REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

Signature .....

Date 06/05/2020

CASE NO: 3039/2018

In the matter between:

VLEISSENTRAAL BLOEMFONTEIN (PTY) LTD	**FIRST APPLICANT**
VLEISSENTRAAL BOSVELD (PTY) LTD	**SECOND APPLICANT**
VENCOR HOLDINGS (PTY) LTD	**INTERVENING CREDITOR**
and	
MADIKOR SESTIEN (PTY) LTD	**FIRST RESPONDENT**

CASE NO: 1699/2019

In the matter between:

VENCOR HOLDINGS (PTY) LTD	**INTEREVNING CREDITOR**
and	
PETRUS JOHANNES STEFANUS LE ROUX NO.	**FIRST RESPONDENT**
LOUISE DEKKER NO.	**SECOND RESPONDENT**
SUSANNA PETRONELLA LE ROUX NO.	**THIRD RESPONENT**
MADIKOR SESTIEN (PTY) LTD	**FOURTH RESPONDENT**
(IN LIQUIDATION)	
VLEISSENTRAAL BLOEMFONTEIN (PTY) LTD	**FIFTH RESPONDENT**
VLEISSENTRAAL BOSVELD (PTY) LTD	**SIXTH RESPONDENT**

In re:

In the Application of:

PETRUS JOHANNES STEFANUS LE ROUX NO.	**FIRST APPLICANT**
LOUISE DEKKER NO.	**SECOND APPLICANT**
SUSANNA PETRONELLA LE ROUX NO.	**THIRD APPLICANT**

(For an application to place Madikor Sestien (Pty) Ltd (in provisional liquidation) in Business Rescue in terms of section 131 of Act 71 of 2008)

JUDGMENT

MAKGOBA JP

[1] This judgment addresses two related applications. The first application under Case No. 3039/2018 is by Vleissentraal Bloemfontein (Pty) Ltd and Vleissentraal Bosveld (Pty) Ltd to wind-up Madikor Sestien (Pty) Ltd which application is now at the stage of the return day of a provisional winding up order issued on 3 December 2018. The second application under Case No. 1699/2019 is by the trustees of the Kremetart Trust, the sole shareholder in Madikor Sestien (Pty) Ltd, for an order to begin business rescue proceedings of Madikor Sestien (Pty) Ltd pursuant to section 131(1) of the Companies Act 71 of 2008.

The two Vleissentraal creditors and Vencor Holdings (Pty) Ltd (the Intervening Creditor) oppose the application for an order to begin business rescue proceedings.

[2] There is therefore, essentially, both an opposed application for winding-up (Case no. 3039/2018) ("the liquidation application") as well as an application for business rescue (Case No. 1699/2019) ("the business rescue application") before this Court, and both applications are opposed.

Vleissentraal Bloemfontein (Pty) Ltd and Vleissentraal Bosveld (Pty) Ltd are, for the sake of convenience, and unless expressly indicated otherwise, referred to as the "Vleissentraal creditors".

[3] The Vleissentraal creditors are secured creditors of Madikor Sestien (Pty) Ltd ("Madikor") and have launched a liquidation application against Madikor under case number 3039/2018 that culminated in a provisional liquidation order against Madikor on 3 December 2018.

Vencor Holdings (Pty) Ltd ("Vencor") is also a secured creditor of Madikor and has launched intervention applications in respect of both the liquidation application and the business rescue application. The Vleissentraal creditors also intervene in the business rescue application in order to oppose same.

Petros Johannes Stefanus Le Roux NO., Louise Dekker NO. and Susana Petronella Le Roux NO. are the joint trustees of the Kremetart Trust ("the Trust"). They are the First, Second and Third Applicants under case number 1699/2019 and seek an order to place Madikor under business rescue.

[4] In chronology, the liquidation application was launched first, on 18 May 2018. Madikor, represented by its director Mr Le Roux opposed the liquidation application. This Court, per Muller J granted an order for the provisional liquidation of Madikor on 3 December 2018. It is this provisional order which has been extended from time to time.

Factual Background: Liquidation Application

[5] The joint claim of the two Vleissentraal creditors is substantial, in total the sum of R 5 859 518.05. Vleissentraal Bloemfontein claimed an amount of R 3 637 800.64 plus interest at a rate of 12,5% per annum calculated from 1 May 2018 to date of payment, and Vleissentraal Bosveld claimed an amount of R 2 221 717.41 plus interest at a rate of 12,5% per annum calculated from 1 May 2018.

It is clear from the founding affidavit that the two Vleissentraal creditors first instituted two separate summons for provisional sentence against Madikor in the Gauteng Division of the High Court, Pretoria under case numbers 59265/17 and 75517/17. The debts were not disputed by Madikor. The institution of the said proceedings then culminated in the entering into a deed of settlement which was signed on 6 December 2017.

[6] In terms of the aforesaid settlement agreement Madikor expressly acknowledged the debt due to the Vleissentraal creditors and furnished an

undertaking to make payment of the debts. The settlement also embodied a further undertaking on the part of Madikor, that in exchange for granting Madikor an extension of time within which to pay the debt, Madikor gave an undertaking to ensure that the trustees of a trust known as the Mollevelle Plase Trust would ensure that the trust bind itself as a surety and co-principal debtor in favour of the Vleissentraal creditors for the due payment of the debts owed to those entities by Madikor. It may be mentioned that this was not the first acknowledgement of debt made by Madikor. On 13 December 2016 Madikor did make acknowledgement of debt which expressly acknowledged in writing the debt due to Vleissentraal creditors.

Madikor made certain payments pursuant to the entering into the 2016 acknowledgement of debt, but failed to honour all the undertakings in order to discharge the debt.

[7] Vleissentraal creditors allege in their application for liquidation that notwithstanding the undertaking given to them, namely to ensure that the trust would sign a suretyship and that a mortgage bond in favour of the Vliessentraal creditors would be registered over certain immovable properties, Madikor failed to honour these undertakings.

Madikor, on a number of occasions, made further requests for indulgences in order for it to be granted an opportunity to make payment of the undisputed debt, but by the time the application for winding-up was launched, Madikor

had been in breach of its repeated undertakings given to the Vleissentraal creditors for a protracted period of time.

[8] Despite some frivolous grounds for opposition advanced by Madikor, it ultimately became clear that the debt could not be disputed *bona fide* and upon reasonable grounds by Madikor and it was furthermore clear that there were grounds for winding-up order on 3 December 2018. The first return date of the provisional winding-up order was 19 March 2019.

[9] One day before the return date, and on 18 March 2019 the same Mr Le Roux (sole director of Madikor) who signed the opposing affidavit in the liquidation application on behalf of Madikor, signed a founding affidavit in terms whereof another trust, the Kremetart Trust launched an application for business rescue in respect of Madikor. It is this application which was launched under case number 1699/2019. It was alleged that the Kremetart Trust is the sole shareholder of Madikor, and consequently an affected person as contemplated in section 131 of the Companies Act, 71 of 2008. In the result, by virtue of the bringing of the application for business rescue, the provisional order could not be confirmed and had to be extended.

[10] On 3 July 2018 Vencor filed an application in order to:

(1) intervene in both the winding-up application and in the business rescue application; and

(2) to procure an order for the dismissal of the business rescue application and the granting of a final liquidation order.

Vencor made common cause with the Vleissentraal creditors.

[11] Vencor explained that it is a major secured creditor of Madikor. Like the Vleissentraal creditors, Vencor provided credit to Madikor. Vencor also purchased from Madikor an abattoir and certain motor vehicles during 2016. It concluded an oral lease agreement whereby Madikor would lease from Vencor a butchery and that Madikor would also pay to Vencor rental and electricity expenses in relation to the butchery.

In respect of the oral lease Vencor alleged that Madikor owed it an amount of R 79 330.93 and on the credit facility owed it an amount of R 3 392 475.37. Madikor took a loan from Vencor and registered in favour of Vencor a continuing covering mortgage bond over the farm Kaaienbult, Limpopo securing a debt of R 4 million, which Madikor undertook to repay over 15 years.

[12] Vencor further alleges that Madikor failed to pay any instalment to Vencor, but a bulk payment of R 200 000.00 was made on 3 July 2018. As at 30 April 2019 the following amounts were owed by Madikor to Vencor:

R 1 263 179.46 : for credit facility

79 330.93 : for rental

R 4 502 429.53 : for loan

5 845 429.92

Vencor also gave examples in its papers of financial difficulties experienced by Madikor over a protracted period of time and also stated that Madikor breached the agreement of sale entered into between Vencor and Madikor, in the sense that Madikor, in breach of the sale agreement, competed with Vencor by being involved in "groot handel" in competition with Vencor.

[13] Vencor mentioned that Madikor is also indebted to another creditor, Kuyanda, in an amount of R 442 146.45 and that on 24 January 2018 Kuyanda issued an application for the winding-up of Madikor in this Court under case number 491/2018. It also became apparent that Madikor was in the process of selling certain of its assets.

On 13 March 2018 Kuyanda and Madikor concluded a written agreement of settlement in respect of the liquidation application under case number 491/2018. In terms of the settlement order Madikor was obliged to make payment to Kuyanda of the sum of R 440 000.00 from the proceeds of the

sale of an immovable property of Madikor. By so earmarking the proceeds of the sale of immovable property as a source of funds to pay a creditor, Madikor, according to Vencor, breached the terms of the security which it provided to the Vleissentraal creditors.

[14] On 11 June 2018, and prior to its intervention in the liquidation application Vencor instituted an action under case number 3544/2018 in which Vencor claimed an amount of R 5 052 868.33 from Madikor. Vencor further stated that Madikor was concealing its 2017 annual financial statements from the Court because those financial statements, according to Vencor, would illustrate that the liabilities of Madikor are far more than those stated in the papers.

Factual Background: Business Rescue Application

[15] Madikor was established during 2001 in order to produce cattle destined for slaughter, with an abattoir and wholesale distribution and retail outlets. As explained in its founding papers for the business rescue application, Madikor was initially successfully conducted as a business but its financial predicament started when it assumed liability, during 2013, for a debt of the father of the deponent (Mr Le Roux) and a company under the father's control.

This then, so the explanation continued, led to a realisation during 2015/2016 that Madikor has to be restructured and in this regard certain steps were allegedly implemented, such as for example selling the abattoir to Vencor for an amount of R 18 125 000.00. In this regard reference is made to Madikor's financial statements which shows a total liabilities of R 83 249 111.00 and assets allegedly valued at R 108 114 510.00.

[16] It is stated in its papers that Madikor has 6 immovable properties registered in its name, namely one farm and a number of other erven and residential units. It was explained that a decision was made that Madikor would sell some of its immovable properties, save for the farm Kaaienbult 675, Limpopo which was valued at R 13 million, and that in respect of certain of these immovable properties successful sale agreements were already concluded. It is stated that Madikor is solvent, and that by virtue of the sale of the other immovable properties Madikor would be in a position to make significant payments to its creditors. In fact it is stated in its papers that Madikor is simply not as at that particular point in time immediately in a position to pay the debt due to the Vleissentraal creditors, but if some breathing space was to be given to the company, it would soon be in a position to pay its debts by effectively converting its assets into cash.

[17] The appropriate contents of paragraph 5 of Madikor's founding affidavit reads as follows:

"5.2. *I submit that it is furthermore clear that the Company has more than enough current assets, in other words assets that can be converted into cash relatively easy, in order to pay the full amount due and payable to Vleissentraal.*

5.3. *The simple reality is, unfortunately, that all these assets, which are that is the implements, and the sable antelope, which are all unencumbered, totaling a value of R 5 750 000.00, can be sold at the fair market value, only if the Company is granted the opportunity to market the assets appropriately to prospective buyers. The Company would need approximately one year to sell these assets. In this regard specific mention must be made to the fact that the Sable were purchased for breeding purposes.*

5.4. *Should the asset simply be realized on a public auction (as will no doubt happen in liquidation proceedings), I have no doubt in my mind that bargain hunters will simply buy the assets at fire sale prices, substantially lower than what the assets are worth, and such a sale will be in nobody's interests.*

5.5. *I submit therefore that it is clear that the Company is financially distressed, but that the Company is by no means technically insolvent and furthermore, that the Company has the ability, given enough time,*

to realise enough assets to pay Vleissentraal and all its creditors in the near future, if given the opportunity."

[18] It is clear from the above and from Madikor's founding affidavit that the Company has unequivocally conceded that it is financially distressed, which concession means that Madikor is not in a position to pay its debts when the debts fall due. Furthermore it would appear that what was intended and explained as a business rescue plan, was in effect, a voluntary liquidation of the bulk of Madikor's assets. This aspect will be dealt with more later in this judgment when I consider the question whether there are reasonable prospects that the Company can be rescued.

Grounds for Opposing the Business Rescue Application

[19] Towards the end of May 2019 the Vleissentraal creditors filed papers in order to oppose the business rescue application launched by the Kremetart Trust.

[20] It was contended on behalf of the Vleissentraal creditors that the bringing of the application for business rescue constitutes abuse. In particular it was pointed out that the then financial position of Madikor was not placed before Court and that the bulk of the allegations in the founding affidavit, in support of the application for business rescue, are of insignificant evidential value.

In this context it was pertinently pointed out that the Kremetart Trust had failed to attach a single deed of sale to its founding affidavit in order to corroborate the allegations that the immovable properties other than the farm are in the process of being sold. Furthermore the value ascribed to all the assets (movable and immovable) is a thumb-suck in as much as no valuation reports by a sworn valuator where attached to properly establish the value of the assets disclosed.

[21] The Kremetart Trust was also criticised by the Vleissentraal creditors for not disclosing to the Court that Madikor, in its application for credit which it made at the Vleissentraal creditors, ceded as security to the Vleissentraal creditors, its right, title and interest in and to all claims for payment due to Madikor, as a result of a sale by Madikor of its assets to a third party.

What this entails is that the Vleissenraal creditors hold security over the right, title and interest of Madikor to receive payment from a third party if it sells its assets, and therefore this cession would make it impossible for Madikor to utilise Vleissentraal security to pay the other creditors in a business rescue.

[22] I agree that the Vleissentraal creditors have demonstrated in their opposition, that the application for business rescue is fundamentally flawed in that the instrument of security held by the Vleissentraal creditors was earmarked by Madikor as the source to pay other creditors. It is trite that the secured claims

of creditors are protected in a business rescue – See section 134(3) of **the Companies Act 71 of 2008; CGG Engineering (Pty) Ltd v Maroos [200] ZASCA 178 (3 December 2018)** and **Louis Pasteur Holdings (Pty) Ltd v ABSA Bank [2008] ZASCA 163 (29 November 2018)** where it was held that a creditor's security interests cannot be utilised by a business rescue practitioner as it has to be paid to the security holder.

[23] The Kremetart Trust failed to deal accurately with the debt owed by Madikor to a major secured creditor, Vencor. Vencor holds security in the form of a mortgage bond over the farm Kaiienbult 675. It became apparent, according to Vencor, that Madikor was in the process of selling certain of its assets. Again, by so earmarking the proceeds of the sale of an immovable property as a source of funds to pay a creditor, Madikor breached the terms of the security which it provided to the Vleissentraal creditors.

[24] It has been submitted on behalf of the Vliessentraal creditors and Vencor that the business rescue application brought by the Kremetart Trust is nothing but an informal liquidation by the Company itself. The bases for such submissions follow hereunder.

[25] The crux of the business rescue plan as suggested by the Kremetart Trust is that certain immovable properties would be sold and the proceeds thereof

would then be utilised as a source with which to make payments to creditors. But, in doing so Madikor will have to utilise both the Vleissentraal security and Vencor security for that purpose because in terms of the cession granted to Vleissentraal, Madikor ceded as security to Vleissentraal the right, title and interest in and to the debts of Madikor, arising from the sale by Madikor of its assets. What this effectively means, is that both Vleissentraal and Vencor are secured creditors and their security may not be destroyed. Such security can also not be suspended during business rescue by utilising section 136(2) of the Companies Act, 2008. As such, the securities cannot be disposed of without the consent of Vleissentraal and Vencor – **BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd 2017 (4) SA 592 (GJ)** at par **[42]-[48]. Energy Systems (Pty) Ltd v Tin Can Man (Pty) Ltd 2017 (3) SA 539 (GJ)** at par **[18]-[22]**.

[26] In business rescue secured claims are protected. Section 134(3) of the Companies Act, 2008 specifically provides that, if during a Company's business rescue, the Company wishes to dispose of any property over which another person has any security or title interest, the Company must first obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest and the Company must further then promptly pay that person, holding security, the sale proceeds attributable to

that property up to the amount of the Company's indebtedness to the person holding the security or provide substitute security to the satisfaction of the creditor.

[27] I accordingly make a finding that Madikor cannot utilise the sale proceeds of its assets to pay dividends to other creditors in the business rescue, as the proceeds had been earmarked for Vleissentraal and Vencor creditors. Moreso, it has been shown that there is no admissible evidence to establish the value of Madikor's assets and thus show that the sale proceeds would be sufficient to even pay the Vleissentraal or Vencor debts. On the true value of assets, see **African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers [2015] ZASCA 69 (20 May 2015)** at para **[34]**.

[28] It has been held authoritatively that a Court will not sanction a business rescue which is in effect nothing but an informal liquidation process.

See **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA)** at para **[33]** where Brand JA said:

".....For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid

the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve."

Whether there are prospects of Madikor Company being rescued

[29] The purpose of a business rescue is that set out in section 128(1)(b) of the Companies Act 71 of 2008 and it is these statutory objectives which is the aim of the order. These objectives are defined as follows:

""business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity 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 than would result from the immediate liquidation of the company."

[30] The threshold standard for deciding that an order is appropriate is whether there is a reasonable prospect of achieving a rescue through those statutory objectives and in this regard, the point of departure is that it is preferable to rescue a company than let it drift or plummet into extinction.

See **Oakdene Square Properties supra; and Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others 2012 (2) SA 378 (WCC)**.

[31] Section 128(1)(b) envisages that measures to be taken in order to facilitate the rehabilitation of the company should provide for temporary supervision, and for a temporary moratorium of the rights of the claimants against the company. They are not meant to provide companies with a mechanism with which to delay payments to creditors with no feasible plan of ever paying its debts, or a means of restructuring its debts over lengthy periods of time – **Firstrand Bank v Normandie Restaurants Investments and Another 189/2016 [2016] ZASCA 178 (25 November 2016)** at para **[19]**.

[32] The intrusion within the context of business rescue proceedings is done for reasons of policy and within tightly set parameters. Business rescue proceedings are geared at providing a window of opportunity to restore an ailing company to financial health and funsctionality. This is in case the company in question may be able to continue to contribute to the flow of the

lifeblood of the economy by way of a plan (D H Brothers Industries (Pty) Ltd v Gribnitz NO and Others 2014 (1) SA 103 (KZP))

In **ABSA Bank Limited v Newcity Group (Pty) Ltd** and **Another** related matter **[2013] 2 All SA 146 (GSJ)** at para **[28]** the following warning was sounded:

"It is however, necessary to caution against the possible abuse of the business rescue procedure, for instance, by rendering the company temporary immune to actions by creditors so as to enable the directors or other stakeholders to pursue their own ends..... it is necessary that an application for business rescue be carefully scrutinised so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy."

See also **Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC)** at para **[3]**.

[33] The business rescue application brought by the Kremetart Trust in the present case cannot be said to be genuine. The manner in which the application was made, both in terms of time and basis or grounds leaves much to be desired. The application was brought a day before the confirmation of the provisional liquidation order as if aimed at frustrating the final order of winding-up. No proper value of Madikor's assets was brought before Court but a mere thumb sucked valuation of the assets was given. Furthermore only two creditors, namely Vleissentraal and Vencor were disclosed leaving out other creditors

like SARS and others. In my view, the whole application was an abuse of process and is fundamentally flawed.

[34] The granting of the business rescue application in the circumstances will amount to this Court sanctioning an informal liquidation which can only benefit the directors of Madikor and / or its shareholders.

I am of the view that the business rescue application must be branded as abuse and refused.

This then leaves the way open to consider the fate of the provisional winding-up order.

Should the Provisional Winding-up Order be confirmed or discharged?

[35] In the winding-up of a company unable to pay its debts (like in the present case) the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for in the old Companies Act 61 of 1973. The provisions of sections 344, 345, 346 and 347 of the old Act are applicable in the present case.

[36] it is common cause that Madikor is indebted to both Vleissentraal and Vencor in the amounts stated earlier in this judgment, that is, R 3 327 416.60 and R 5 845 429.92 respectively.

It matters not that the debtor's assets, fairly valued, far exceeds its liabilities: once the Court finds that the debtor cannot pay its debts as they fall due to be met in the ordinary course of business, it follows that the Court is entitled to, and should, hold that the debtor is unable to pay its debts within the meaning of section 345(1)(c) of the Companies Act 61 of 1973 ("the Old Act").

See **ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others 1993 (4) SA 436 (C)**.

[37] In **Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D & CLD)** it was held that the proper approach in deciding whether a company should be wound-up because it is commercially insolvent appears to be that if it is established that a company is unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency.

[38] Section 347 of the Old Act provides that the Court may grant or dismiss any application for winding-up or adjourn the hearing thereof conditionally or unconditionally, or make any other order it may deem just. The plethora of judicial authority spawned by disputes about the powers provided for in section 347 has included the notion that even where the rationale for a liquidation was "commercial insolvency" (i.e the assets did *de facto* exceed liabilities and liquidity was the reason for non-payment) the Court's discretion

to refuse an order was limited because a creditor with an unpaid debt is entitled *ex debto justitiae* to an order of winding-up.

See **Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd** supra at **597 E-F**.

[39] This issue was well set out and settled, in my view, in the case of **ABSA Bank Limited v Rhebokskloof (Pty) Ltd**, supra, at **440F – 441A** by Berman J when he said the following:

"Turning to the merits of the matter, Mr Gauntlett contended that ABSA was entitled to a final winding-up order on the basis that Rhebokskloof was "commercially insolvent". The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent, is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and to thereafter be in a position to carry on normal trading, - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities, - once the Court finds, that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its

debts within the meaning of section 345(1)(c) as read with section 344(f) of the Companies Act, and is accordingly liable to be wound up."

[40] *In casu,* it is clear that Madikor does not have liquid assets or readily realisable assets available to meet its liabilities, hence it proposes to sell the available assets in order to pay its debts. The value of the said assets has not even been fairly determined to ensure that the company is in a position to pay its debtors.

Conclusion and Orders

[41] I come to the conclusion that both Vleissentraal and Vencor established their grounds of winding-up as Madikor is commercially insolvent by reason of one or more of the following:

(1) Madikor failed to pay Vleissentraal in terms of an Acknowledgement of Debt.

(2) Madikor failed to pay Vleissentraal notwithstanding an Agreement of Settlement that was made an order of Court.

(3) Madikor admitted in correspondences to Vleissentraal that it is in dire financial circumstances and even requested the monthly instalments payable to Vleissentraal to be reduced.

(4) According to Madikor's own financial statements it is commercially insolvent as it simply does not have sufficient current assets in order to pay current liabilities.

(5) Notwithstanding a restructure that has been going on for 5 years by the sale of its assets, Madikor has not been able to cure its commercial insolvency.

(6) The Kremetart Trust has applied for business rescue in respect of Madikor and thereby conceded that Madikor is financially distressed.

(7) Notwithstanding the indebtedness owing to Vencor, Madikor failed to pay the instalments owing to Vencor as well as to keep the credit facility within its limit. Notwithstanding various demands to pay, Madikor failed to do so.

[42] In the result, the following orders are granted:

Case No. 1699/2019

1. Leave is granted to Vencor Holdings (Pty) Ltd, Vleissentraal Bloemfontein (Pty) Ltd and Vleissentraal Bosveld (Pty) Ltd to intervene and oppose the application launched by the First, Second and Third Applicant under Case No. 1699/2019 for an order to commence business rescue as envisaged in

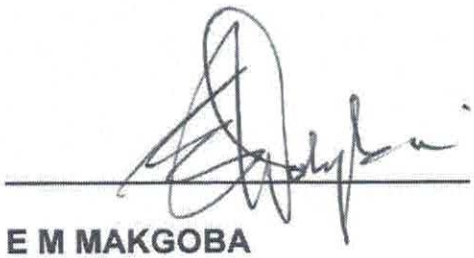
section 131(1) and 131(4) of the Companies Act, 71 of 2008, in respect of Madikor Sestien (Pty) Ltd (in provisional liquidation).

2. The application launched by the First, Second and Third Applicant under Case No. 1699/2019 to place Madikor Sestien (Pty) Ltd (in provisional liquidation) under business rescue is dismissed.
3. The First, Second and Third Applicant shall pay the costs incurred by Vencor Holdings (Pty) Ltd, Vleissentraal Bloemfontein (Pty) Ltd and Vleissentraal Bosveld (Pty) Ltd.

Case No. 3039/2018

1. Leave is granted to Vencor Holdings (Pty) Ltd to intervene in the liquidation application launched by Vleissentraal Bloenfontein (Pty) Ltd and Vleissentraal Bosveld (Pty) Ltd against Madikor Sestien (Pty) Ltd under Case No. 3039/2018.
2. Madikor Sestien (Pty) Ltd is placed under final winding-up in the hands of the Master at the instance of Vleissentraal Bloemfontein (Pty) Ltd and Vleissentraal Bosveld (Pty) Ltd.

3. The costs incurred by Vleissentraal Bloenfontein (Pty) Ltd, Vleissentraal Bosveld (Pty) Ltd and Vencor Holdings (Pty) Ltd shall be costs in the liquidation of Madikor Sestien (Pty) Ltd's insolvent estate.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	**: 26 March 2020**
Judgment delivered on	**: 06 May 2020**
For Vleissentraal Creditors	**: M P Van der Merwe SC**
Instructed by	**: Symington & De Kok Attorneys c/o Niland Pretorius Inc**
For Intervening Creditor (Vencor Holdings (Pty) Ltd	**: L Meintjies**
Instructed by	**: Espag Magwai Attorneys**
For Applicants (Kremetart Trust)	**: G J Diamond**
Instructed by	**: De Bruin Oberholzer Attorneys**
For Respondent (Madikor Sestien (Pty) Ltd	**: M Bresler**
Instructed	**: DDKK Attorneys**