IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 52115/2015

11/12/2015

In the matter between:

SAFARI THATCHING LOWVELD CC Applicant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED. ✓
16/12/2015
DATE SIGNATURE

and

MISTY MOUNTAIN TRADING 2 (PTY) LTD Respondent

BRUNO JEROLDI First Intervening Party

JOHAN CHARL BRINK Second Intervening Party

JUDGMENT

DAVIS, AJ

[1] This is a winding-up application by Safari Thatching Lowveld CC as Applicant of the company known as Misty Mountain Trading 2 (Pty) Ltd as Respondent. Bruno Jeroldi ("*Jeroldi*") and Johan Charl Brink ("*Brink*") are both directors of the Respondent and are both intervening parties in the winding-up application (although Mr Jeroldi's role has been somewhat limited by previous orders of this court as more fully set out hereinlater). Mr Jeroldi was also the Applicant in two applications to have the Respondent placed under supervision and for the commencing of business rescue proceedings. The winding-up application consisted of only 140 pages, but, due to all the

other applications, interlocutory and otherwise, the totality of documents filed of record became voluminous.

SALIENT FACTS:

[2] To a large extent, the factual allegations of the Applicant are uncontroverted as, despite applications for leave to intervene, no answering affidavits have been delivered in the winding-up application. From a reading of the papers, the following factual matrix emerges:

2.1 During the latter part of 2012 and at Chitwa Chitwa in the Sabie Sand Game Reserve the Applicant and the Respondent entered into a principal building agreement on the terms as provided in a standard JBCC Series 2000 building contract. This was for the construction of a luxury safari camp.

2.2 The initial contract price amounted to some R15 million but due to subsequent variations and the addition of construction of staff quarters adjacent to the luxury safari lodge, the contract amount escalated to some R19 million with an additional almost R3 million for the staff quarters.

2.3 Construction took some time to commence but from 7 February 2014 onwards some fifteen payment certificates were issued and certified in respect of the lodge itself and another three in respect of the construction of staff quarters. At the time when the winding-up application was launched, the last of each of the two series of payment certificates were outstanding in the amount of R1 533 533,70 and R274 156,53 respectively. In the founding affidavit allegations were made that various further amounts would still become due and payable as a result of construction work already completed but not yet certified. Future or contingent indebtedness of the Respondent in this regard of some R5 million was estimated.

2.4 The failures to make payment occurred when the construction was approximately 82% complete and principally as a result of an apparent irreconcilable dispute between the two intervening parties as directors of the Respondent. The two intervening parties were also the major co-shareholders in the Respondent and the dispute allegedly centred around Mr Jeroldi's failure or refusal to make payment of an alleged balance subscription price for shares in an amount of approximately R8 million. Significantly, Jeroldi refers to himself as the "*financier*" of the safari lodge. This dispute also featured in the subsequent

applications for the announcement of business rescue proceedings dealt with hereinlater. In the affidavit of Mr Jeroldi in support of his initial application for leave to intervene in the winding-up application, various further disputes were alluded to, *inter alia* the accusation that Mr Brink awaited to "*take over*" the safari lodge.

2.5 As a result of the above, construction halted, other creditors of the Respondent remained unpaid and as the Respondent had no other business (or assets) other than the proposed luxury safari lodge, it became unable to meet its current financial liabilities. The deadlock between its directors and shareholders (which included a third minor shareholder) also resulted in an impasse which continued to exist until date of this judgment. I interpose to state that the Respondent does not own the immovable property on which the safari lodge was to be construction but had a lease agreement with traversing rights from the land owner, Manyeleti (Pty) Ltd.

2.6 Against the aforesaid background the Applicant applied for the liquidation of the Respondent on the basis that the Respondent is both factually and commercially insolvent and that it is just and equitable that it be wound up.

PROCEDURAL HISTORY:

[3] 3.1 The winding-up application was initially launched as an urgent application to be heard on 21 July 2015. It was subsequently enrolled as a special motion with leave of the Deputy Judge President on the 21st of August 2015.

3.2 At the hearing of the application on 21 August 2015, Mr Brink was granted leave to intervene in the winding-up application. Apart from having sought and obtained such leave, Mr Brink as Second Intervening Party did not further participate in the winding-up application.

3.3 On the same day, and at Mr Jeroldi's apparent insistence on opposing the winding-up application with reliance on a conditional application to commence business rescue proceedings, an order was granted in the following terms:

> "*1. Leave is granted to intervene to the First Intervening Applicant on the basis in the matter of business rescue.*

2. *The application to appear for the Respondent is refused.*"

3.4 I understand this order to mean that Jeroldi was allowed to intervene in the winding-up application and to oppose the granting thereof with reliance on the application to commence business rescue proceedings launched by him. Whatever the situation, not much came of it at the time as Mr Jeroldi's rather extensive application to commence business rescue proceedings was struck from the roll. According to the Applicant this was due to the fact that the court had allegedly found that there was no proper application to commence business rescue proceedings before it.

3.5 Be that as it may, after the aforesaid had occurred, the winding-up application was postponed to 6 October 2015. As part of the opposition to the winding-up application, the amounts claimed by the Applicant as referred to in paragraph 2.3 *supra* had been paid into an attorney's trust account. It was ordered that these amounts be transferred to the Applicant's attorney's trust account and that Mr Jeroldi pay the outstanding interest on these amounts on or before 31 August 2015 together with costs of the application including costs occasioned by the

postponement. The further order of this court also dated 21 August 2015 reflecting all these aspects conclude as follows:

> *"Should Mr Jeroldi fail to comply with any of his aforesaid obligations, the Applicant is granted leave to supplement its founding papers and to set the matter down for determination."*

3.6 The capital amount of the Applicant's claims were paid, however there was a failure to pay the interest resulting in the Applicant supplementing its papers in this regard.

3.7 By the time the winding-up application was heard on 6 October 2015, four further payment certificates have been certified in favour of the Applicant. The two in respect of the luxury lodge amounted to R1 310 796,25 and R804 672,00 and the two in respect of the staff housing amounted to R305 021,08 and R64 586,13. Al four these certificates were due, payable and outstanding and remained unpaid.

3.8 In the interim, Mr Jeroldi had withdrawn the application to commence business rescue proceedings, which application has been struck off and a formal notice of withdrawal forms part of the papers. There was some dispute as to the validity of this

withdrawal as it was not done with the consent of all the parties. Be that as it may, it is quite clear that Mr Jeroldi had no intention of proceeding with the first application to commence business rescue proceedings as I have been alerted by Mr Beaton, who appeared for Mr Jeroldi, that a second such application has been launched on 1 October 2015, citing the same parties as in the initial application to commence business rescue proceedings. The papers handed to me in respect of this second application were incomplete and consisted of the notice of motion and the various documentation pertaining to service thereof (in respect of which service took place, electronically, by correspondence or by way of the Sheriff as the case may be). The principal service affidavit however, deposed to by one of Mr Jeroldi's attorneys, lists some 16 creditors of the Respondent. This list was extracted from a letter from the Applicant's attorneys wherein a number of reasons for the current situation of the Respondent were listed and certain proposals were made. The reasons accorded with those made in the Applicant's founding affidavit in the application for winding-up to the effect that an amount of some R8 million had remained outstanding in respect of the initial subscription of shares and that a projection for the operating

costs of the "*most prestigious lodge in the Sabie*" for the initial 8 months amounted to another R8,85 million. The proposal was that these amounts be paid or guaranteed, that Mr Jeroldi resigns as a director of the Respondent and that a third director be appointed and that certain further costs, *inter alia* regarding a forensic audit, also be paid. These proposals, according to the letter, would have remained open until close of business on Tuesday 1 September 2015 and which included the condition that the first business rescue application then still pending be withdrawn. Despite the withdrawal of the first application to commence business rescue proceedings, the remainder of the proposals apparently came to naught and I was not otherwise informed by Mr Beaton.

3.9 Similarly, no further information pertaining to the Respondent's position, the position of its existing creditors or any proposed benefit to them as a result of the second proposed application to commence business rescue proceedings or any resolution of the deadlock between the directors and shareholders of the Respondent were placed before the court save for the reliance on Section 133 of the Companies Act, No. 71 of 2008.

CONSIDERATION OF THE STATUTORY PROVISIONS:

[4] 4.1 Section 131(1) of the Companies Act allows an affected person to apply to a court "*at any time*" for an order placing a company under supervision and commencing business rescue proceedings.

4.2 Business rescue proceedings begin, in terms of Section 132(1)(b) when such an "*affected person applies to the court for an order placing the company under supervision in terms of Section 131(1)*" (or when a court makes an order placing a company under supervision during the course of liquidation proceedings in terms of Section 132(1)(c)).

See also: **Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC** 2013(6) SA 540 (CC) and **Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metals CC** 2013(6) SA 141 (KZP).

4.3 The operative provision for purposes of the current set of facts regarding the Respondent is Section 131(6) which provides as follows:

"If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of sub-section (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."

4.4 With reliance hereon, Mr Beaton made the suggestion from the bar that the winding-up application be postponed yet again.

4.5 I was referred to the decision in **Richter v Absa Bank** 2015(5) SA 57 (SCA) by both Mr Beaton and Mr de Beer who appeared for the Applicant. In this decision the Supreme Court of Appeal has determined that the term "*liquidation proceedings*" includes the process of winding-up of a company after a final liquidation order has been granted, i.e. it includes proceedings that occur after a winding-up order to liquidate the assets and account to creditors up to deregistration of a company. The factual position in the **Richter**-case is to be distinguished from the facts of this matter. However, it is clear from a reading of the

judgment, and in particular paragraph [17] thereof, that the suspension of proceedings contemplated in Section 131(6) also include pending applications for winding-up (this much is clear from a simple reading of the sub-section):

> *"[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 rescue to those cases in which a final winding-up order has not been granted, is inimical to the Act."*

4.6 Applicable to the present facts, whilst Mr Jeroldi's aborted first application to commence business rescue proceedings is no longer on the table, the second application launched on 1 October 2015 notionally suspends the Applicant's application for winding-up.

4.7 Section 133(1)(b) however provides that, during business rescue proceedings, legal proceedings against the company may be "*commenced or proceeded with*" with the leave of the court "*... and in accordance with any terms the court considers suitable*".

4.8 In **Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others** 2015(4) SA 485 (KZD) it was found that the moratorium on legal proceedings against a company has the result that leave to institute proceedings must be obtained by way of separate proceedings before the commencement of proceedings and not (even) as part of relief in the main proceedings.

4.9 A contrary position was taken in **African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd** 2013(6) SA 471 (GNP) where the requisite leave to commence proceedings was granted as part of the relief claimed in the main proceedings.

4.10 Whilst Section 133(1) clearly prescribes substantial rights and consequences pertaining to the "*general moratorium on legal proceedings*" against companies in circumstances like that of the Respondent, no procedural requirements are laid down regarding the obtaining of the leave of the court.

4.11 The requirement for the obtaining of the leave of the court (for example by way of a separate application) prior to the

commencement of legal proceedings against a company whilst business rescue proceedings are pending (as found in the **Elias Mechanicos**- matter) is readily understandable and accords with the wording of the section. The judge in the aforesaid matter reasoned in this regard as follows:

> "*11. The construction which the Applicant seeks to place on Section 133(1)(b) is that the proceeding may be commenced without the leave of the court and that leave to do so may be sought as part of the relief in the main application. This is inconsistent with the wording or the section. It will also defeat one of the purposes of the moratorium, which is to give the company and the business rescue practitioner space and time to deal with the rescue of the company without having to deal with litigation by creditors. The practitioner will in each such proceeding have to deal not only with the application for the court's leave in terms of Section 133(1)(b), but also with the merits of the claim, because it is all part of one application.*"

4.12 To my mind and with respect to the learned judge, the position is fundamentally different when proceedings have already been commenced and predated the commencement of the business rescue proceedings. The same considerations applicable to

the requirement for obtaining the leave of the court prior to the commencement of legal proceedings would often be substantially different from those applicable to the requirement of obtaining leave to continue with legal proceedings which had already commenced. Although numerous permutations might arise, an illustrative example is the following: Say, for instance, a trial had commenced and after the many months that it customarily takes to exchange pleadings, make discovery, deliver expert notices, to apply for and obtain a trial date and to have a matter set down have expired and taken place and say for example further the trial is on its third or fourth or fifth day of evidence or even if evidence had been concluded and during argument, a director of the defendant company then suddenly "*commences*" business rescue proceedings. Although the substantive law imposed by Section 133(1) suspends the legal proceedings, it would be contrary to the administration of justice to require the trial to be postponed as a part-heard matter and to impose on the plaintiffs therein the obligation to launch a substantive application (possibly even on a different roll of the court) to obtain leave (from the same or a different judge) to continue with the trial. Both practicalities and the considerations contemplated in the Act clearly suggest that the

trial court ceased with the previously commenced legal proceeding would be in a position to consider the granting of the requisite leave to proceed with the trial or not. This would particularly be so where the applicant in such fresh business rescue proceedings would be a party to the action before that court.

4.13 To bring the example closer to the present application: Say that the trial referred to in my example was one where an application for winding-up launched by one of the directors of the company had been referred to trial. To read into the Act that the consequences of the requirement for leave of the court contemplated in Section 133(1)(b) were that the trial had to be "*halted*" (to use a word used in the **Elias Mechanicos**-judgment) so that the one director can launch a substantive separate application to obtain the leave of the court to continue with a pending trial where a moratorium had been imposed by his co-director simply by the filing of an application commencing business rescue proceedings may not only lead to absurdity but might notionally unduly infringe the first-mentioned director's constitutional right of access to court contemplated in Section 34 of the Constitution, Act No. 108 of 1996.

4.13 Having regard to the circumstances illustrated in the abovementioned examples I find no basis for the proposition that an application for the requisite leave of the court to continue with such already commenced proceedings may not be made during such proceedings. There is also no reason why a litigant already engaged in legal proceedings would have to incur further costs and expenses and time (including judicial time) in dealing with what might be a defective application or an abuse of process. Such a litigant should not be precluded from requesting the requisite leave during the prior existing proceedings. I do not read nor interpret the Act to impose such a procedural limitation.

4.14 I therefore find that it is legally competent for a litigant such as the Applicant to request the requisite leave to continue with the already commenced legal proceedings during those proceedings itself when faced with a subsequent application to commence business proceedings and the moratorium imposed thereon by Section 133(1).

4.15 In stating aforesaid, I have not lost sight of one of the inherent elements of business rescue proceedings which is to facilitate the rehabilitation of a company that is financially distressed by

providing for a temporary moratorium on the rights of claimants against the company for purposes of the development and implementation of a plan to restructure the affairs of a company "*... in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders that would result from the immediate liquidation of the company*" (as prescribed in Section 128(1)(b) of the Companies Act). I also had regard to the effects of the statutorily imposed moratorium as *inter alia* considered in **Absa Bank Ltd v Summer Lodge (Pty) Ltd** 2013(5) SA 444 (GNP) and **Van Zyl v Engelbrecht NO** 2014(5) SA 312 (FB).

4.16 Even if I may be wrong in the aforesaid approach as a general principle, then I am of the view that the present matter is an example of exceptional circumstances and I cannot conclude that Section 133(1)(b) would exclude or prevent a court from dealing with exceptional circumstances "*... in accordance with any* [manner] *... the court considers suitable*". I deal with these circumstances as part of the consideration of both the

Applicant's application for winding-up and its request for the requisite leave hereunder.

4.17 As already alluded to in paragraph 3.9 *supra*, there were no evidence placed before the court indicating a "*reasonable prospect of rescue*" of the Respondent company which could lead a court to accede to the default position of the moratorium imposed by Section 131(6) without considering the timing and process of granting of leave to proceed with pending proceedings as contemplated in Section 133(1)(b).

See also: **Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd** 2013(4) SA 539 (SCA) and

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012(2) SA 423 (WCC) as to the requirements relating to a "*reasonable prospect of rescue*".

CONCLUSIONS:

[5] 5.1 A summary of the uncontroverted facts are the following:

5.1.1 The Applicant is an unpaid creditor of the Respondent.

5.1.2 There are numerous similar unpaid creditors.

5.1.3 The Respondent appears to be both factually and commercially insolvent.

5.1.4 There is an insurmountable deadlock between the directors and shareholders of the company.

5.1.5 The Applicant has commenced winding-up proceedings on 6 July 2015.

5.1.6 All the formal requirements pertaining to winding-up applications have been complied with.

5.1.7 Both the directors and principal shareholders of the company are parties to these proceedings.

5.1.8 A first application for the commencement of business rescue proceedings of the company by one of the directors was struck off the roll of this court, withdrawn and not proceeded with.

5.1.9 Scant days prior to the postponed hearing of the winding-up application, the same aforementioned director launched a second application for the commencement of business rescue proceedings.

5.1.10 There was no application for postponement of the winding-up application on behalf of the director who had launched the aforementioned second application for the commencement of business rescue proceedings and there was no separate or fresh application to yet again intervene in the winding-up application based on the second application for the commencement of business rescue proceedings.

5.1.11 No evidence was placed before the court indicating that whatever might have been proposed in the second application for the commencement of business rescue proceedings would be more beneficial to the creditors than the proceeding with the pending winding-up application.

5.1.12 No evidence was placed before the court that any of the problems or financial distress which the company

faced as set out in the Applicant's founding affidavit or in the letter of its attorney relied on by the attorney for the director in his second application for the commencement of business rescue proceedings have been addressed, ameliorated or would "*maximise the likelihood of the company continuing in existence on a solvent basis*".

5.2 In these circumstances I find no reason why the Applicant's request for leave of this court to proceed with the winding-up application should not be granted and the requisite leave is hereby given.

5.3 Having regard to the circumstances already set out above, I am satisfied that the requirements for the granting of a winding-up application have been met. I am furthermore satisfied that this is one of those instances where a court can justifiably exercise its discretion to grant a final order.

5.4 Insofar as Mr Jeroldi or any other party may be or become in a position to rescue the company, their rights to do so are to my mind further adequately protected by Chapter 6 of the

Companies Act and as set out in the judgment of **Richter v Absa Bank**, *supra*.

[6] I therefore make an order in the following terms:

1. A final order is issued whereby the Respondent is placed under liquidation in the hands of the Master of the High Court, Pretoria.

2. The First Intervening Creditor is ordered to pay the costs occasioned in the winding-up application by his reliance on his application to commence business rescue proceedings in case no. 79657/2015.

3. Save as aforesaid, the costs of this application are to be paid from the estate of the Respondent.

N DAVIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA