved in favour of the respondent, together with a Nedbond facility of R5000000.00 (Five Million Rand). The Nedbond facility was never implemented as the respondent failed to provide the documentation stipulated in clause 3.7.2 of "FA3"; 18.2. The overdraft facility was subject to review and repayable on demand at the applicant's discretion in accordance with normal banking practice.

18.3. The Applicant would be entitled to debit the account with any fees identified in annexure "FA3."

18.4. The interest rate would be linked to the applicant's publicly quoted prime lending rate ("the prime rate"). The maximum penalty rate would be equal to the ruling rate of the South African Reserve Bank repurchase rate ("the repo rate plus 14%").

18.5. The Applicant would be entitled to charge a penalty interest rate in the event of the overdraft facilities being exceeded.”

[7] The agreement further provides grounds upon which the applicant could demand immediate payment from the respondent. The relevant clauses provides as follows:

“18.8.1 if the respondent did not pay on the due date any amount payable in terms of the facility;

18.8.2 if the respondent did not comply with any requirement relating to the financial covenants set out in annexure FA3.

18.8.3 if the respondent or any security provider committed a breach of any of the terms and conditions set out in annexure "FA3";

18.8.4 if the respondent or any security provider committed a breach of any of the terms and conditions set out in any agreement entered into between the Applicant and Respondent;

18.8.5 if a representation or warranty that was made or given or deemed to be made or given by the respondent in connection with annexure "FA3" was incorrect or misleading in any respect when made or given.”

[8] In paragraph 22 of its founding affidavit, the applicant contends that despite its compliance with the terms and conditions of the agreement, the respondent failed to comply with clauses 7, 8 and 9 of the agreement. The overdraft was cancelled, and payment was demanded from the respondent.

[9] The applicant avers that the respondent used and withdrew from the overdraft facility even before compliance with the provisions of clauses 7, 8 and 9 of the agreement.

[10] The other agreement between the parties was a loan agreement concluded on 6 October 2015 for R10 million, referred to as the Nedbank bond.

[11] In light of the above, the applicant, on 20 November 2020, instituted proceedings against the respondent for breach of the agreement. The matter did not proceed in court; the parties have reached a settlement agreement in which the respondent was to pay the Nedbank sum of R413 507.56 for the bond facility by 30 November 2020. Furthermore, the respondent was to pay the balance in fifty equal instalments by 31 December 2020. According to the applicant, the debt under the Nedbank facility was R6 253 783.44.

[12] The respondent disputes the debt and contends that it never drew down on the restructure overdraft facility and further that the applicant is indebted to it for R 470 000. 00 for overcharging the group.

[13] The respondent further contends that the applicant has liquidated the proceeds of the unit trust investment held in Old Mutual, which ought to have been used towards the settlement of the overdraft facility.

Legal principles and analysis

[14] It is also trite that a company that is unable to pay its debt in terms of section 344 of the Companies Act may be wound-up. The respondent may resist the winding-up application by showing that the winding-up is disputed on *bona fides* grounds.

[15] It is trite that the process of winding up in terms of the Companies Act is initiated by issuing the statutory letter of demand in terms of section 345 (1)

(a) of the Companies Act. In terms of sub-section (c) of the section, the applicant has to satisfy the court that the respondent cannot pay its debt. See *Kowarski v Time Clothing (Pty) Limited*.¹

[16] In my view, the facts before this court reveal that the respondent is indebted to the applicant and has failed to liquidate the same upon the demand to do so by the applicant. The contention by the respondent that the applicant is indebted to it in the sum of R470 000.00 does not appear to be plausible. The applicant's version is that the amount was not due to the respondent but instead to one of the entities in the group, Boundary Super Market. The amount was refunded to that company on 25 June 2020.

[17] The claim that the applicant is indebted to the respondent for the Old Mutual unit trust proceeds is also unsustainable. The respondent does not disclose the amount paid out from the unit trust, and thus the alleged indebtedness of the applicant has not been established. The applicant avers that it did not liquidate the unit trust proceeds as those proceeds had already been pledged to another institution.

[18] The other defence raised by the respondent relates to the indulgence agreement between the parties, which it contends cannot serve as part of this application because, at the time this arose, the section 345 letter had already been issued. This does not assist the respondent because all it does is confirm that the respondent cannot pay its debts.

[19] I proceed to deal with the effect of the application for the business rescue on this application. It is common cause that the application was brought to the

¹ 2010 JDR 1178 (ECG).

attention of this court from the bar on 28 February 2022. The information came to light soon after the matter was mentioned for hearing on that day.

[20] The business rescue application was instituted by Leeu Projects and Consulting (Pty) Ltd ("Leeu"), one of the creditors of the respondent. It was uploaded onto case lines under the present case number. The immediate issue that arose consequent this was whether the provisions of section 131(6) of the Companies Act were triggered.

[21] The parties in the business rescue application are not before this court, and neither have they sought any intervention in this application.

[22] An application to place a company under the process of business rescue is governed by section 131(1) of the Companies Act. The implication of such an application to the liquidation proceeding that may have commenced at the time that the business rescue application is made, as set out in section 131(6) of the Companies Act is 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."

[23] The issue that has arisen in this matter following the information about the business rescue application, which was instituted in the Pretoria High Court, is whether that application was "made" within the meaning of section 131(6) of the Companies Act.

[24] As a general rule, an application to place a company under liquidation is immediately suspended as soon as an application for business rescue is made. However, the suspension would only happen where section 131(6) requirements have been satisfied. Failure to meet the requirements would mean that the court would proceed to determine the liquidation application despite the business rescue application purported; thus, the fundamental requirement for a business rescue application to cause the suspension of a liquidation application is that it has to be shown that the requirements of section 131 (6) of the Companies Act have been satisfied.

[25] The high court decisions in dealing with whether the business rescue application “made” has the effect of suspending the liquidation proceedings have adopted two divergent approaches. The approach that was adopted in *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*,² was that:

“A business-rescue application is thus only to be regarded as having been made once the application has been lodged with the registrar, has been duly issued, a copy thereof served on the Commission, and each affected person has been properly notified of the application.”

[26] In *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*,³ the court adopted a different approach to the above and held that:

“Applying this functional approach to section 131 (6), it is obvious that in this case the lodging of the application with the Registrar for the issue thereof, constituted the “making” of the application and the commencement of

² 2013 (6) SA 141 (KZP).

³ (2544/2013) [2013] ZAWCHC 136; 2013 (6) SA 540 (WCC) (23 August 2013).

proceedings to place the company under business rescue (as opposed to the commencement of business rescue *per se*).”

[27] These approaches were noted by the Supreme Court of Appeal (“the SCA”) 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*⁴, the SCA in that case, categorised the two approaches as follows:

“There are conflicting high court judgments on when a business rescue application is 'made' within the meaning of s 131(6) of the Companies Act. What some considered constituting the 'making' of a business rescue application are the issue, service and prescribed notification thereof, and others the mere lodging of the business rescue application with the registrar and the issue thereof.”

[28] The SCA, in that judgment aligned itself and adopted as the correct approach the interpretation that says that suspension of the liquidation proceedings that are already commenced is triggered when a business rescue application has been "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 s131(6)... ."

[29] In interpreting the word "made" and what is envisaged by the provisions of section 131 (6) of the Companies Act the SCA held:⁵

“The word 'made' is the past participle of the word 'make'. The dictionary meaning of the verb 'make' includes 'bring about or perform; cause'. But, as was said in *Natal Joint Municipality Pension Fund v Endumeni Municipality*,
[m]ost words can bear several different meanings or shades of meaning and

⁴ (1088/2020;1135/2020) [2022] ZASCA 66 (10 May 2022) at 24.

⁵ Ibid at 27.

to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise'. And in *Plaaslike Oorgangsraad, Bronkhortspruit v Senekal*, '. . . dat mens jou nie moet blind staar teen die swart-op-wit woorde *nie*, maar probeer vasstel wat die bedoeling en implikasies is van dit wat gesê is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is.

That is also true of the words 'application is made' in s 131(6), 'apply' in s 131(1) and 'applies' in s 132(1)(b) of the Companies Act. However, on a proper interpretation of the word 'made' in isolation, in the context of s 131 as a whole (especially subsections 131(1) to (3)), in the context of the Companies Act as a whole (especially the nature and purpose of business rescue proceedings vis-à-vis those of winding up proceedings as well as s 132(1)(b)), and the apparent purpose to which s 131(6) is directed, its meaning becomes clear: 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 and to deliver the application to them, to meet the requirements of s 131(6) in order to trigger the suspension of the liquidation proceedings."

[30] It is apparent that the purpose of section 131(3)] of the Companies Act is to ensure that each of the persons or entities mentioned therein have to be afforded an opportunity to participate in the business rescue application; they have the right to either support or oppose the application.

[31] In the present matter, the shareholders or creditors of the respondents, any union representing the employees of the respondent or individual employees

were entitled to participate in the business rescue application. Participation could entail either opposing or supporting it. It further follows creditors such as the City of Johannesburg, the South African Revenue Services and the Spar were entitled to have been notified of the institution of the business rescue application.

[32] It is apparent from the proper reading of the Companies Act that the right to participate by the affected persons envisaged in section 131(3) is fundamental and forms an integral part of the business rescue application.

[33] As indicated earlier, one of the grounds upon which the respondent opposes the relief sought by the applicant is that the liquidation application is suspended by the business rescue application. It is important to note that the business rescue application was brought, as mentioned earlier, to the attention of this court on the day of the hearing, namely 28 February 2022. On that date, the court was informed that Leeu, one of the creditors of the respondent, instituted business rescue proceedings. The proceedings were instituted on 22 February 2022, and was uploaded on Caselines without any notice to the respondent or the court.

[34] I agree with the applicant's counsel that the manner in which the respondent dealt with the issue of the business rescue application is not satisfactory. The proper approach would have been for the respondent to have applied for the postponement of these proceedings or stay thereof to place the application before the court properly and allow the respondent to interrogate whether the business rescue application met the requirements of section 131(6) of the Companies Act.

[35] I now turn to the issue of whether the provisions of section 131(6) of the Companies Act has been triggered by the business rescue application in the present matter. It is important to note that at the time the *Lutchman* decision was handed down, judgment in the present matter had already been reserved.

[36] The respondent's counsel in the supplementary heads of argument contended that it could never have been the intention of the legislature that strict compliance with the provisions of section 131(6) was required. This proposition is clearly unsustainable in light of the decision in *Lutchman*. In this respect, the SCA, in its judgment in paragraph 39, specifically states the following:

“ The service and notification requirements set out in s131(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. As this court noted in *Pro-Wiz*, '[i]t has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted.”

[37] As stated earlier, this matter was served before this court on 28 February 2022. The case then stood down to 1 March 2022. In between, the

respondent uploaded a service affidavit deposed to by Leeu's attorneys of record indicating that notice of the business rescue application was subsequent to the hearing of the 28 February 2022 served on the City of Johannesburg as a creditor of the respondent. The service affidavit was consequent to the affidavit of the applicant's attorneys of record, wherein it was stated that the City of Johannesburg was not notified about the business rescue application. This means that at the time this matter was served before this court on 28 February 2022, there was noncompliance with the requirements of notification to the City of Johannesburg and the South African Revenue Services.

[38] The applicant's attorneys further aver in her affidavit that Spa Group Limited, another creditor of the respondent (owed a significant sum of R41 million), has not been notified about the business rescue application.

[39] In light of the above, I find that the business rescue application has not triggered the requirements of section 131 (6) of the Companies Act and thus cannot serve as a basis to suspend the present application.

[40] In conclusion, I find that the applicant has satisfied the requirements of the winding-up of the respondent.

Order

[41] In the circumstances the following order is made:

1. The respondent be placed under final liquidation in the hands of the Master of the above Honourable Court;

2. That the costs of this application be costs in the administration of the respondent's estate.

E MOLAHLEHI

Judge of the High Court

Gauteng Division, Johannesburg

Representation

For the applicant: Counsel M De Oliveira

Instructed by: KWA Attorneys

For the respondent: Counsel: AJ Venter

Instructed by: Witz Incorporated

Hearing date: 28 February 2022

Delivery date: 6 June 2022