

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

CASE NO.:67845/15

DATE:21 NOVEMBER 2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

SIGNATURE

DATE



In the matter between

A P SMUTS NO

First Applicant

T G NELL NO

Second Applicant

and

RON'S HIRE (MPUMALANGA) CC

Respondent

J U D G M E N T

A B ROSSOUW AJ

- (1) The applicants, ie two business rescue practitioners, bring an application for the following relief :

‘1. That the business rescue proceedings in respect of the respondent be discontinued and the respondent be placed into liquidation in terms of section 141(2)(a)(i) of the Companies Act 71 of 2008;

2. That the remuneration and expenditure of the applicants in their capacity as business rescue practitioners be ordered to be costs in the liquidation of the respondent;

3. That the costs of the application be costs in the liquidation; and

4. Further and/or alternative relief.’

- (2) The application is opposed by Mr Schuster in his capacity as manager of the respondent and in his capacity as a creditor of the respondent.

- (3) The facts underlying this application are briefly the following:

- (4) On 16 April 2014 the respondent resolved to begins business rescue proceedings and to place the respondent under supervision in terms of section 129(3) of the Companies Act 71 of 2008 (‘the Act’).

- (5) The notice beginning the business rescue proceedings in terms of sections 129 of the Act was filed with the Companies and Intellectual Property Commission ('the Commission') on 25 April 2014.
- (6) The business rescue accordingly commenced on 25 April 2014.
- (7) The applicants were appointed as business rescue practitioners on 8 May 2014 and 6 May 2014 respectively.
- (8) The applicants prepared a business rescue plan for consideration and possible adoption at a meeting to be held in terms of section 151 of the Act.
- (9) At the section 151 meeting two creditors with a combined voting interest of 51% of the total voting interest voted against the adoption of the business rescue plan.
- (10) Neither the applicants nor any affected person took any steps in terms of section 153 of the Act relating to the rejected business plan.
- (11) Subsequently and on 10 September 2014 the applicants brought an application for the termination of the business rescue proceedings and the liquidation of the respondent in the

Magistrates' Court. This application was opposed by the respondent.

- (12) On 22 January 2015 the respondent was provisionally liquidated. The relevant part of the court order reads as follows:

‘IT IS ORDERED

1. That the business rescue with regards to the Respondent is terminated and that the Respondent be placed in liquidation in the hands of the Master in terms of section 141(2)(a)(i) of Act 71 of 2008.

2. That a rule *nisi* be issued calling upon the Respondent and all other interested parties to furnish reasons, if any, to the above Honourable Court on 26 February 2015 at 09H00 or as soon thereafter as the matter may be heard as to why:

2.1 a final winding up order should not be granted; and

2.2 that the remuneration and expenditure of the Applicants in their capacity as Business Rescue Practitioners should not be ordered to be costs in the liquidation of the Respondent; and

2.3 the costs of this application should not be costs in the liquidation.’

- (13) The issue as to whether the rule *nisi* should be granted or not was argued on 19 March 2015. The respondent was not represented by an attorney or an advocate, but by the manager of the respondent, i.e. Mr Schuster. A point *in limine* was

argued that Mr Schuster was unable to represent the respondent. The judgment was reserved.

- (14) In the meantime and on 3 February 2015 the applicants completed and filed form CoR 125.2. This form contains the notice that is envisaged in section 141(2)(b)(ii) read with section 132(2)(b) of the Act, in other words the prescribed notice of termination that has to be filed where a business rescue practitioner has concluded that there are no longer reasonable grounds to believe that the company is financially distressed.
- (15) The applicants explained that they used this form since there was no prescribed form available for the termination of business rescue proceedings where the business rescue plan was not adopted in terms of section 153(5) of the Act. Attached to the founding affidavit is a letter from the Commission admitting the non-existence of such a form and advising the applicants that the said form may be used as a notice in terms of section 153(5) of the Act provided that the said form is amended to reflect the correct information.
- (16) The applicants, however, never filed an amended standard form reflecting a notice as envisaged in terms of section 153(5).

- (17) On 19 March 2015 the Magistrates' Court made the following order:

'IT IS ORDERED

1. That the point *in limine* be upheld;
 2. That the application is postponed to the 9th of April 2015; and
 3. That the rule nisi is extended to the 9th of April 2015.'
- (18) The return date was extended to 12 June 2015 on which date the application was postponed *sine die*, costs to be cost in the cause. Thus, the return day was not extended to a specific date.
- (19) On 29 May 2015 and 7 July 2015 Mr Schuster and Ms Schuster respectively brought applications to intervene in the application that was pending in the Magistrates' Court.
- (20) In Ms Schuster's affidavit the point was taken that the failure to extend the return day was fatal to the provisional order's continuing validity.
- (21) The applicants conceded that the point was well taken, withdrew their application in the Magistrates' Court and instituted the present proceedings.

(22) The respondent argued that the applicants have no *locus standi* because, firstly, the business rescue practitioners terminated the proceedings by filing form CoR 125.2 and, secondly, because the business rescue proceedings were terminated on 22 January 2015 when the aforesaid order was made in the Magistrates' Court.

(23) Section 132(2) of the Act reads as follows:

‘Business rescue proceedings end when—

(a) the court—

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings;

(b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or

(c) a business rescue plan has been—

(i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or

(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.’

(24) A notice of termination of business rescue proceedings must be filed in two instances: Where no person has taken any steps in terms of section 153(1), then the practitioner must file a

notice of termination in terms of section 153(5). The second instance is where the practitioner concludes that there no longer are reasonable grounds to believe that the company is financially distressed, he must file a notice of termination in terms of section 141(2)(b) (ii).

- (25) I am of the view that upon a contextual interpretation of the Act the notice referred to in section 132(2)(b) is the notice referred to in section 141(2)(b)(ii) and not section 153(5), because the failure to adopt a business rescue plan is specifically dealt with in section 132(2)(c)(i).
- (26) Although section 132(2)(c)(i) does not specifically mention that a notice has to be filed in order for the business rescue proceedings to end, I am of the view that the filing of a notice in terms of section 153(5) is a prerequisite for the termination of the business rescue proceedings. If that is not the case, then the provisions of section 153(5) would serve no purpose and would be nonsensical. The clear objective of section 153(5) is to bring certainty and finality regarding the status of the business rescue proceedings.
- (27) The notice in terms of section 141(2)(b)(ii) was filed whilst the liquidation application was still pending.

- (28) No person to whom this notice was addressed would under these circumstances have understood the notice to mean that the applicants had concluded that the respondent was no longer financially distressed. The recipients of this notice would have realised that the notice was filed in error and that no legal consequences could flow from it.
- (29) I therefor find that under the circumstances the filing of the aforesaid notice had no legal consequences.
- (30) Since no notice was filed with the Commission in terms of section 153(5) the business rescue proceedings have not been terminated in terms of section 132(2)(c)(i).
- (31) Regarding the order that was granted on on 22 January 2015, the following:
- (32) Paragraph 1 of the order in terms whereof the business rescue proceedings were terminated was a prerequisite for the provisional liquidation order to be granted. An order in terms whereof business rescue proceedings are terminated and a provisional liquidation order is granted is one indivisible order. It cannot be construed as two separate orders. The fact that the application has been withdrawn simply means that the conversion of the business rescue proceedings to liquidation proceedings has not been brought to finality. Section 132(2) of

the Act can only be construed as meaning that business rescue proceedings come to an end after a final liquidation order has been granted.

- (33) I therefore find that because no notice has been filed in terms of 153(5) and because the business rescue proceedings have not been converted to liquidation proceedings that the respondent is still under business rescue and that the applicants have *locus standi* to bring this application.
- (34) The next issue is whether the business rescue proceedings should be converted to liquidation proceedings.
- (35) It is clear from the respondent's affidavit that the respondent is, at least, commercially insolvent. This is not seriously disputed on the papers.
- (36) The respondent, inter alia, admits that a judgment has been granted against it which has not been satisfied
- (37) The respondent further alleges that Absa Bank has written off a debt in the amount of R311 380,80. This allegation is supported by a document which appears to be a bank printout. The heading of this printout reads "Cheque Presentation Enquiry" and it contains an item 'BAD DEBT W/OFF HEADOFFIC'. No confirmatory affidavit of Absa Bank is

attached to the answering affidavit explaining same. I am not convinced that the bank has indeed written off this debt.

- (38) Furthermore, no valuations of the respondent's assets are attached to the answering affidavit.
- (39) The respondent is further indebted to Mr Schuster in the amount of R200 000.00 in respect of arrear salaries, the payment of which is still outstanding.
- (40) Furthermore, there are a number of creditors mentioned in the list attached as 'E' to the founding affidavit, such as SARS and others, which the respondent has decided not to deal with in its answering affidavit.
- (41) To summarise, I am satisfied that the applicants have made out a case on the papers that the respondent is unable to pay its debts.
- (42) As far as prayer 2 of the relief sought is concerned, the following: In terms of section 143(5) of the Act a practitioner's claim for the unpaid balance in respect of his remuneration and expenses will rank in priority before the claims of all other secured and unsecured creditors. In terms of section 135 (3) of the Act the practitioner's remuneration and expenses referred to in section 143 takes preference. If business rescue

proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 of the Act remains in force. The applicants can prove their claims in the liquidation proceedings. I therefore find it unnecessary to grant prayer 2 of the relief sought.

(43) I therefore make the following order:

1. The business rescue proceedings in respect of the respondent is discontinued and the respondent is placed into provisional liquidation in the hands of the Master in terms of section 141(2)(a) of Act 71 of 2008.
2. A rule *nisi* is issued calling upon the respondent and all other interested parties to furnish reasons, if any, on 5 December 2017 at 10:00 or as soon thereafter as the matter may be heard as to why:
 - 2.1. a final winding up order should not be granted; and
 - 2.2. the costs of this application should not be ordered to be costs in the liquidation.
3. A copy of this order:-
 - 3.1. shall be served on the respondent;
 - 3.2. shall be furnished/delivered by hand or electronically transmitted to:
 - 3.2.1. the Office of the Master;

- 3.2.2. the South African Revenue Services;
 - 3.2.3. the employees of the respondent;
 - 3.2.4. the trade union/s representing any of the employees of the respondent;
 - 3.2.5. all creditors of the respondent whose particulars and addresses the applicants are aware of; and
 - 3.2.6. the members of the respondent;
4. The applicants shall before or during the hearing of this application on the return day file an affidavit setting out the manner in which the aforesaid formalities have been complied with.

A B ROSSOUW AJ

CASE HEARD ON: 20 NOVEMBER 2017

JUDGMENT GIVEN ON: 21 NOVEMBER 2017

APPLICANTS' ATTORNEYS: TINGTINGERS INC

APPLICANTS' COUNSEL: M P VAN DER MERWE SC

DEFENDANT'S ATTORNEYS: LEON SONNEKUS ATTORNEYS

DEFENDANT'S COUNSEL: L SONNEKUS