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

CASE NO: 10862/14

In the matter between:

RESOURCE WASHING (PTY) LTD	APPLICANT
and	
ZULULAND COAL RECLAIMERS PROPRIETARY LIMITED (Under business rescue Registration number 2008/024439/07)	FIRST RESPONDENT
MUHAMMED ASIF LATIB	SECOND RESPONDENT
MUHAMMED ASIF LATIB NO	THIRD RESPONDENT
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	FOURTH RESPONDENT

JUDGMENT

Date of hearing: 3 March 2015
Date of judgment: 20 March 2015

D. PILLAY J

Parties

[1] Resource Washing Proprietary Limited is the applicant, a creditor of the first respondent, Zululand Coal Reclaimers (ZCR), a company under business rescue. Muhammed Asif Latib is the second respondent in his personal capacity and the third

respondent in his capacity as the business rescue practitioner (BRP). The Companies and Intellectual Property Commission is the fourth respondent; it does not oppose this application. The opposing respondents are collectively referred to as the respondents.

[2] The applicant seeks an order granting 'to the extent necessary' leave in terms of s 133 of the Companies Act 71 of 2008 (the Act) to launch these proceedings to set aside the resolution in terms of s 130(1)(a) and 130(5)(a) of the Act and declaring the business rescue proceedings in respect of ZCR to have terminated, and for the provisional winding up of ZCR. The applicant abandoned its challenge to the validity of the respondent's resolution.

Opposition *in limine*

[3] On the eve of the hearing of the application the respondents delivered supplementary heads of argument objecting *in limine* to the application on the ground that the applicant failed to apply in advance in terms of s 133 to obtain leave to launch proceedings against ZCR. Incorporating an order in terms of s 133 in an application instituting the legal procedures as this application does was allegedly not compliant with s 133 because it deprived the court of an opportunity to give directions about the future course of the application, (such as issuing an order for the appointment of an independent party to assess the effects of business rescue and liquidation proceedings on the creditors and the shareholders and to report to the court). To enable the applicant to institute its s 133 application disjunctively from the main proceedings counsel for the respondents sought an adjournment.

[4] Senior counsel who appeared for the respondents was not the counsel who had prepared the heads of argument. He acknowledged that in the answering affidavit the respondents had stated that consent in terms of s 133 was 'not' required. Notwithstanding the absence of any evidence from the deponent to the answering affidavit counsel nevertheless persisted that the word 'not' was a typographical error or an erroneous concession to which the respondents were not bound. For the submission that s 133 imposed a statutory moratorium on legal proceedings against a company

under business rescue, non-compliance with which rendered this application premature the respondents relied on *Merchant West Working Capital Solutions (Pty) Ltd v The Advanced Technologies and Engineering Company Limited* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) para 67 and *Msunduzi Municipality v Uphill Trading* 14 *(Pty) Ltd and Others* case number 11553/2012 27 June 2014 (unreported). *Moodley v On Digital Media (Pty) Ltd and Others* 2014 (6) SA 279 (GJ) which the applicant submitted defeated the respondents' objection *in limine*, was also relied on by the respondents.

[5] In *Merchant* the court dismissed the application for amendment in which the applicant sought '*ex post facto*' leave to institute proceedings in terms of s 133(1)(b). It reasoned that the moratorium applied to all legal proceedings unless the exception in (a) to (f) in s 133 applied.[1] That the proceedings amounted to legal proceedings was not in dispute.[2] The court rejected Merchant's distinction between legal proceedings generally which were prohibited by s 133(1) and those launched for the perfection of security which the applicant contended were not prohibited. Merchant was seeking substantive relief that included an order authorising the Sheriff to attach and deliver a helicopter over which it had a cession and a pledge as security and for perfecting the attachment.[3] On these facts and legal submissions *Merchant* is distinguishable from this case as will emerge below.

[6] In *Msunduzi,* the court dismissed an application in terms of s 133(1)(b) firstly because it seemed to the court that the applicant, a municipality, was not a regulatory authority which the Act defined as 'an entity established in terms of national or provisional legislation responsible for regulating an industry, or sector of an industry'. Consequently Msunduzi did not fall into the exception in subsection (f) which permits a

[1] *Merchant* para 60.
[2] *Merchant* para 61.
[3] *Merchant* para 31.

regulatory authority to institute legal proceedings in the execution of its duties after written notification to the BRP.[4]

[7] Secondly, it was not disputed that Msunduzi did not notify the BRP in terms of subsection (f). There was good reason for such notice prior to commencing legal proceedings, the court opined. It gave the BRP an opportunity to investigate and resolve the matter thus avoiding litigation. Lastly, it was not permissible to apply from the bar for leave in terms of s 133.[5] On these facts and legal submissions *Msunduzi* is also distinguishable from this case as will be shown.

[8] *Moodley* above pertinently addresses the interpretation and application of s 133 and the ambit of the moratorium on legal proceedings. *Moodley* considered the application of s 133 'in so far as it was required' to proceed with an application against the company and its BRP for declaratory relief that certain share transactions were not in accordance with the adopted business rescue plan.[6] The court concluded:

> '[10] ...Legal proceedings, such as the present case, which seeks that an adopted business rescue plan be executed and implemented strictly according to its terms and in accordance with the applicable conditions of the Companies Act, are legal proceedings against the business rescue practitioner *and* the company in business rescue in connection with the business rescue plan. They are not legal proceedings against the company or property belonging to the company or lawfully in its possession within the meaning of s 133(1).
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> [11] Section 133, therefore, finds no application in legal proceedings against the company in business rescue and its business rescue practitioner in connection with the business rescue plan, including its interpretation and execution towards implementation ... The applicant does not acquire the leave of this court as

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[4] *Msunduzi* para 7.
[5] *Msunduzi* para 8.
[6] *Moodley* para 1.

contemplated in s 133(1)(b) of the Companies Act to proceed with the present proceedings.'[7]

[9] In coming to this conclusion the court found *Redpath Mining South Africa (Pty) Ltd* v *Marsden NO*[8] to be wrongly decided and declined to follow it, preferring instead the academic opinion of *Henochsberg on the Companies Act 71 of 2008*.[9] *Redpath* was an application to interdict the BRP and the company under business rescue from implementing the business rescue plan pending proceedings to be instituted within two weeks of the interdict being granted. That application was prefaced by an application in terms of s 133(1)(b). The learned judge who had a month earlier pronounced in *Merchant* reiterated his opinion that s 133(1) 'calls for a complete moratorium in the clearest and unambiguous terms'.[10] However, he accepted that 'only in exceptional circumstances may a court permit litigation against a business rescue plan'.[11] He found that the applicant failed to present 'sufficient motivation' for the breach of the 'statutorily set moratorium against legal proceedings during the period a business rescue plan is in operation',[12] and 'to convince this court to indulge the applicant'.[13] Citing himself in *Merchant* he found that the circumstances in *Redpath* did not 'cumulatively constitute sufficient motivation'.[14]

[10] Respectfully, I too disagree with the reasoning in *Redpath* that there must be 'exceptional circumstances' for granting an application in terms of s 133. Apart from being vague, the wording 'exceptional circumstances' is not one of the grounds stipulated or foreshadowed in s 133. Nor does the learned Judge give any direction as to what would constitute 'exceptional circumstances'. There may have been 'a lot of things and circumstances ... alluded to by ... the applicant' that failed to convince that court that exceptional circumstances existed justifying the granting of the application.

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[7] *Moodley* para 10 – 11.
[8] (18486/2013)[2013] ZAGPJHC 148 (14 June 2013).
[9] *Moodley* para 5; PA Delport (ed) *Henochsberg on the Companies Act 71 of 2008* Vol 1 (October 2014 – Service Issue 9).
[10] *Redpath* para 70.
[11] *Redpath* para 71.
[12] *Redpath* para 72.
[13] *Redpath* para 71.
[14] *Redpath* para 72.

However, the findings of fact in *Redpath* do not go far enough to elevate 'exceptional circumstances' to a legal principle and ground for granting s 133 applications. Eventually granting the application in terms of s 133 for the limited purpose of bringing that very application was circular and unnecessary, with respect.

Does the applicant require leave in terms of section 133(1)(b) of the Act

[11] This application in terms of s 133 does not suffer from being made '*ex post facto*' or from the bar as happened in *Merchant* and *Msunduzi above.* I align myself with *Moodley* in holding that s 133 does not apply to legal proceedings that are against the company in general or property belonging to the company or lawfully in its possession.

[12] In addition, barring the court from scrutinising procedural and substantive compliance with the requirements of the Act is inimical to the Constitution of the Republic of South Africa, 1996. Section 1(c) entrenches the supremacy of the Constitution and the rule of law. The principle of legality requires that anything done in conflict with the rule of law shall not enjoy the force of law.[15] Eliminating illegalities that occur in business rescue proceedings should be automatic. Consequently, to interpret s 133 as indiscriminately barring all legal proceedings unless they meet the requirements of subsections (a) to (f) undermines the principle of legality.

[13] This application challenges the business rescue proceedings on the substantive ground that such proceedings have come to an end. Furthermore s 130(5) and by way of another example, s 132(2)(a)(i) permit applications to court to set aside a company's resolution to begin business rescue proceedings without rendering these sections subject to the leave of the court being granted in terms of s 133. Nor is there any rider in s 133 qualifying applications brought under those sections.

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[15] C Hoexter *Administrative Law in South Africa* (2ed) 12-3, 116 fn 36 and cases cited there; E Mureinik *Discretion and Comment: The Sock Exchange Case* 102 *SALJ* 434

[14] The respondents failed to support with any authorities their contention that the application should be disjunctive of the substantive legal proceedings. Moreover, the allegations in support of the substantive relief claimed in terms of s 130(5)(a) of the Act also support the application in terms of s 133(1)(b) of the Act. Without sufficient precise information as to how the business rescue proceedings are being conducted the court would be hamstrung in intervening to give any directions that counsel for the respondents anticipate. With the information the court has in this application their suggestion that the court appoint another independent person to assess the business rescue proceedings and the application for provisional liquidation will serve no purpose other than to bulk up the bureaucracy and delay the resolution of the claims of all stakeholders.

[15] Accordingly, I find that the applicant did not need to apply in terms of s 133(1)(b) to institute proceedings to set aside the resolution.

Issues in dispute

[16] Having abandoned its challenge in terms of s 129(5) of the Act that the resolution to commence business rescue and placing the ZCR under supervision had lapsed and was a nullity, the applicant persisted with its alternative grounds for setting aside the resolution in terms of s 130(1)(a)(ii) and 130(5)(a) and to declare the business rescue proceedings to be terminated. The applicant contends that there is no reasonable prospect for rescuing the company and, having regard to all the evidence, it is just and equitable to set aside the resolution..

[17] Broadly, the applicant relies on 2 interconnected factors:

(a) There has been a delay of 11 months since the BRP was appointed on 5 September 2013 until this application was launched.

(b) Notwithstanding the passage of time the BRP has failed to develop and propose a business rescue plan that makes sense.

In support of these submissions the applicant referred to *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) para 17 and 18 and *Welman v Marcelle Props* 193 CC (33958/2011) [2012] ZAGPJHC 32 (24 February 2012).

[18] The respondents resisted the termination of the business rescue proceedings on the basis that none of the options on termination provided in s 130(5)(c) were 'apposite'. Furthermore, the fact that the plan did not comply with s 150 was not a reason for setting aside the business rescue proceedings. Mainly, the respondents sought to persuade the court to give effect to the letter and spirit of the Act in introducing business rescue proceedings as stated in s 7 and several judgments.[16]

The Delay

[19] As regards the delay s 132(3) of the act provides that if a company's business rescue proceedings have not ended within three months the BRP must apply to court for an extension of time. Supporting such an application must be a report on the progress of the business rescue proceedings and an update at the end of each subsequent month until the end of the proceedings. The BRP must also deliver the report and regular updates to the court. Section 132 does not spell out what the consequences would be if the BRP fails or refuses to apply to court for an extension. Besides, the passage of time is not the only consideration in deciding whether business rescue should continue or come to an end. Nevertheless, the sense of urgency in finalising business rescue proceedings is manifest from these provisions. I am unaware of any application for extension being made by the BRP in this case.[17]

[20] *DH Brothers Industries (Pty) Ltd* v *Gribnitz* above para 26–27 acknowledges that 'time is of the essence' in a business rescue because it is an intrusion on the rights of

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[16] *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) para 34-39; *Madodza (Pty) Ltd v Absa Bank Ltd and Others* [2012] ZAGPPHC 165 para 12-15.

[17] *Welmen v Marcelle Props 193 CC and Another* (33958/11) [2012] ZAGPJHC 32 (24 February 2012) para 26.

creditors.[18] A countervailing consideration that underpins the rationale for business rescue is the purpose of the Act of allowing companies to contribute to enhancing the economic welfare of South Africa as a partner within the global economy.[19]

[21] In refusing an application for postponement by a company in business rescue in *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10 the Western Cape Court remarked :

> 'It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen ... the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted.'[20]

[22] Unlike the facts in *DH Brothers* in this case the meetings of stakeholders and the adoption of a business rescue plan has been postponed on several occasions sometimes at the instance of the applicant. The various drafts of the plan were not acceptable to all the stakeholders in particular the applicant. No matter who sought the postponement for whatever reason, protracted business rescue proceedings would be permissible if the plan works, is capable of working or enjoys the support of significant stakeholders.

[23] In this case a plan has yet to be adopted. Almost triple the expected time of three months has passed since the process began. Alarming as the delay is it must be assessed in the context of what has been achieved.

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[18] See also *Koen* and *Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10.
[19] Section 7(e) of the Ac.t
[20] *Koen* at para 10.

The Content of the Business Rescue Plan

[24] The scheme of business rescue is manifestly to enable stakeholders to participate meaningfully in the business rescue process. The BRP must make full disclosure of all relevant information to enable stakeholders to make informed decisions. Such disclosure must also seek to clarify and convince stakeholders of the factual basis for seeking business rescue, that it is a genuine attempt at rescuing the business and not a subversive exercise to enable the company to avoid its creditors. A BRP cannot hope to secure buy-in or endorsement of stakeholders without full and meaningful disclosure of relevant information.

[25] The Act prescribes the content of the proposed business rescue plan in general terms for the obvious reason that it applies to all industries and sectors of commercial enterprise, big and small. However, the Act does stipulate basic minimum requirements in s 150(2)(a) in three parts as to what a business rescue plan must contain. Part A: Background, Part B: Proposals and Part C: Assumptions and Conditions 'must include at least' the list of requirements set out in those parts. Nothing precludes the BRP from providing more information if such information would be relevant to enabling stakeholders to accept, reject or modify the business rescue plan. But he cannot provide less.

[26] Turning to each of the requirements in s 150(2)(a) Part A subsection (i) requires:

> '(i) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;'

The plan states:

> 'Material Assets
>
> Immovable Property- The Boomlaer Dump

> Valuation thereof: R14 500 000.00 (market related) calculated at R12 rand per ton with a reserve of 1 200 000 tons of material R9 600 000.00 (forced sale) at R8 per ton.
> The assets are free unencumbered save for a limited covering bond in favour of Resource Washing.
> No appraisal was obtained and the practitioner reserves his rights to do so should it be deemed necessary by direction of affected parties.'

[27] Although the plan reflects the immovable property it does so without any description as to its location, title deed, size or value. The valuation appearing below it is misleading. It refers to the valuation of the property. However, what is provided is the valuation of the coal deposits on the property. The applicant has a notarial covering bond over ZCR's stock in trade on the immovable property and is therefore aware of the property description. The same cannot be said of other creditors participating in the business rescue process. Furthermore 'covering bond' could refer to both a mortgage bond over immovable property and a notarial bond over movables. The business plan does not disclose over which assets the covering bond is held. In this regard too it is misleading and imprecise. The only known covering bond is the notarial bond in favour of the applicant. Presumably the immovable property is freehold.

[28] Despite the passage of eleven months before this application was launched the BRP failed to obtain an appraisal of the assets, a material piece of information to enable stakeholders and the court to decide whether the business is genuinely in need of rescue, whether there is or is not sufficient assets to meet the claims of creditors, whether the business's cash flow problems could be resolved by raising capital using unencumbered assets as collateral and ultimately whether it is better to remain in business rescue than to liquidate the business.

[29] Section 150(2)(a) Part A subsection (ii) requires:

> '(ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify

as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims'.

The business plan provides:

'List of known creditors as at commencement of business rescue

M. Yacoob	R7 035 796.00
Schoerie and Sewgoolam	R 159 000.00
R. Verster	R1 209 869.00
Resource Washing Services	R2 380 211.10
Deloitte & Touche	R 193 800.00
South African Revenue Services	Unknown
Total:	R10 978 676.10'

[30] *Henochsberg* observes[21] that although the term 'creditor' is not defined in the Act it should bear its normal meaning. It would therefore include an employee to whom outstanding amounts relating to employment are due. The business plan does not disclose what, if any, amounts are owing to its employees. Nor does it reflect whether any amounts are due and payable to the local authority in respect of rates and taxes.

[31] It is a poor reflection on the BRP to record 'unknown' against the claim of the South African Revenue Services (SARS) who is a creditor and a participant in the business rescue process. The BRP offers no explanation as to why after 11 months he is still unaware of SARS' claim. His duty is to ascertain the claimants and the amounts of their claims. If SARS has no claim then it would not be reflected as a creditor; it would certainly not be participating in the business rescue process. Deloitte and Touches' claim is for services rendered in compiling the 2012 financial statements of ZCR. That presupposes there were financial statements for 2011, a fact relevant to the requirement of disclosure of financial information below.

[21] PA Delport (ed) *Henochsberg on the Companies Act 71 of 2008* Vol 1 (October 2014 – Service Issue 9) 445.

[32] Although the business rescue plan does not indicate whether the creditors are secured, preferent or concurrent and whether any have proved their claims this information appears in other parts of the business rescue plan. The applicant disputes the claim of M. Yacoob on the basis that it is not apparent as to whether he is an independent and bona fide creditor. Section 145 (5)(a) requires a BRP to determine whether a creditor is independent. It emerged in this application that M. Yacoob ceded his claim to Bayete Mining Resources (Pty) Ltd (Van Rooyen), the company competing with the applicant to buy the ZCR's dump material, allegedly for monies lent and advanced. Coinciding the interests of creditor Bayete as trading partner with its interests as shareholder would have been less suspicious if the cession was revealed in the plan and discussed with other stakeholders before such a significant disposal of shareholder interests had occurred. The cession may or may not be a positive development depending on how Bayete intends to influence the settlement of claims of all other creditors. The court has no information to make this assessment. In any event it was not invited to do so.

[33] Section 150(2)(a) Part A subsection (iii) requires:

> '(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;'

The business plan provides:

> 'The probable dividend if liquidated
>
> Secured creditor: 100 cents in the Rand (limited to the extent of the bond, subject to same been perfected)
>
> Preferent Creditors None exist
>
> Concurrent Creditors as per the above creditors schedule. Estimated to be 100 cents in the rand with the effluxion of time alternatively approximately 80 cents in the rand on a forced sale.'

[34] Having failed to indicate which of the creditors are secured, statutory preferent and concurrent as required in the preceding subsection (ii) the response to the requirements in subsection (iii) is meaningless without any calculation, source documents, explanation or motivation. Without some estimation of how long it would take to settle claims stakeholders and the court cannot make informed decisions on the viability of the plan. Why creditors would stand to receive 80 cents in the rand when the current assets alone of R14m, excluding the value of the freehold immovable property, exceeds the liabilities of R11m tabled above is puzzling. The BRP's projections are unconvincing, irrational and unreliable.

[35] Section 150(2)(a) Part A subsection (iv) requires:

> '(iv) a complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any'.

The BRP ignored this requirement altogether.

[36] Section 150(2)(a) Part A subsection (vi) enquires:

> '(vi) ... whether the proposal includes a proposal made informally by a creditor of the company'.

Presumably the BRP is responding to subsection (v) when he states:

> 'Offers have been received from various parties namely: Osho Coal and Keaton and KwaZulu-Natal Crushing (Pty) Ltd. These appear to have been withdrawn alternatively have lapsed by fluxion of time.'

What the attitudes of all the participants in the business rescue process were to these offers and why they were not accepted, are not known to the court.

[37] <u>Part B: Proposals</u>

[38] Section 150(2)(a) Part B subsection (i) requires:

'(i) the nature and duration of any proposed debt moratorium'.

Part B is also not a model of clarity and certainty. The BRP produced the offers from the applicant and Bayete. He bases his proposals on these two offers. The moratorium referred to subsection (i) depends on which of the two proposals is 'deemed appropriate by creditors'. ZCR does not seek to be released from paying its debts.[22] In anticipating paying creditors fully but over an extended period depending on which proposal, if any, is adopted, the approximate duration is not forecasted.

[39] As for ZCR's on-going role and treatment of any existing agreement the BRP discloses in terms of subsection (iii) the following:

> '3. It is anticipated (on the Resource Washing and Bayete proposals) that the entity will retain its asset base, both movable (to the small extent that it does have) and immovable, and earn an income in the form of payment generated on a rate per ton per month, for the benefit of the general body of creditors.
> 4. It is proposed that the governing asset (the dump material inclusive of slurry) of the entity be utilised for the direct generation of income in terms of the plan in order to make funds available to pay creditors.'

[40] How it intends to retain its asset base of movables and simultaneously 'utilise' the 'governing asset' that is the dump material inclusive of slurry to generate income to pay off creditors is incomprehensible. It transpires that by 'utilise' the BRP means 'sell'. But if he sells he will be depleting the applicant's security held via its notarial bond. Section 134(3)(a) prohibits the BRP from disposing of any property over which another person has any security without the prior consent of that person unless the proceeds will be sufficient to fully discharge that persons claim and pay or secure that person's

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[22] Section 150(2)(b)(Part B)(ii)

claim promptly. The BRP's plan to dispose of dump material is with not with the applicant's consent. Nor is the proceeds of the disposal intended to 'promptly 'settle or secure with ZCR's indebtedness to the applicant. For this reason alone the plan is a non-starter.

[41] Later the BRP adds:

> '9. The plans for consideration is that ring fenced debt shall be reduced by payment of the minimum sum of R150 000 per month, commencing on a date thirty days from the receipt of the first payment as proposed.
> 10. In addition, the adoption of the business rescue plan will mean that the business will be ongoing and also be generating a meaningful monthly income which can be used to reduce the ring fenced creditors claims as stipulated at commencement of business rescue and meet its current obligations.'

[42] How the BRP arrives at R150 000 he does not explain. What the 'ring fenced debt' is remains uncertain. As stated above the full list of creditors and the amounts owing to them are unknown to all the stakeholders and, at this stage of the proceedings, even to the court. Reducing the debt is a retreat from the earlier undertaking to pay the ZCR's debts fully over time and to satisfy the claims of creditors at 100 per cent in the rand. In the BRP's response as to why the plan should be preferred instead of liquidation this undertaking is further whittled down to the ZCR paying its debt 'either in full alternatively a major portion'.[23] Such inconsistencies in a plan may be overlooked as being in the nature of the uncertainty of plans if the foundation of information on which the plan rests is credible and reliable.

[43] Unhelpfully the BRP assumes that:

> 'the plan will end with the fluxion of time and compliance alternatively against failure to substantively comply with the business rescue plan as adopted.'

[23] Para 7(b) of the plan.

With no projection as to when the plan would end and with failure being a possibility independent creditors have little reason to vote in favour of it.

[44] The first assumption the BRP makes in response to Part C of s 150(2) of the Act is that the ZCR should remain intact to trade 'as a going concern alternatively the outright buy be facilitated'. '[O]utright buy' is ambiguous if not misleading. It could refer to the sale of ZCR or only its business as a going concern. Whether either includes or excludes the immovable property is also not clear. The only 'trade' contemplated is the sale of the movable dump material over which the applicant has a notarial covering bond.

[45] Although the plan does not state how many employees ZCR engages it transpires that there were two employees: Mrs van der Merwe, a shareholder and the son of Mr Verster, the deponent to the affidavits for ZCR. The son is no longer an employee. What Mrs van der Merwe does and what her remuneration is are not disclosed in the plan.

[46] Although not evident from the plan it emerges in the answering affidavit that the respondents intend to sell the dump material as is to buyers who would undertake the washing and processing of the raw materials themselves. This would avoid the ZCR having to obtain washing and other licences. This could be a viable option. Whether it is necessary for the ZCR to remain in business rescue to execute this option is discussed further.

[47] Section 150(2)(c) Part C (iv) calls for a 'a projected -:

> (aa) balance sheet for the company; and
>
> (bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted.'

The BRP dismissed this requirement as 'not applicable at this stage'. His explanation is that the estimated income from the two offers is 'determinable at the suggested minimum tonnages and rate per ton.' He reserves the right to determine the projections on either option being adopted.

[48] This is not what the section prescribes. 'At least' he 'must' project a balance sheet and income statement for three ensuing years on the 'assumption' that the proposed business plan is adopted. Furthermore s 150(3) anticipates and therefore permits 'alternative projections based on varying assumptions and contingencies' in the projected balance sheet and statement of income and expenses.

[49] The obvious starting point of any assessment of an entity's commercial viability is its financial statements. For this there must be full financial disclosure of the company in an authentic and credible way to the stakeholders and to the court. Usually production of the financial records for the company would serve this purpose. Without such records in this instance the BRP was statutorily bound to project a balance sheet and income and expense statement. He has failed to do so.

[50] In *Commissioner, South African Revenue Service* v *Beginsel NO and Others* 2013 (1) SA307 (WCC) at para 38 the court remarked that:

> 'upon a proper construction of s 150(2) substantial compliance with the requirements of the section will suffice. This would, in my view, mean that where sufficient information, along the lines envisaged by s 150(2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected, there would have been substantial compliance.'

[51] In *Welmen* the South Gauteng High Court dismissed an application to place a company under supervision and business rescue '[b]ecause of the dearth of facts upon

which' that application was based.[24] In *Koen* [25] the Western Cape Court found that the applicant had 'fallen woefully short of furnishing the court with the material required to make the assessment of whether a reasonable prospect of business rescue succeeding exists.'

[52] Success of a plan must be evident or at least the expectation of it should rest on objectively reasonable grounds.[26] My analysis above shores up the deficiencies in the plan that arise from a serious failure to disclose relevant and reliable information to the stakeholders. The failure is not merely an inadvertent oversight. For instance, the applicant had asked repeatedly for a list of the shareholders. It became aware of who they were only in the respondents' affidavits filed in this application. Furthermore, management and assessment of any business starts with an understanding of its financial statements. If the 2012 financial statements are not available because ZCR has not paid Deloitte's for them then the BRP should have obtained and disclosed the 2011 financials or used it as a basis on which to authenticate the information he receives from the ZCR and to estimate its subsequent financials. He could have asked SARS for its records of ZCR's financials with the assistance of ZCR, if necessary.

[53] Disconcertingly the language of the plan is opaque, ambiguous and in parts contradictory. If the court has misunderstood it the poor quality of the draft must account for such misunderstanding. Bearing in mind that the BRP is a practicing attorney who is writing possibly for non-lawyers he must appreciate the special need to express his thoughts precisely and clearly. The absence of these qualities in the plan plus the non-disclosure of relevant and reliable information inspires no trust and confidence in the BRP and his plan but doubt and suspicion.

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[24] *Welmen* para 29. *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ); *_Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (GSJ) (unreported case no 12/45437, 16566/12, 28-32013)
[25] Para 25.
[26] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB); Blair Wassman *Business rescue - getting it right* De Rebus; 28 January 2014; 28 KB

[54] Although the ZCR appoints the BRP the latter is an officer of the court reporting to the court.[27] The business rescue plan proposed by the BRP requires him to facilitate the claims and interests of the various stakeholders in deciding whether to accept or reject the proposals made in the plan.[28] Most importantly, a BRP has the same responsibilities, duties and liabilities as a director of a company as set out in ss 75 - 77 of the Act. Section 75–77 partially codifies the duties of directors and by extension the BRP's. However, their duties are largely regulated by the common law and codes of best practice such as the King Report on Corporate Governance.[29]

[55] Essentially BRPs, like directors of a company, have non-negotiable fiduciary duties towards the company. Directors are duty bound to exercise an independent discretion.[30] The BRP may not be a dummy or puppet blindly following instructions of a shareholder or anyone else who appointed him. If he does so he commits a breach of his statutory duty.[31] He also has a statutory duty to act bona fide in the best interest of the company irrespective of any contractual obligation he agrees to.[32] Under s 77 the BRP assumes the same liability as directors and prescribed officers of a company. This includes the liabilities arising from his fiduciary duty, loss, damages or costs.

[56] The BRP is a facilitator of conflicting and competing claims. To succeed he has to earn the trust of all the stakeholders. Crucial to earning trust he must be demonstrably and impeccably open, independent, impartial, competent and capable. In short a BRP must be a person of the highest integrity. A BRP who fails to meet these standards may be removed by application to court in terms of s 139.

[57] The conditional counter-application invites the court to order that ZCR be placed under business rescue under the stewardship of another BPR. Turning to Australian

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[27] Section 140(3).
[28] PA Delport (ed) *Henochsberg on the Companies Act 71 of 2008* Vol 1 (October 2014 – Service Issue 9) 517.
[29] King III Practice notes: *Guidance on Business Rescue*
[30] PA Delport (ed) Henochsberg on the Companies Act 71 of 2008 Vol 1 (October 2014 – Service Issue 9) 298(5).
[31] Section 139 (2)(e)
[32] *Henochsberg* above.

law, which is the backdrop to the Act, the court in *Jeffrey Raymond Dallinger* v *Halcha Holdings Pty Ltd (Administrator Appointed) and Christopher Mel Chamberlain* [1995] FCA 1727 (8 December 1995) para 17-18 considered the power under section 449(b) of the Corporations Law which authorises the court to remove an administrator and appoint a replacement if to do so would conduce to the better conduct of the administration. On the facts in that case the court found the administrator to be suitable, competent and impartial. Therefore there was no evidence that the administration would be better conducted by someone else.[33]

[58] Contrastingly in this case the evidence suggests otherwise. The BRP in this case does not demonstrate these qualities clearly and convincingly. Respondent counsels' suggestion that the court appoint another independent person to assess whether business rescue or liquidation should be followed substantiates the court's finding that the BRP is unsuitable. As an officer of the court the the BRP cannot be seen to be making common cause with the ZCR by being represented by the same counsel. Conflicts of interest can arise as they do when the BRP's compentence, impartiality and independence are challenged. Commentators calling for up-skilling BPR's and orientating them to their statutory obligation find justification in cases such as this.[34]

[59] Against this analysis the BRP's concluding certificate prescribed in subsection 4 is untrustworthy and unreliable. Over 11 months the BRP has achieved little. He has not fulfilled his basic statutory responsibilities. His plan does not have sufficient reliable information to persuade me that the twofold jurisdictional requirements in s 128(1)(b)(iii) of the Act for business rescue persist. These requirements are that there is a likelihood of the company continuing in existence on a solvent basis and failing that, business rescue proceedings will result in a better return for creditors and shareholders than liquidation of the company would. Such information that has been disclosed points to be ZCR and its creditors being better off without business rescue.

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[33] *Jeffrey Raymond Dallinger* v *Halcha Holdings Pty Ltd* (Administrator Appointed) and Christopher Mel Chamberlain [1995] FCA 1727 (8 December 1995) para 22

[34] Rezen Papaya 'Are business rescue practitioners adequately regulated' [2014] De Rebus 241.

[60] Having regard to the macroeconomic policy considerations in s 7 underpinning business rescue terminating business rescue in this case will not defeat those developmental objectives on the contrary it might facilitate development. ZCR is a business in the mining industry. Currently it is dysfunctional. Disposing of it or its business as a growing concern in the ordinary course so that it becomes functional would be consistent with the developmental objectives of s 7.

[61] On the available information the BRP has listed creditors to the value of about R11m. He projects the value of the dump material to be conservatively R9,6m on the applicant's offer and R14,5m on the Bayete offer. These figures exclude the value of the immovable property that inexplicably remains undisclosed in this application. In the absence of any indication that the property is anything but freehold, the prospect of using the property to raise capital to refinance the business to stave off its immediate cash flow constraints is an obvious option that surprisingly is not considered in the plan. Faced with what is projected as being essentially a cash flow constraint arising from conflict with the applicant as a service provider, reflexively recourse should have been to explore ways to recapitalise the business. If the BRP considered this option there is no explanation as to why it was not acted upon. Whether a loan from shareholders or an issue of shares was tabled as options is also not evident.

[62] Given the passage of 11 months the BRP has little progress to show. If any assessment can be made at all it is that the plan is skewed to protect shareholders at the expense of independent and minority creditors. The BRP has little hope of convincing minority independent creditors to vote in favour of the plan. For these reasons the business rescue should be terminated

The remedy

[63] Turning to the remedy on the available information I am unable to find that any of the requirements of s 130(1)(a) for setting aside the resolution to declare ZCR to be under business rescue had been met. I cannot find that a reasonable basis exists for

believing that ZCR remains financially distressed or that there is no reasonable prospect for rescuing the company. I have found that the ZCR can continue in business on a solvent basis without being in business rescue. If it was commercially insolvent when it was placed in business rescue without opposition it has had sufficient time to put itself on a firm financial footing if the shareholders and the BRP genuinely intended to settle the claims of the independent creditors. Section 130(1)(a) cannot be the basis for setting aside the resolution.

[64] Helpfully, s 130(5)(a)(ii) exists. It provides :

> 'When considering an application in terms of subsection (1) *(a)* to set aside the company's resolution, the court may-
> *(a)* set aside the resolution-
>
> (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;'

DH Brothers highlights difficulties in interpreting and applying the 'just and equitable' discretion of the court in s 130(5)(a)(ii). Challengingly at this nascent stage of the development of the Act the 'just and equitable' power that s 130(5)(a)(ii) confers on courts injects a degree of flexibility necessary to cater for the numerous circumstances that can arise to justify or not justify setting aside the resolution. A just and equitable power can work in favour of or against the company in business rescue. As the court is so empowered anyone seeking to invoke such power must lay the factual and legal basis for invoking it. I doubt that any litigant who sets out a compelling basis for invoking the court's just and equitable powers can justifiably suffer the striking off of its pleadings. I do not have to decide this issue as the court in *DH Brothers* did because in this case the applicant seeks to invoke the just and equitable power of the court to set aside the resolution declaring ZCR to be under business rescue without the respondents resisting with a striking off of its pleadings.

[65] In view of the deficiencies in the plan I find that the respondents have failed to make the case for business rescue of the ZCR. The twofold jurisdictional requirements

in s 128(1)(b)(iii) of the Act do not exist. Accordingly, the main application should succeed

[66] Mr Verster as director and shareholder of ZCR has delivered a conditional counter-application seeking to reinstate ZCR under business rescue under the stewardship of the same BRP if the respondents fail in opposing the main application. Following my findings above the conditional counter-application should be dismissed.

[67] As for the application for provisional liquidation, I have found that the ZCR is not insolvent. Recapitalisation, the sale of ZCR or its business in the ordinary course, hold better prospects of satisfying the claims of creditors than liquidation. However, if theses options do not materialise the applicant would still have an opportunity to apply to liquidate the ZCR. The application for provisional liquidation should be adjourned with the applicant having leave to reapply on the same papers supplemented if necessary.

Costs

[68] A substantial portion of the application related to the applicant's s 129 challenge. It became aware that the BRP's registration certificate had been properly issued before his appointment when the respondents delivered their replying affidavit in the counter-application. It should have abandoned its challenge at that point. Instead it ran up unnecessary costs that took up 50% of the heads of argument and wasted the court's time in preparing for hearing it. Consequently the applicant should bear the respondents' costs related to the s 129 challenge from the 18 October 2014 to the date of the hearing. For the rest costs follow the results with the further qualification that the BRP and Mr Verster should bear costs jointly and severally with the ZCR.

Order

i. The application setting aside the resolution to commence business rescue proceedings and placing the first respondent under supervision annexed as 'FA116' to the founding affidavit is set aside in terms of s 130(5)(a) of the Companies Act, 2008 with costs.

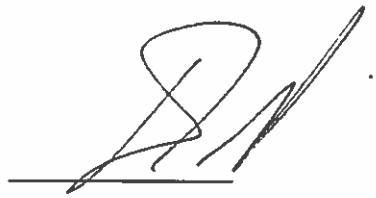
ii. The costs referred to in (i) above shall be born by the first, second and third respondents jointly and severally the one paying the others to be absolved.

iii. The business rescue proceedings pertaining to the first respondent are declared to have come to an end.

iv. The application for provisional liquidation is adjourned sine die with costs reserved.

v. The applicant has leave to reapply for provisional liquidation on the same papers supplemented if necessary.

vi. The conditional counter-application is dismissed with costs such costs to be born by the first, second and third respondents and Mr Verster, jointly and severally the one paying the others to be absolved.



D. Pillay J

APPEARANCES

Counsel for the plaintiff	:	B.M Gilbert
Instructed by	:	Cuzen Randeree c/o Venns Attorneys Ref: Mr R A Stuart – Hill/ Michael/26145043 Tel: (033) 355 3100 Fax: (033) 394 1947
Counsel for the first to third respondents	:	Y.N Moodley SC, H.S Gani
Instructed by	:	Vather Attorneys Ref: U Vather Tel: (033) 342 4099 Fax: (033) 342 4075