

REPORTABLE

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO:33410/11

DATE:23/09/2011

In the matter between –

10 ENGEN PETROLEUM LIMITED
 (Registration Number: 1989/003754/06)

Applicant

and

MULTI WASTE (PTY) LIMITED
(Registration Number: 1991/005964/07)

20 and others

Respondents

J U D G M E N T

BORUCHOWITZ J:

[1] This is an urgent application brought by an intervening creditor, Engen Petroleum Limited (Engen), to oppose the grant of an order for the placement of two companies under supervision and to commence business
30 rescue proceedings in terms of s 131(1) of the Companies Act, 71 of 2008 (the Act).

[2] The relevant facts are largely common cause and can be briefly stated. The two companies concerned in the rescue proceedings are Multi Waste (Pty) Limited (Multi Waste) and Multi Fleet Logistics (Pty) Limited (Multi Fleet). The core business of Multi Waste is the purchasing of fuel which it supplies to Multi Fleet in order to enable it to conduct a cargo haulage business. The companies are substantially indebted to Engen in respect of fuel purchases, their joint indebtedness amounting to approximately R8 million.

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[3] To secure its considerable financial exposure, Engen procured a cession of the book debts of both companies and a deed of suretyship from Multi Fleet in respect of the obligations of Multi Waste. In June 2011 the companies executed a written acknowledgement of debt in favour of Engen in which they jointly undertook to discharge their outstanding indebtedness by means of instalments, but that undertaking was breached.

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[4] Engen proceeded to enforce the cession of book debts and terminated Multi Fleet's mandate to receive any funds from its debtors. An agreement was concluded on 24 June 2011 whereunder Multi Fleet was mandated to institute legal action on behalf of Engen against certain of its debtors, and undertook to furnish Engen with the contact details of its debtors. It also undertook to inform its debtors that payment was to be made to Engen's attorneys.

[5] Because Engen encountered difficulties in collecting the outstanding debtors book, a meeting was held on 15 July 2011, at which Multi Fleet again undertook to provide Engen with details of its current debtors and creditors, and a plan to overcome its cash flow problems.

[6] On 25 July 2011, it was brought to Engen's attention that a resolution envisaged in s 129 of the Act to voluntarily begin business rescue proceedings had been passed by the board of directors of each of Multi Waste and Multi Fleet on 21 July 2011. Engen was not forewarned
10 that such resolutions would be taken, and which was in marked contrast to what had been discussed at the meeting on 15 July 2011.

[7] Engen then launched an urgent application to set aside the resolutions on the ground that they had lapsed for want of compliance with certain procedural requirements laid down in the Act. On 16 August 2011, this Court set aside the resolutions by consent, and a written agreement was entered into in terms of which the companies again undertook to provide Engen with all documents and information that was necessary to enforce the cession. Pursuant to that agreement, Engen's attorney took
20 possession of certain documents, which included the bank statements of Multi Fleet.

[8] The application to commence business rescue proceedings in terms of s 131(1) of the Act was instituted on an *ex parte* basis on 2 September

2011 by various employees and the sole shareholder and director of the companies, Mr P J L Moller, in their capacities as affected persons in terms of s 128(1)(a) of the Act.

[9] The present application is said to be urgent for the following reasons: Multi Fleet and Multi Waste are profoundly insolvent and fall to be liquidated rather than placed under supervision. A company, Multi Crow Logistics (Pty) Limited (Multi Crow), has effectively taken over the business of Multi Fleet and is in the process of disposing of its assets, including
10 vehicles and collectable debts. Bank statements in Engen's possession indicate that Multi Fleet is in the process of transferring vast sums from its bank account to the accounts of related companies. A creditor, Alondra Trading CC, has also instituted winding-up proceedings against Multi Fleet.

[10] Engen also states that it was not given proper notice of the business rescue application and that it only learnt of the existence thereof when its attorney received an incomplete email copy on 6 September 2011. It also complains that there has not been disclosure, as required in *ex parte* applications, of Engen's position as a partially secured and affected party,
20 the involvement of Multi Crow and the pending application for liquidation brought by Alondra Trading CC.

[11] The business rescue application is bristling with procedural irregularities. The most glaring of the irregularities pertains to the use of

the short form notice of motion (Form 2 of the First Schedule to the Uniform Rules) and the failure to comply with the service and notice requirements laid down in the Act.

[12] Section 131 of the Act, provides, so far as is relevant, as follows:

"131 Court order to begin business rescue proceedings.

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(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

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(2) An applicant in terms of subsection (1) must –

(a) Serve a copy of the application on the company and the Commission; and

(b) Notify each affected person of the application in the prescribed manner.

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(3) Each affected person has a right to participate in the hearing of an

application in terms of this section.

(4) ..."

[13] An *ex parte* application, or and application using the short form notice of motion (Form 2), is used either because it is not necessary to give notice to the respondent, or the relief claimed is not final in nature (see *Simross Vintners (Pty) Limited v Vermeulen* 1978 (1) SA 779 (T) at 783A; 10 *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696D. Rule 6(5)(a) provides that every application other than one brought *ex parte* shall be brought in accordance with Form 2(a) of the First Schedule to the Uniform Rules.

[14] The following are, in my view, textual indications in the Act that an application under s131(1) must be brought using the long form notice of motion (Form 2(a)).

[15] Section 131(2) provides that an applicant, in terms of ss (1) must 20 serve a copy of the application on the company and the Commission, and notify each affected person of the application in the prescribed manner. As both the company and the Commission (the Companies and Intellectual Property Commission) have a direct and substantial interest in any order that the Court might make and are required to be joined as parties to the business rescue application. The Commission is one of the regulatory

agencies established under Chapter 8 of the Act. Each affected person has a right to participate in the hearing of an application in terms of s 131(1) (see ss 131(4), 144, 145 and 146), a right that can only properly be exercised if affected persons are given notice of the application in the manner prescribed in the Act and regulations.

[16] The legislature appears to have been cognisant of the distinction between an *ex parte* application and an application brought using the long form notice of motion. Although in a different context, specific reference is made in s 129(5)(b) to the use of an *ex parte* application. It is safe to assume that had an *ex parte* application been intended in respect of applications brought under section 131(1), the legislature would have said so.

[17] Adopting a purposive approach to the sections mentioned, I am satisfied that the word "apply", as it appears in section 131(1), contemplates an application brought utilising Form 2(a) and the use by the applicants of the *ex parte* form (Form 2) constitutes an irregularity.

[18] Section 131(2)(a) requires that an applicant serve a copy of the application on the company and the Commission. Rule 4(1)(a) provides that service of any document initiating application proceedings shall be effected by the sheriff in one or more of the manners therein stipulated. An application to place a company under supervision in terms of section 131(1) is clearly a document that initiates proceedings and is thus required

to be served by the sheriff. The companies have purported to waive the requirements of service and notice but the Commission has not. Proof is therefore required that the application was served on the Commission by the sheriff as required in terms of Rule 4. A copy of the application appears simply to have been left at the office of the Commission but not served by the sheriff as required under the Rules. This also constitutes an irregularity.

[19] Section 131(2)(b) provides that an applicant must “*notify*” each
10 affected person of the application “*in the prescribed manner*”. The Act and Companies Regulations, 2011, published under GN R351 in GG 34239 of 26 April 2011, specifically provide how notification is to be given to affected persons.

[20] Regulation 124 reads:

20 “**124. Notices to be issued by affected persons concerning court proceedings.** – An applicant in court proceedings who is required, in terms of either section 130(3)(b) or 131(2)(b), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant.”

[21] Regulation 7 provides as follows:

“7. Delivery of documents. – (1) A notice or document to be delivered for any purpose contemplated in the Act or these regulations may be delivered in any manner –

(a) contemplated in section 6(10) or (11); or

(b) set out in Table CR 3.

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(2) A document delivered by a method listed in the second column of Table CR3 must be regarded as having been delivered to the intended recipient –

(a) on the date and at the time shown opposite that method, in the third column of that table; or

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(b) if the date and time for the delivery of a document referred to in Table CR 3 to a regulatory agency is outside of the office hours of that regulatory agency, as set out in regulation 165(2), that document will be deemed to have been delivered on the next business day, subject to regulation 165(3).

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(3) If, in a particular matter, it proves impossible to deliver a document in any manner provided for in the Act or these regulations -

(a) if any person other than the Tribunal is required to deliver the document, the person may apply to either the Tribunal or the High Court for an order of substituted service; or

(b) if the Tribunal is required to deliver the document, the recording officer of the Tribunal concerned may apply to the High Court for an order of substituted service.

10 (4) A document that is delivered by fax must include a cover page, and a document that is transmitted by electronic mail must be accompanied by a cover message, in either case setting out -

(a) the name, address, and telephone number of the sender;

(b) either -

20 (i) the name of the person to whom it is addressed, and the name of that person's attorney, if applicable; or,

(ii) the name or description of the class of intended recipients, if the document is being delivered generally to all the members of a particular class of persons;

(c) the date of the transmission; and

30 (d) in the case of a fax transmission -

(i) the total number of pages sent, including the cover page; and

- (ii) the name and telephone number of the person to contact if the transmission is incomplete or otherwise unsuccessful.”

[22] Subsections 6(10) and (11) of the Act stipulate:

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“6(10) If, in terms of this Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.

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6(11) If, in terms of this Act, a document, record or statement, other than a notice contemplated in subsection (10), is required –

(a) to be retained, it is sufficient if an electronic original or reproduction of that document is retained as provided for in section 15 of the Electronic Communications and Transactions Act; or

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(b) to be published, provided or delivered, it is sufficient if –

- 10 (i) an electronic original or reproduction of that document, record or statement is published, provided or delivered by electronic communication in a manner and form such that the document, record or statement can conveniently be printed by the recipient within a reasonable time and at a reasonable cost; or
- 20 (ii) a notice of the availability of that document, record or statement, summarising its content and satisfying any prescribed requirements, is delivered at each intended recipient of the document, record or statement, together with instructions for receiving the complete document, record or statement.”

[23] Table CR3 details the various methods of notification and dates of times of deemed delivery.

30 [24] An applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by

delivering a copy of the court application to them in accordance with regulation 7. Where compliance proves impossible, an applicant may apply to the High Court for an order of substituted service (see regulation 7(3)). At the very least it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered. Where electronic means, such as a fax machine, is used to give notice, evidence is required of the information stipulated in regulation 7(4).

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[25] The seventh applicant is the sole shareholder and director of Multi Waste and Multi Fleet. In that capacity he would have had control of and access to the companies' records and was in a position to properly identify the affected persons entitled to notification of the application. He should have provided the Court with the information contemplated in regulation 7 (including ss 6(10) and (11) of the Act, and Table CR3).

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[26] On a proper conspectus of the papers, it cannot be said that there has been compliance, or even substantial compliance, with the notification requirements laid down in the Act and Regulations.

[27] Given the nature and extent of the irregularities involved, the business rescue application falls to be dismissed. On 13 September 2011, the application was postponed *sine die*. To permit a thoroughly irregular application to remain pending before the Court on an indefinite basis is

confusing and potentially prejudicial to creditors, affected persons or persons who in the future choose to deal with the companies. This, in itself, creates an element of urgency.

[28] There are other considerations that render the matter urgent. There is evidence that Multi Fleet, which is profoundly insolvent, is disposing of or transferring its assets to other entities, and moneys received from its book debtors is being paid to entities other than Engen. It is, in my view, essential that a winding-up order be granted so as to enable a liquidator to
10 take control of the affairs of both Multi Fleet and Multin Waste.

[29] There is yet a further reason why the business rescue application cannot succeed. It is settled practice in this Division that the liquidation of more than one company cannot be sought in a single application unless there is a complete identity of interests (see *Breetveldt and Others v Van Zyl* 1972 (1) SA 304 (T)); nor is it advisable that two or more individuals should be joined in an application for their sequestration (*Ferela (Pty) Limited v Craigie* 1980 (3) SA 167 (W); see, also, the unreported judgment of *Erich Brack and Another v Front Runner Racks and Others*, (Case No:
20 45084/2010). Each of the companies involved in the present application has its own separate share capital, creditors and presumably different affected persons. It would be prejudicial to persons who are only interested in one of the companies to be engaged in business rescue proceedings in respect of the other.

[30] Engen, as an affected person, has a right to participate in the hearing of an application in terms of s 131(1) of the Act. It would not require leave of the Court to intervene. Such leave may, however, be necessary as a procedural requirement. See, in this regard, *Fullard v Fullard* 1979 (1) SA 368 (T) and *Shapiro v South African Recording Rights Association Limited (Galeta Intervening)* 2008 (4) SA 145 (W).

[31] For these reasons I would allow the intervention and dismiss the business rescue application.

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[32] The following order is granted:

(a) The application for leave to intervene is granted.

(b) The application brought under Case No: 33410/2011 to place Multi Waste (Pty) Limited and Multi Fleet Logistics (Pty) Limited under supervision and to commence business rescue proceedings in terms of Section 131(1) of the Act is dismissed with costs.

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(c) No order is granted in respect of prayer 5 of the application to intervene.

DATED at JOHANNESBURG on this the 25th day of OCTOBER 2011

P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT

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