THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 20181/2014
Reportable

In the matter between:

DAWID JACQUES RICHTER **Appellant**

and

ABSA BANK LIMITED **Respondent**

Neutral citation: *Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 100 (01 June 2015)

Coram: Mhlantla, Leach, Pillay JJA, Fourie and Dambuza AJJA

Heard: 18 May 2015

Delivered: 01 June 2015

Summary: Business rescue – application for business rescue can be made after final order of liquidation – Interpretation of 'liquidation proceedings' in s 131(6) of the Companies Act 71 of 2008 – 'liquidation proceedings' includes court proceedings and the complete process of winding up or liquidation of a company.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Bam J sitting as court of first instance):

1 The appeal is upheld with costs and the order of the court a quo is set aside.

2 The matter is remitted to the court a quo to determine the application for rescission of judgment.

JUDGMENT

Dambuza AJA (Mhlantla, Leach, Pillay JJA and Fourie AJA concurring):

[1] This appeal concerns the issue whether it is competent to apply for business rescue in terms of section 131 of the Companies Act 71 of 2008 (the Act) after a final liquidation order has been granted against a company. The issue comes on appeal within the context of ss 131 (1) and (6) of the Act. The first of these two sub-sections entitles an affected party to apply to a court, at any time, for an order placing a company under supervision and commencing liquidation proceedings; the second provides for suspension of liquidation proceedings where such an application is brought at a time when 'liquidation proceedings have already commenced'. The crux of the issue is the interpretation of 'liquidation proceedings' within the context of s 131(6); whether the term refers only to a pending application for a liquidation order or includes the process of winding up of a company after a final liquidation order has been granted. The court a quo held that it was not competent to apply for

business rescue after the issue of a final winding order. The appeal against this decision lies with its leave.

[2] On 13 September 2012 the Free State High Court, Bloemfontein granted a final order of liquidation against Bloempro CC (Bloempro). The order was granted despite opposition from Bloempro, which had contended that it should rather be placed in business rescue. On 12 February 2013 the appellant, Mr Dawid Jacques Richter brought an application, in the Gauteng Division, Pretoria, (the court a quo in this appeal) for an order placing Bloempro CC under supervision and commencing business rescue in terms of s 131 of the Act. At the time Mr Richter, a chartered accountant, was employed by Bloempro as a general manager. Bloempro was the owner of immovable property and derived income from rental received from commercial tenants who occupied that property. On 18 March 2013 the respondent, ABSA Bank Limited (ABSA), filed an application for intervention in the business rescue proceedings. The application for intervention also served as opposition to the application for business rescue.

[3] Initially Mr Ritcher opposed ABSA's application to intervene. However on 12 April 2013 he served on ABSA's attorneys a notice withdrawing his opposition. The interpretation of that notice became contentious. Mr Richter maintained that the withdrawal of opposition was only directed at the application for leave to intervene. ABSA insisted that opposition was withdrawn in respect of both the application for leave to intervene and its opposition to the order of business rescue sought by Mr Richter. That issue is, however, not relevant in this appeal. Following the notice of withdrawal on 6 May 2013 ABSA obtained an order by default granting it leave to intervene in the application for business rescue, and dismissing the application for business rescue.

[4] In due course Mr Richter applied for rescission of the default judgment. ABSA opposed that application contending that default judgment had been granted in the context of Mr Richter having withdrawn his opposition to ABSA's application. In opposing the application for rescission, ABSA contended that when Mr Richter brought the application for business rescue, a final order of liquidation had already been granted against Bloempro and that it was no longer open to the court to consider an application for business rescue. Thus, there were no prospects of success in the application for business rescue and, that in any event a similar application had previously been dismissed by the Free State High Court.

[5] The application for rescission of the default judgment served before Bam J. The learned judge considered two issues which he viewed as determinative of the application: (1) whether Mr Richter had locus standi to bring the application for rescission and to apply for business rescue, and (2) whether a business rescue application could properly be made, given that Bloempro was in final liquidation.

[6] The court a quo dismissed the application for rescission. It found that Mr Richter was an affected party as envisaged in s 128 of the Act; but that as a final order of liquidation had been granted against Bloempro, it was not open to any affected party to apply for business rescue proceedings. It is against this order that Mr Richter appeals. Before us counsel were in agreement that in the event that the appeal succeeded the matter would have to revert to the court a quo to determine the application for rescission.

[7] Sub-sections of s 131 (1) and (6) of the Act provide that:

'(1) 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.

(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.'

[8] Counsel for Mr Richter submitted that the stay of liquidation proceedings as provided for in s 131(6) is applicable only in respect of a pending application for liquidation; and that once a final order of liquidation is made no application for business rescue may be brought. The submission was that 'liquidation proceedings' in s 131 (6) should be interpreted in the same manner as in s 132(1) *(c)* in which, so he argued, the phrase liquidation proceedings referred to proceedings preceding a final winding up order. Section 132 (1) of the Act reads:

'(1) Business rescue proceedings begin when-

(a) the company-

(i) files a resolution to place itself under supervision in terms of s129 (3); or

(ii) applies to the court for consent to file a resolution in terms of s129 (5) *(b)*;

(*b*) an affected person applies to the court for an order placing the company under supervision in terms of s 131 (1); or

(*c*) a court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 131(7).'

The argument, as I understood it, was that if it had been the intention to refer to proceedings after a final winding up order in s132 (1) *(c)* the provisions of s 132 (1) (b) would be superfluous. The argument is strained. The fact that legislation may be somewhat repetitive does not necessarily mean that a departure from the otherwise clear meaning of the Act is justified. In my view, the provisions of s

132 (1) do not clearly indicate that 'liquidation proceedings' necessarily mean those proceedings leading up to a final winding up order and nothing else.

[9] The definition of 'liquidation proceedings' as envisaged in s 131(6) is at the core of the issue. Firstly, it is significant that s 131(1) entitles affected persons to apply to court 'at any time' for an order placing the company under supervision and commencing business rescue proceedings. In the same vein section 131 (7) also empowers the court, on application for business rescue, to grant orders provided for in subsections 131 (4) and (5) 'at any time' during the course of 'any liquidation proceedings'. Generally, in law and in business, liquidation is the exhaustive process by which a company is brought to an end, and the assets thereof, if any, are redistributed. The authors of *Cilliers and Benade;* Corporate Law[1] describe liquidation as follows:

(27.01)'…The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realising its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue (if any) among the shareholders of the company in accordance with their rights, is known as the *winding-up* or *liquidation* of the company.'(my emphasis)

[10] The reasoning of the court a quo was motivated by an erroneous premise that upon liquidation Bloempro ceased to exist; that it was 'stripped of its original legal status'. The correct position is that upon the final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company. As to when liquidation commences, in terms of s 348 of the Companies Act 61 of 1973 (the 1973 Act) liquidation of a company by the court is deemed to commence on presentation to the court of the application for the winding up and continues until the affairs of the company have been finally wound up and the Master's certificate to that effect is

[1]H S Cilliers et al: Corporate Law; 3 ed, 2000, at 494.

published in the Government Gazette, thus dissolving the company.[2] Similarly s 82 of the Act provides for existence of a company until deregistered by the Commission.

[11] Significantly, the terms 'liquidation' and 'winding-up' have historically been used interchangeably in the context of dissolving a company. Thus, for example s 79 (1) *(a)* of the Act provides for a solvent company to be dissolved by 'voluntary winding-up' as contemplated in section 80 or 'winding-up and liquidation' by a court order as contemplated in section 81. The terms are also used interchangeably in ss 80, 81 and 82 in relation to the process of liquidation both prior to and subsequent to the final liquidation order being granted, including the final stages of the winding-up of a company.

[12] I do not think the phrase 'liquidation proceedings' in any way alters the significance of what is meant by liquidation. In terms s 136 (4) of the Act if liquidation proceedings have been converted into business rescue proceedings, the liquidator is regarded as a creditor of the company to the extent of any outstanding amounts owing to him or her for any remuneration due for work performed, or compensation for expenses incurred before the commencement of business rescue proceedings. Under s 1 (1) and Schedule 5 (9) of the 1973 Act, which applies to liquidation of insolvent companies, the definition of 'liquidator' includes a provisional liquidator and a final liquidator. Consequently, the conversion of liquidation to business rescue even after a final liquidation order has been granted, was clearly envisaged by s 136 (4).[3]

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[2] It has been held that the deeming provision only comes into effect once a liquidation order has been granted, but that is not relevant to this appeal. See *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 A (158/87) [1987] ZASCA 156 (3 December 1987) ; *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 (GNP) at 447. (63188/2012, 63189/2012) [2013] ZAGPPHC 544 (23 May 2013).

[3] See also: Henoschberg on the Companies Act 71 of 2008 issue 9 at 479.

[13] A review of the background to the introduction of the business rescue process into our law gives an insight as to the intention of the legislature in introducing the procedure. Our business rescue regime is adapted from similar concepts in other jurisdictions such as the United States and Great Britain. In South Africa it was introduced against the background of general acceptance that the judicial management process provided for under chapter XV of the 1973 Act was failing the local economy because only few, if any, judicial management orders resulted in the saving of companies experiencing financial difficulties. Its purpose is stated as: 'to provide for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.'[4] It is meant to be a flexible, effective process of extending the lifespan of companies and businesses.[5] A necessary consequence thereof is limitation, to some extent, on the power of creditors to singlehandedly curtail the life of a company. But this is subject to compliance with the procedural and substantive requirements set out in s 129 of the Act.

[14] Of significance is the fact that in respect of business rescue, the Act refers to the interests of 'stakeholders' in contrast to the interests of creditors and shareholders which take centre stage in liquidation proceedings.[6] The rights of employees, through trade unions, as stakeholders, are expressly recognised in the Act. Section 128(1)*(a)* defines the following as principal stakeholders and affected persons who may apply for business rescue in respect of a company: shareholders, creditors, registered trade unions representing employees, and employees not represented by a registered trade union. Business rescue therefore seeks to protect interests of a wider group of persons than liquidation.

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[4] Subsection 7*(*k) of the Act.

[5] T H Mangalo. 'An overview of company law reform in South Africa: From the Guidelines to the Companies Act 2008': (2010) Acta Juridica xiii.

[6] See for example subsection 7 *(k)* of the Act.

The role of companies as a means of achieving economic and social benefits is given prominence.[7]

[15] It takes little to imagine instances developing, after the issue of the final order, that could lead to the circumstances of a company improving radically, such that it would become profitable if allowed to trade. It could be awarded a contract for which it had earlier tendered or secure funding for future projects; a major creditor might indicate a willingness to subordinate its claim. Accordingly, in the scheme of things, where, during liquidation, evidence becomes available that business rescue proceedings will yield a better return for shareholders and creditors and jobs will be retained, there could be no reason to deny business rescue only because a company is in final liquidation. Indeed, to allow it to do so would fall into the very scheme of business rescue envisaged by the Act and fulfil the objectives of providing for revival of a financially distressed company with all its attendant social benefits.

[16] Counsel for ABSA expressed concern that a liberal interpretation of s 131(1) may have negative results for the liquidation process. These include repetitive disruptions and uncertainty that may result from various affected parties making applications for business rescue at different times during the winding up process, reversion of business control to the same directors who may have been the cause of the financial distress experienced by the company, and the capacity of a company under final liquidation to conduct effective business, including concluding contracts, during the implementation of the rescue plan. All these concerns are valid and appear to have been uppermost in the mind of Bam J when he considered the issues. Indeed implementation of the Act may produce some seemingly awkward results in the initial stages. However, that does not justify an unduly restrictive approach in the

[7] Subsection 7*(d)* of the Act.

interpretation of the provisions of the Act.[8] The simple answer is that a court can dismiss any application for business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved.

[17] There is no sensible justification for drawing the proverbial 'line in the sand' between pre and post final liquidation in circumstances where the prospects of success of business rescue exist. The legislature did not do so and to restrict business recue to those cases in which a final winding up order has not been granted is inimical to the Act.

[18] For these reasons a proper interpretation of 'liquidation proceedings' in relation to s 131(6) of the Act must include proceedings that occur after a winding up order to liquidate the assets and account to creditors, up to deregistration of a company.

[19] Accordingly, I make the following order:

1 The appeal is upheld with costs and the order of the court a quo is set aside.

2 The matter is remitted to the court a quo to determine the application for rescission of judgment.

N Dambuza
Acting Judge of Appeal

[8] Section 5 of the Act provides that the Act must be interpreted in a manner that gives effect to its purposes.

APPEARANCES

For Appellant:	RF De Villiers Instructed by: Jacobs Attorneys, Pretoria Hanno Bekker Attorneys, Bloemfontein
For Respondent:	DM Leathern SC Instructed by: Ririch Wolmarans & Luderits Inc, Pretoria Symington & De Kok, Bloemfontein