



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Reportable

CASE NO: 7233/15

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

Applicant

and

A-TEAM AFRICA TRADING CC

Respondent

JUDGMENT

Ploos van Amstel J

[1] This is an application for the provisional winding-up of a close corporation (the respondent) on the basis that it is unable to pay its debts. After the application was launched, but before it was heard, an application was brought in the Local Division in Durban for an order placing the respondent under supervision and commencing business rescue proceedings in terms of section 131 of the Companies Act.¹ The

¹ Act 71 of 2008.

issue before me was whether the effect of the business rescue application was to suspend the liquidation application in terms of s 131(6).²

[2] The background is briefly as follows. The applicant, Standard Bank,³ entered into seventeen instalment sale agreements with the respondent during the period 2010 to 2013 relating to vehicles, plant and equipment. The bank's case is that the respondent fell into arrears with the instalments and that in spite of several written demands it continues to be in arrears, which amounted to some R927 490 when the liquidation application was launched. The respondent does not dispute that it is in arrears, but challenges the calculation of the amount outstanding and the bank's entitlement to cancel the agreements. On any basis it seems clear that the respondent is currently commercially insolvent as it is unable to pay its debts as they fall due.

[3] The only issue which was argued before me is whether it is competent to grant a provisional winding –up order in the light of the business rescue application. Counsel for the respondent submitted that the effect of the business rescue application was to suspend the liquidation application in terms of section 131(6). Counsel for the bank contested this and submitted that what is suspended in terms of the section is not the liquidation application, but the liquidation process which follows upon a liquidation order, until either of the events referred to in section 131(6) (a) and (b) occur. The answer to these competing contentions lies in the proper interpretation of s 131(6).

[4] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ the court dealt with the current approach to statutory interpretation and said:⁵

'Interpretation is the process of attributing meaning to the words used in a document ... consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent

² All the sections referred to in this judgment are references to the Companies Act 71 of 2008, except where indicated otherwise.

³ The Standard Bank of South Africa Ltd.

⁴ 2012 (4) SA 593 (SCA).

⁵ Per Wallis JA in para 18.

purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors ... A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used ... The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document’.

[5] In *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO*⁶ Wallis JA said business rescue is a process aimed at avoiding the liquidation of a company if it is feasible to do so. Section 7 sets out the purposes of the Act, which includes⁷ to ‘provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders’.

[6] Section 131(1) reads as follows:

‘Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings’.

Section 131(6) reads as follows:

‘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.’

[7] In support of his argument that ‘liquidation proceedings’ in subsection (6) does not include an application for a provisional winding-up order, counsel for the bank

⁶ 2015 (5) SA 63 (SCA) para 8.

⁷ Section 7(k).

submitted that it was held in *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd*⁸ that liquidation proceedings only commence after a provisional winding-up order is granted, and that I am bound by this decision unless I am satisfied that it is clearly wrong. I do not think this is what was decided in that case.

[8] In *Imperial Crown Trading* a bank sought an order for the provisional liquidation of the respondent company on the ground that it was unable to pay its debts. At the hearing before Swain J the respondent sought a postponement of the matter so as to enable it to investigate the advisability of launching an application for business rescue. Counsel for the bank urged the court to grant a provisional winding-up order with an extended return date so as to give the respondent sufficient time to bring a business rescue application if it was so advised. Counsel for the respondent asked the court not to grant a provisional order as, he submitted, it would preclude an application for business rescue. Swain J pointed out that this was not so and said the following:⁹

‘Consequently, on the facts of this case, if a provisional order of liquidation is granted, the board of the respondent will be precluded from resolving that the respondent voluntarily begin business rescue proceedings and place the company under supervision. The grant of such an order will, however, not preclude an “affected person” from applying to court to place the respondent under supervision and the commencement of business rescue proceedings.’

Whether the launching of the liquidation application itself precluded the adoption of a resolution by the board to begin business rescue proceedings was neither argued nor decided. The decision must be read in the context of the facts of the case. I do not consider that it is authority for the proposition that the expression ‘liquidation proceedings’ in section 131(6) does not include an application for a liquidation order.

[9] I should add that I do not think it is helpful in determining when liquidation proceedings commence, for the purposes of s 131(6), to have regard to sections 348

⁸ 2012 (4) SA 266 (KZD).

⁹ Para 22.

and 352 of the 1973 Act.¹⁰ Those sections do not define when liquidation proceedings commence. Section 348 provides as follows:

‘A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up’.

And s 352(1):

‘A voluntary winding-up of a company shall commence at the time of the registration in terms of section 200 of the special resolution authorising the winding-up’.

[10] These sections deal with the commencement of the winding-up, in other words the time from when the company is, or is deemed to be, in liquidation. A distinction must be made between the proceedings which lead to a winding-up order, and the winding-up process during which the liquidator performs his duties in terms of the Act.

[11] Further reliance was placed on two decisions of the North Gauteng High Court in *Absa Bank Ltd v Summer Lodge (Pty) Ltd*.¹¹ Three applications for provisional winding-up orders were heard together by Van Der Byl AJ.¹² Before the hearing, applications were launched for orders placing the respondents under supervision and commencing business rescue proceedings. In the light of this it was contended that the liquidation applications had been suspended in terms of section 131(6). The learned judge rejected this contention and concluded as follows:

‘In my opinion what s 131(6) means is that once liquidation proceedings have commenced by the granting of a liquidation order, whether provisional or final, the mere issue and service of a business rescue application would suspend the liquidation process.’¹³

¹⁰ The Companies Act 61 of 1973.

¹¹ 2014 (3) SA 90 (GP) for the provisional winding-up orders and 2013 (5) SA 444 (GNP) for the final orders.

¹² 2014 (3) SA 90 (GP).

¹³ *Summer Lodge* 2014 para 19.

He held that the business rescue applications did therefore not suspend the liquidation applications and granted provisional winding-up orders in all three cases. On the return day the matters came before Makgoba J and the issue whether the liquidation applications had in terms of section 131(6) been suspended by the business rescue applications was argued again. The learned judge agreed with the conclusion reached by Van Der Byl AJ and granted final orders.

[12] I regret to say that I find the reasoning of both judges in *Summer Lodge* unpersuasive. They seem to have overlooked the fact that liquidation proceedings are commenced by the launching of an application, and that subsection (6) refers to liquidation proceedings 'by or against' the company. If a liquidation application is dismissed the proceedings come to an end. That does not mean that the application did not constitute liquidation proceedings. If a liquidation order is granted the company is, in terms of section 348 of the Companies Act of 1973, deemed to have been placed in liquidation when the application was launched. And the liquidation proceedings continue until the order is discharged or the company is deregistered on completion of the liquidation process.¹⁴ I think with respect that Van Der Byl AJ misread section 348. It is not the liquidation proceedings which are deemed to have commenced when the application was presented - it is the winding up of the company. The reliance by Makgoba J on the dictionary definition of the words 'liquidation' and 'proceeding' is not helpful. The words are used together in section 131(6) and they must be understood in the proper context. By way of analogy, eviction proceedings in every day practice commence with an application for an eviction order and include the process of serving the eviction order and ejecting the unlawful occupant. I do not see why it should be different in the case of liquidation proceedings.

[13] It follows that I respectfully disagree with the conclusions reached in the *Summer Lodge* cases. I also disagree with the similar conclusion reached in *Absa Bank Ltd v Makuna Farm CC*.¹⁵ The decision in *Vermeulen and Another v CC Bauermeister (Edms) Bpk and Others*¹⁶ on which the learned judge relied does not

¹⁴ *Richter supra*.

¹⁵ 2014 (3) SA 86 (GJ)

¹⁶ 1982 (4) SA 159 (T)

appear to me to support his conclusion. It dealt with the commencement of the winding-up process, which, upon the granting of an order, is deemed to have commenced when the application was presented to the court.

[14] Counsel for the bank submitted that it is essential for a provisional order to be granted so that those who control the respondent can be deprived of the control of the business until the respondent is either placed under supervision or the winding-up recommences. The notion that a business rescue application should not have the effect of suspending an application for the winding-up of a company because the persons who run the company should be stopped in their tracks is not consonant with the idea of business rescue. In *Richter v Absa Bank Ltd*¹⁷ Dambuza AJA said:

‘It is meant to be a flexible, effective process of extending the life span of companies and businesses. A necessary consequence thereof is limitation, to some extent, on the power of creditors to single-handedly curtail the life of a company’.

[15] Regard should also be had to s 134(1), which provides for a limitation on the disposal of the company’s property during business rescue proceedings, which, in terms of s 132(1) (b), begin when an affected person applies to the court for an order placing the company under supervision. This provides some comfort with regard to the company’s property while the liquidations proceedings are suspended.

[16] If counsel’s submission is correct and a provisional winding-up order is granted in this case, the respondent will be precluded from running its business, but so will the liquidator, as the winding-up process will be suspended in terms of section 131(6). This hiatus will continue until the court has adjudicated upon the business rescue application. In the interim the respondent may lose its contracts and its customers and there may be no basis for a rescue plan. The interpretation suggested by the bank does not seem to me to be a sensible one, nor is it supported by the wording of s 131(6).

¹⁷ 2015 (5) SA 57 (SCA) para 13.

[17] Part of the context in which s 131(6) must be interpreted are some of the other sections in Chapter 6. Section 133 deals with a general moratorium on legal proceedings. It provides that 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 in the circumstances set out in the section. This seems to me to include an application for the liquidation of the company, with the result that during business rescue proceedings an application for the winding-up of the company may not be commenced or proceeded with. Section 134 provides for a limitation on the disposal of property by the company during its business rescue proceedings. Section 131(4) provides that after considering an application in terms of subsection (1) the court may make an order placing the company under supervision and commencing business rescue proceedings, or dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

[18] Section 132 deals with when business rescue proceedings begin and end. Section 132(1) (b) is relevant in the present context and provides that business rescue proceedings begin when an affected person applies to the court for an order placing the company under supervision in terms of s 131(1).¹⁸ It seems to follow that the moratorium on legal proceedings in s 133 then takes effect, and also the limitation on the disposal of the company's property in terms of s 134.

[19] It is in this context that a meaning must be attributed to the words in s 131(6). Legal proceedings are commenced by the launching of an application or the institution of an action. Liquidation proceedings are invariably brought by way of an application. In my view the application itself forms part of the liquidation proceedings, just as an application for the eviction of an unlawful occupier forms part of the eviction proceedings. The label merely tells one what the nature of the proceedings is. This approach seems to me to be fortified by the wording of subsection (6), which refers to liquidation proceedings which have already been commenced 'by or

¹⁸ Also see Davis et al *Companies and other Business Structures in South Africa* 3ed p245.

against¹⁹ the company. The winding-up process which follows a liquidation order also forms part of the liquidation proceedings,²⁰ in the same way that the issue of a warrant of eviction forms part of the eviction proceedings.

[20] This approach finds support in dicta in *Richter v Absa Bank Ltd*,²¹ *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*,²² *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*²³ and *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*.²⁴ Also see *Henochsberg on the Companies Act*, where the learned authors say the following in their commentary on section 131:

‘An important aspect of this section is that an application for the winding-up of a company can be superseded by an application placing the company under business rescue. This is a sensible provision considering that in many cases a company that is about to be wound up may in many cases (sic) still be rescued. However, the provision appears to go further, also allowing for a company that has already been placed in liquidation to be placed under business rescue proceedings’.²⁵

[21] I conclude therefore that the business rescue application had the effect, in terms of s 131(6), of suspending the application for the liquidation of the respondent. It is arguable that the liquidation application may in any event not proceed as a result of the moratorium on legal proceedings in s 133, which took effect, in terms of section 132(1) (b), when the business rescue application was made. Counsel for the bank, in supplementary heads of argument, submitted that the moratorium will only take effect in this case if and when the court makes an order in terms of s 131(4), placing the respondent under supervision and commencing business rescue proceedings. I refrain from expressing any firm view on this aspect of the matter as it was not dealt with in argument before me. The competing contentions in the supplementary heads of argument demonstrate that the issue is not free from difficulty and needs to be fully argued.

¹⁹ My emphasis.

²⁰ *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA) para 18.

²¹ *Ibid* para 1

²² 2014 (2) SA 518 (SCA) para 25.

²³ 2013 (6) SA 141 (KZP).

²⁴ 2013 (6) SA 540 (WC).

²⁵ P Delpont *et al Henochsberg on the Companies Act 71 of 2008* (May 2015 – Service Issue 10) 463.

[22] The order which I make is as follows:

- (a) It is declared that the application for the liquidation of the respondent has been suspended as contemplated in s 131(6) of the Companies Act 71 of 2008;
- (b) The applicant is ordered to pay the costs of the opposed hearing on 22 October 2015.

Ploos van Amstel J

Appearances:

For the Applicant : Adv. A.J Rall SC / H Van Der Merwe

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For the Respondent : Adv. S Alberts

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Date of Hearing : 20, 22 October 2015

Date of Judgment : 17 November 2015