IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 5924/2016

In the matter between:

MOHAMED SALIM KHAN	**Applicant**
and	
SPRINT LOGISTICS SA (PTY) LTD	**1ST Respondent**
NEDBANK LIMITED	**2ND Respondent**
COMPANIES AND INTERLLECTUAL PROPERTY COMMISSION (CIPC)	**3RD Respondent**
MASTER OF THE HIGH COURT	**4TH Respondent**

Case No: 12824 / 2015

In the matter between:

NEDBANK LIMITED	**Applicant**
and	
SPRINT LOGISTICS SA (PTY) LTD	**Respondent**

Case No: 3167/2016

In the matter between:

SPODE MARKETING CC T/A

SPODE STORAGE SOLUTIONS **Applicant**

and

SPRINT LOGISTICS SA CC **Respondent**

Case No: 78/2016

In the matter between:

MOMENTUM PROPERTY INVESTMENTS (PTY) LTD **Applicant**

and

SPRINT LOGISTICS SA CC **First Defendant**

MOHAMED SALIM KHAN **Second Defendant**

JUDGMENT

CHETTY J:

[1] The first application before me relates to an application for business rescue in terms of s 131 of the Companies Act 71 of 2008 ("the Act") of the entity known as Sprint Logistics SA (Pty) Ltd (the first respondent), together with the appointment of Vishnu Roopnarain Maharaj (Mr Maharaj) as the interim business rescue practitioner. This application is opposed by Nedbank, the second respondent in the

business rescue proceedings. Prior to the launching of the business rescue proceedings, Nedbank launched an application for the winding-up of Sprint Logistics SA (Pty) Ltd under case number 12824/2015, which proceedings were issued out of this court on 3 December 2015, and set down for 22 December 2015. On 21 December 2015, MS Khan launched an application for business rescue of Sprint Logistics under case under 13414/2015. Both the matters came before Lopes J on 22 December 2015. He adjourned the applications *sine die*, and reserved the issue of costs.

[2] Both applications came before me on 23 June 2016 when Mr *Moosa* appeared for Sprint Logistics in the business rescue proceedings and in the winding-up application. At that stage, Nedbank had filed its opposing papers in which it attacked the *locus standi* of the applicant, MS Khan, to bring the business rescue proceedings in as much as he is a trustee of the Mohamed Khan Family Trust, which is a 100% shareholder of Spring Logistics. In the application under case number 13414/2015, the deponent to the founding affidavit in the business rescue application incorrectly stated that he was the sole shareholder of Sprint Logistics. This deficiency in the papers was seized upon by Nedbank, who sought that the application be dismissed on those grounds alone. Faced with an insurmountable difficulty on the founding papers, Mr *Moosa* sought leave to amend his papers, which application I turned down. Counsel then informed the court that his mandate in the matter had been terminated, but not before informing me that in as much as the applicant intended withdrawing the defective business rescue application, it was in the process of having a new application (supposedly with the deficiencies corrected) issued at the offices of the Registrar, and consequently I was precluded from continuing to hear the application for winding up.

[3] Section 131(6) of the Act reads as follows:

> 'If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-
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> (a) the court has adjudicated upon the application; or
>
> (b) the business rescue proceedings end, if the court makes the order applied for.'

As to the moment of the commencement of proceedings, see *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP) para 19 where the Court pointed out that:

> 'In my opinion what s 131(6) means is that once liquidation proceedings have commenced by the granting of a liquidation order, whether provisional or final, the mere issue and service of a business rescue application would suspend the liquidation process.'

[4] Relying on *Standard Bank of South Africa v A-Team Africa Trading CC* 2016 (1) SA 503 (KZP), Mr *Moosa* submitted that the issuing of the new business rescue application had the effect, in terms of s 131(6), of suspending the application for liquidation by Nedbank. Section 132 spells out when business rescue proceedings begin and end. Mr *Thatcher SC* who appeared on behalf of Nedbank in both applications appeared to accept that the application could not proceed in light of a new business rescue application having taken the place of the withdrawn application.

[5] In any event, Mr *Thatcher* faced objection to proceeding with the application for the liquidation of Spring Logistics following upon the late intervention by the employees of the company who contended not to have been properly served with the application, despite a candidate attorney deposing to an affidavit of service stating that on 15 December 2015 at 4:05pm he had left a copy of the application with a Mr Patric Medic at the security office at the entrance to the company's premises at 110 South Coast Road, Congella, Durban, and after the said employee confirmed (supposedly with those in charge of the company) that he could accept service of the papers.

[6] Mr *Mfeka*, who appeared on behalf of the intervening employees on 23 June 2016, submitted that the matter could not proceed while there had not been proper service on the employees as prescribed by s 346 of the Act. In light of the need to ensure proper service on the employees, it appeared to be a view commonly shared amongst all those involved in the matter that it was inappropriate for the matter to proceed while a new business rescue application was already issued and about to be served on Nedbank. Moreover, there was still uncertainty as to whether proper service had been effected on the employees. Without deciding whether there had

been compliance with s 346, I agreed to the matter being adjourned and to serve before me on the next available date in the following session.

[7] Consequently, both matters came before me on 25 August 2016, on which occasion the applicant in the business rescue application was represented by Mr *Choudree SC*, who argued the matter off a fresh set of papers. Ms *Leonard* appeared on behalf of Sprint Logistics to oppose the liquidation application. Mr *van Rooyen* was present on behalf of Spode Marketing CC trading as Spode Storage Solutions in respect of a liquidation application filed under case number 3167/2016. In the heads of argument filed by Mr *van Rooyen*, he associates himself with the opposition by Nedbank to the business rescue application. In respect of Spode Logistics' application for a provisional winding-up order, Mr *van Rooyen* submitted that his client has made out a case for a provisional order, but accepts as both Nedbank and Spode Logistics have both sought the winding-up of Sprint Logistics, the general rule is that where contemporaneous applications are made, with each making out a case for the same relief, it is necessary to treat one of the applicants as having priority – the general rule being that the applicant who first furnished security in terms of s 9(3) of the Insolvency Act 24 of 1936, has priority. First in the queue on that basis is Nedbank. Mr *van Rooyen* further submitted that Spode Logistics would therefore only move for a provisional order in the event of Nedbank failing in its application.

[8] At the same time, Mr *Bingham* joined in the fray on behalf of Momentum Property Investments (Pty) Ltd, which had on 18 August 2016 under case number 78/2016, secured an order for the ejectment of Sprint Logistics from the leased premises at 110 South Coast Road, Congella, Durban, which it occupied. An application for leave to appeal against the eviction order was subsequently dismissed by Kruger J. The stance of Momentum is that Sprint Logistics is now in unlawful occupation of the premises, as there is no longer a lease with the company. I shall refer later in this judgment to an affidavit filed by Nolene Claasen, on behalf of Momentum, and the impact of the cancellation of the lease and the ejectment order on the business rescue proceedings.

[9] Prior to dealing with the main issues of the business rescue and the liquidation proceedings, an interlocutory application was filed by MS Khan, Farhana Khan and Abdool Rahim Khan in their capacities as joint trustees of the Mohamed Khan Family Trust. The application is dated 19 July 2016 and was set down on 23 August 2016 before Henriques J. For reasons which were not apparent from the papers, the application was withdrawn before Henriques J and subsequently re-enrolled before me. The applicants sought leave to intervene as the second, third and fourth applicants respectively in the business rescue application. In essence, their intervention is intended to neutralise the point advanced by Mr *Thatcher* in the business rescue application, that MS Khan did not have locus standi to bring the application as he erroneously described himself as the sole shareholder of Sprint Logistics. The sole shareholder of the company is the Mohamed Khan Family Trust, and it follows that any proceedings pertaining to the company can only be brought by all of the trustees. "Trustees have to act jointly unless the trust deed provides otherwise and trust deeds seldom do." See *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para 16. As a trust is not a separate juristic person, all the trustees ought to have been parties to the original application. Hence the application for the remaining trustees to be joined. Despite the point being well taken by Nedbank, and notwithstanding my initial misgivings in relation to the application, as there was no prejudice to any of the parties and particularly in light of Mr *Thatcher's* stance not to oppose the application, I granted the relief allowing the remaining trustees of the Mohamed Khan Family Trust to be joined as second to the fourth applicants in the business rescue proceedings.

[10] Section 131(4)*(a)* of the Act provides as follows:

> (4) After considering an application in terms of subsection (1), the court may
>
> *(a)* make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that -
>
> (i) the company is <u>financially distressed</u>;
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> (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
>
> (iii) it is otherwise <u>just and equitable</u> to do so for financial reasons,

> and there is a <u>reasonable prospect</u> for rescuing the company…' (my underling)

[11] It is against this statutory framework that the applicant must make out a case for business rescue. In dealing with the standard to be met by the applicant, the SCA in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2013 (4) SA 539 (SCA) para 21 made the following observation:

> 'In a case such as this, the court's discretion is bound up with the question whether there is a reasonable prospect for rescuing the company. The other pertinent requirement in s 131(4), namely, that the company must be financially distressed, seems to turn on a question of fact. As to whether there is a reasonable prospect of rescuing the company, it can hardly be said, in my view, that it involves a range of choices that the court can legitimately make; of which none can be described as wrong. On the contrary, as I see it, the answer to the question whether there is such a reasonable prospect can only be 'yes' or 'no'.'

[12] In unpacking the notion of what would constitute a 'reasonable prospect', the Court in *Oakdene* at paras 29-31 accepted that it means something less than a reasonable probability; something more than a prima facie case; something more than an arguable possibility; a prospect based on reasonable grounds; and mere speculative suggestion is not enough. See *Pouroullis v Market Pro Investments 106 (Pty) Ltd (South African Bank of Athens Ltd and Absa Bank Ltd* (20370/2015) [2016] ZAGPJHC 12 (12 February 2016).

[13] The Court in *Oakdene* stated further that the applicant must establish these grounds in its founding papers, in accordance with the usual rules of motion proceedings. While earlier cases like *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) were suggestive of the approach that an applicant must provide a substantial measure of detail about the proposed plan to satisfy the requirement of a 'reasonable prospect', the SCA in para 30 endorsed the views of Van der Merwe J (as he then was) in *Propspec Investments v Pacific Coasts Investments 97 Ltd* 2013 (1) SA 542 (FB) para 11:

> 'I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for

> business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.

And in para 15 Justice Van der Merwe noted:

> 'In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'

[14] Brand JA in Oakdene para 31 succinctly pointed out that the plan which the applicant is required to show must be either to restore the company to a solvent going concern, or at least to '*facilitate a better deal for creditors and shareholders than they would secure from the liquidation process*.' He added further that an '*applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b)*.'

[15] Against this background I proceed now to consider those factors that weigh in the present case. The company's core business is a cold storage operation. In January 2015 the company concluded an agreement with Nedbank in terms of which Nedbank provided overdraft facilities of R3,8m as well as vehicle and asset finance of R20 639 000, and two further such facilities for R407 867.00 each. In December 2014 Nedbank then sold to the company various refrigeration components for its cold storage business, as well as motor vehicles such as forklifts. These were to be paid over sixty (60) instalments of R391 753.00 and R52 798.00 in respect of two separate contracts. In June 2015 the company breached the agreement as it failed to reduce its overdraft and defaulted on payment of the instalments in respect of the

two contracts concluded with Nedbank. The company was requested by Nedbank's attorney to make proposals as to how it intended to remedy these breaches. These approaches failed, resulting in a demand on the company in September 2015 to pay the amount of R1,8m within three (3) weeks, failing which Nedbank threatened to wind-up the company. As at the end of November 2015 the company's indebtedness to Nedbank was close to R20m. In light of the company's inability to pay any of the amounts set out in Nedbank's demand in terms of ss 344 and 345(1) of the Act, proceedings were initiated for the winding-up of the company. The application was issued out of this Court on 3 December 2015 and the matter set down for 22 December 2015.

[16] As a response to the winding up application, Sprint Logistics launched an application for business rescue on 21 December 2015, a day before the winding-up application was to be heard. As referred to earlier, that original business rescue application was eventually withdrawn after certain fatal deficiencies emerged from the papers. The deficient application is replaced with that which is currently before me. It is on these papers that I must determine whether the applicant has made out a case for relief. The applicant, as a director of the company, resolved on 15 June 2016 that the business was financially distressed in terms of s 128(1)(f) of the Act and consequently approached Mr Maharaj, as a business rescue practitioner, to accept an appointment in terms of s 131(5) of the Act, which he did. Nedbank, which opposes the application, did not contest the allegation of Khan and his fellow trustees to be "*affected persons*" for the purposes of s 128(1)(a) of the Act.

[17] The basis on which the Sprint Logistics has brought the business rescue application is that the '*material assets of the company is the "get-up of the business" together with the assets funded by Nedbank and a lease held by the company in respect of the immovable property located at 110 South Coast Road, Durban, which it currently holds*'.[1] The applicant bears the burden of satisfying the standard of proof as set out in *Oakdene* and *Propspec Investments.* In addition to these grounds, the applicant relies heavily on the report of the business rescue practitioner, which purports to chart a course for the recovery or rehabilitation of the company. Viewed collectively, the goal or end result must be for the company to

[1] Para 18 of the applicant's founding affidavit: business rescue application.

continue in existence on a solvent basis, alternatively to provide a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. See *Propsec Investments*, para 7.

[18] There is nothing in the applicant's founding papers in the business rescue application to suggest that it does not owe the monies claimed by Nedbank. That must therefore account for the first hurdle of the applicant being '*financially distressed*' as contemplated in s 131(4)(a) of the Act.

[19] Counsel for the applicant contended in argument that the applicant was not obliged to present the entire business rescue plan as part of the founding papers. Whether this was intended to deflect some of the criticism or deficiencies in the report of Mr Maharaj as pointed out by Nedbank in its opposing affidavit, is uncertain. What is now settled law is that an applicant need not set out a detailed plan in the application for business rescue. As the Court in *Oakdene* para 31 pointed out, this can be left to the practitioner to compile, after a proper investigation in terms of s 141. It added however 'the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b)'.

[20] I now turn to the grounds relied on by the applicant. It avers that one of its material assets is the '*get-up*' of the business. Nedbank points out that there is nothing in the founding affidavit to suggest that Sprint Logistics has acquired a reputation in the cold storage industry which indicates that it has carved for itself a reputation in connection with the services its renders, making it distinctive from others in the industry.[2] One this basis, it was submitted that the get-up of Sprint Logistics does not have any market value and therefore is not to be relied on as a ground to establish the prospect of the company being rescued. I agree with Nedbank's submission in this regard and find nothing on the papers before me to

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[2] When one generally considers the concept of a "get-up", it is the form in which the brand owner presents its product to the market and typically includes the labelling and packaging of a product which consist of a number of features such as colour combinations, arrangements, graphics and other design elements. In other words, the get-up of a product is the whole "dress" in which the goods are offered to the public. For example, the decor of the COCA COLA® line of products, namely the distinctive form of the words. See note by Alicia Castleman, February 2014, "*Protecting the get-up of a product and the benefits associated with it*".

indicate the Sprint Logistics has acquired a reputation in the market place to which one can attach a value to its name alone.

[21] The second leg relied on by Sprint Logistics is the value of the assets funded by Nedbank. In this regard Nedbank points out that the assets have been valued by its sworn appraiser at R11 250 000.00. On the other hand, Sprint Logistics rely on a valuation at a forced sale of R9,5m in comparison to that relied on by Nedbank in the amount of R5,3m. Against the backdrop of the debt owed to Nedbank being R20m, Nedbank submits that no reliance can be placed on the valuation of Mr Ferreira, which is relied upon by Sprint Logistics, that the equipment in the cold storage unit has a total market value of R98,5m. Counsel for Nedbank pointed out that anyone wishing to make an offer to buy the cold storage equipment would naturally have regard to what the equipment would fetch at a forced sale. Assuming that anyone wishing to purchase this equipment would presumably approach a financial institution to fund such purchase, the latter would necessarily have regard to what the initial cost of the machinery was in the first place. I am in agreement with the submissions by Mr *Thatcher* that no reliance can be placed on the valuation of Mr Ferriera insofar as his assessment that the market value of the equipment stands at R98,5m.

[22] The weakest link, in my view, in the applicant's case for business rescue is its contention that part of its '*material assets*' is the lease which it holds over the immovable property it currently occupies. The property in question is owned by Momentum. The rental for the property is approximately R2,2m per month. As at 8 January 2016 (after the launching of the first business rescue application) Momentum launched an application under case number 28/2016 claiming an amount of R5 722 444,00 being arrear rentals owed to it by the applicant. It further sought the cancellation of the lease agreement owing to the breach and the consequent ejectment of the applicant from the premises. Sprint Logistics continued to occupy the premises carrying on business from it. To compound problems, the applicant was unable to pay for its electricity consumption, resulting in the eThekwini Municipality cutting off electricity to the leased premises. An urgent application was brought by the applicant under case number 6263/2016 on 30 June 2016 for the restoration of the water and electricity supply to the premises. That application was dismissed,

resulting in there being no supply of water and electricity. As this is a crucial component of any cold storage facility, the applicant was obliged to use diesel generators for the supply of electricity. There is nothing on the papers as to what alternative arrangement has been made in respect of water. What is apparent from the report of Mr Maharaj is that the cost of providing electricity via diesel generators would be substantially higher than electricity supplied by the municipality.

[23] At the hearing of this matter, counsel for Nedbank brought to my attention that the business rescue application and indeed the report prepared by Mr Maharaj is based on the assumption that the applicant will be able to continue running its business from the leased premises and that it would be able to service certain existing contracts in order to restore it to solvency. As stated earlier, judgement has been granted in favour of Momentum against the applicant. An affidavit was also filed by Nolene Claassen on behalf of Momentum, in which she clarifies that the lease with the applicant has been cancelled and that its occupation of the leased premises remains unlawful. As such there is no lease in respect of the premises and while Momentum is prepared to engage in settlement negotiations with the applicant in respect of the arrears owing to it, it has firmly resolved that on no account will the applicant be granted a right to occupy the premises. There is nothing on the papers to refute these averments.

[24] It also came to light that shortly prior to the hearing of this application; the applicant had applied for leave to appeal against the order of Justice Kruger in the eviction application. The application for leave to appeal was dismissed and Momentum was granted leave to execute the judgment. In my view, this is a mortal blow to the business rescue aspirations of the applicant. Without any premises to trade from, the applicant would then have to dismantle all of the components of the cold storage facility and relocate to other premises, on the assumption that it has the necessary funds to afford the rental. It has not made out any case in this regard, and has rather approached this Court on the basis that it enjoys a lease agreement in respect of the premises located at 110 South Coast Road. In light of the eviction application of 18 August 2016, which was granted with immediate effect, the applicant is left without a premises from which to operate its business, irrespective of however many contracts it may have, existing or potential. It would also follow that if

the applicant is evicted from the premises as at 18 August 2016, this would have an immediate impact on those employed at the site, in that their employment would come to an abrupt end. This has a bearing on the intervening application by the employees in the liquidation application brought by Nedbank.

[25] The remaining leg of the applicant's argument to be permitted the opportunity to rehabilitate its business rests on the report of Mr Maharaj. The report rests on three pillars – firstly, that the affairs of the applicant will be *'rescued'* by the entity known as Sprint Logistics KZN CC, which is owned by the Mohamed Khan Family Trust (who is the sole shareholder of the applicant) and the Ouiem Family Trust (controlled by one Yvette de Beer) in equal shares. The second pillar is that new contracts are to be obtained for the cold storage business of the applicant, presumably justifying the assumption that it can trade as a solvent business, and thirdly that a new investor will be brought on board. Counsel for the applicant emphasised that the threshold to be met by the applicant was only to show that there was a reasonable prospect of the business being rehabilitated in a sense that there would be a higher return to creditors if a business rescue practitioner were to be appointed in contrast to any potential dividend that would flow from liquidation of the business. Counsel for Nedbank however proceeded to dismantle the assumptions underpinning the report and conclusions of Mr Maharaj. Each of these assumptions is considered below.

[26] Firstly, Mr Maharaj is of the view that Sprint Logistics KZN CC will be in a position to rescue the applicant. Mr Maharaj's report is laden with vague observations – for example he states that the '*KZN entity has contracts for the cold storage that would last seven (7) months into the year which will provide for the contracts in the off season to have sufficient income per month to pay its liabilities and that of SPRINT SA*'. The report lacks any detail to enable an interested party to reasonably evaluate the veracity of the claim. There are no details or names of the parties holding these contracts and their worth. A further problem which looms over this pillar of the report is that the applicant, as a consequence of the eviction judgment in favour of Momentum, no longer has leased premises from which it would service these contracts, if they existed.

[27] It was also correctly submitted that there is no evidence on the papers before me to indicate that the Mohamed Khan Family Trust or the Quiem Family Trust, as joint owners of the KZN entity, have consented to or resolved, to buy a shareholding in the applicant. Furthermore, if the Mohamed Khan Family Trust did have such resources, surely it would have ploughed these first into liquidating the indebtedness of the applicant, an entity of which they are the sole shareholder. Nedbank further contends that it is doubtful that either of these trusts has any money to invest in the applicant in light of them having entered into a joint venture agreement to start a cold storage business, which ended with the liquidation of Sprint Cold Storage Durban (Pty) Ltd in 2015. The prospect of Sprint Logistics KZN CC moving from a profit of R58 584.00 in 2015 to R6,3m in 2016/7 is unrealistic and I am in agreement with Mr *Thatcher* that not much weight can be attached to these forecasts as providing the basis for Sprint Logistics KZN CC coming to the rescue of the applicant.

[28] The second pillar of the report is that a new investor will be brought on board to inject capital into the applicant, and more specifically that a Kenyan businessman, Mr Ouya was to provide R42.6m in guarantees to improve and expand the cold storage facilities, which would increase the revenue of the business. This injection would presumably have been used to settle the debt owing by the applicant to Nedbank. It is apparent from Mr Maharaj's report that this funding from Mr Ouya was not forthcoming and eventually fell through. However, later in his report, Mr Maharaj still clings onto this thread noting at paragraph 84 that '*at the time of this report Khan has been actively pursuing possible new investors*'. During argument, Mr *Choudree* attempted to introduce new evidence not contained in any of the affidavits before me to the effect that an entity referred to as Podiso was interested in providing the necessary finance to the applicant. This was objected to by Mr *Thatcher*, and correctly so in my view. In my view, I cannot take into account information not on affidavit, and moreover under circumstances where Nedbank would not have had an opportunity of investigating these claims, and where to allow its admission would be clearly prejudicial and would simply cause a delay in the finalisation of this matter.

[29] Thirdly, the applicant relies on the assumption that it will secure new contracts for the cold storage as well as the dry storage component of the business. The

applicant's affidavits do not say who these contracts are with, for what duration and their worth. Mr *Thatcher* trawled through the financial detail contained in the report of Mr Maharaj to emphasise this point. I am satisfied that on a careful reflection of the figures contained in the annexures to Mr Maharaj's report, the figures do not simply add up, particularly against a scenario of the applicant moving from a loss in 2016 of R7,5m, and where such loss is to be made good by Sprint Logistics KZN CC, which itself only returned a profit of R58 584 in 2015.

[30] In addition to the above, it also turned out that Sprint Logistics was sub-letting part of the leased premises out to other businesses, including Sappi, from which it received rental but failed to pay these over to Momentum as the landlord. The applicant in his replying affidavit simply '*notes*' the averment that Sappi has recently began paying the rental directly to the landlord.

[31] After carefully analysing the report of Mr Maharaj, I am satisfied that there are fundamental fault lines in several of the assumptions he relies upon for concluding that there is a reasonable prospect that Sprint Logistics can be rescued. Taking into account the current circumstances of Sprint Logistics being evicted from its leased premises where it had a custom built cold storage facility, that it has no reliable source of electricity other than that obtained via a generator and has no new investors or identifiable contracts for the foreseeable future, in my view it is neither just nor equitable for Sprint Logistics to be placed under business rescue. As such, I am of the view that there are no prospects of returning the affairs of Sprint Logistics to solvency or to provide a better deal for creditors than what they would receive through liquidation. In the result, I would dismiss the business rescue application.

[32] In now turn to the application in which Nedbank seeks a provisional winding-up order arising from Spring Logistics inability to pay its debts of just under R20,5m owed to Nedbank. The background to the indebtedness appears from para 13 above. In summary, Nedbank lent and advanced various sums to Sprint Logistics, being in the form of an overdraft facility and vehicle and asset finance. At the time these proceedings were instituted the applicant was prima facie a creditor of the respondent (Sprint Logistics) in the sum of approximately R20,5m. While the applicant contends that the respondent was in breach of the various agreements to

make either payments on due dates in terms of the instalment sale agreements or to reduce its overdraft by a specified time, the respondent in its opposing affidavit simply denies the allegation and relies on the contention that evidence will be placed before this Court at the time of trial.

[33] The respondent denies having breached any of the agreements with Nedbank, relying on the contention that it was under no obligation to pay the amounts, in as much as they were not due and payable. While the respondent accepts that the letter of demand dated 30 September 2015 calling on it to pay the outstanding amounts was issued in writing and delivered to its premises at 110 South Coast Road, Congella, Durban, it raises the point that this was not its registered offices. What is not disputed is that the letter of demand was also sent to the postal box address of the respondent, as per the CIPRO records. Nedbank further contends that as at 30 November 2015, the total arrears owing by the respondent from the instalment sale agreements and the overdraft was approximately R20m. All that the respondent proffers in reply is that these figures do not accord with its records and are disputed. It offers no explanation at all as to what amounts, if any, it has paid towards its indebtedness. Although it undertook to investigate the matter and place this information before the Court, nothing further was forthcoming from the respondent at the time when the matter was argued.

[34] In light of the respondent having been notified of its breach and its failure to remedy the breach, whatever amounts were then outstanding became accelerated, with the consequence that the full amounts due became due and payable. This was made abundantly clear to the respondent in Nedbank's attorney's letter of 3 November 2015, in which the respondent was forewarned that failure to pay would result in a winding-up application.

[35] Having received no payment from the respondent, Nedbank launched the winding-up application on the basis that the respondent was commercially insolvent in that it was unable to pay its debts within the normal course of its business. The authorities are clear that the applicant would be entitled to a winding-up order ex debito justitiae. In this regard see *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) and *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* and others 1993 (4) SA 436 (C).

[36] The winding-up application was opposed, with Ms *Leonard* strenuously arguing this segment of the application. Her contention that the respondent is not factually insolvent is in stark contrast to the volume of evidence placed before me in the business rescue application to show that Sprint Logistics was financially distressed. In fact, the entire business rescue application was premised on Sprint Logistics being financially distressed. Most significantly, the respondent has not put up a shred of evidence to advance its claim that it is not indebted to Nedbank, and more particularly, to refute the claim that it is unable to pay its debts. There is nothing before me on the papers to indicate that Sprint Logistics is in fact solvent. While the respondent denies that it is insolvent, perhaps the sentiments expressed by Innes CJ in *De Waard v Andrew & Thienhans Ltd* 1907 TS 727 at 733 are appropriate:

> 'To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes'.

[37] At the provisional stage, all that the applicant has to make out is a *prima facie* case – in the peculiar sense of that term explained in *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 976D-978F. I am satisfied that it has.

[38] I am furthermore satisfied that all the necessary statutory formalities have been complied with for the granting of an order, including service on the SA Revenue Service, and the Master.

[39] As regards service of the liquidation application on the employees of the company, the employees have intervened in the winding-up application contending that there has not been compliance with s 346(4A) of the Act. It has been contended by Nedbank that a copy of the application papers were left with an employee, one Mr Patric Medic. He and 52 other employees however aligned themselves with the averments in the affidavit of a fellow employee, Mr Abdul Sheik, who states that the winding-up application only came to his knowledge on 21 June 2016. On 23 June 2016, the employees were represented by counsel and advanced their concern that they were unaware of the winding-up application. As a matter of interest, Mr Sheik does not elaborate on how he came to know of the matter on 21 June 2016 and who

brought it to his attention. I can only assume that he had sight of the papers on that date as he was aware then that the matter would be in court on 23 June 2016. Mr Sheik also claims that '*neither he nor the other employees*' (presumably including Medic) had sight of this application as it was never posted on the notice board inside the company premises. This statement stands in contrast to the service affidavit of the candidate attorney Matthew Campbell who states that on 15 December 2015 at approximately 4:05pm he left a copy of the application papers with a person he describes as Medic. How would the candidate attorney know of Medic if he had not done as he states in his service affidavit? There is nothing on the papers before me from Medic indicating whether he disputes the allegations made under oath by the candidate attorney, and how it came about that the candidate attorney would have named him as the person who received a set of the papers.

[40] To the extent that there is a dispute of fact, I am of the view that this is a case deserving of a robust approach as the probabilities are evident from the conflicting versions. I find no reason to disbelieve the views expressed in the service affidavit of the candidate attorney and I am of the view that the "intervening application" is nothing more than a rear guard attempt to stave off the winding-up application by means of a technical defence.

[41] In any event, to the extent that the employees allege that they have not had proper notice of the winding up proceedings, the passages below from *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA) are instructive:

> '[22] In order for the court to perform this function properly it will be necessary for applicants, in the founding affidavit or the affidavit in terms of s 346(4A)(b), to deal with whether the respondent has employees and if so where those employees are working or are likely to be found. It is only in the light of this information that the court hearing the application can decide whether there has been compliance with the requirements of the section. If there is reason to believe that the respondent does not have employees then this and the grounds for it must be stated.
>
> [23] To sum up thus far the position is as follows. The requirement that the application papers be furnished to the persons specified in s 346(4A) is peremptory. It is not however peremptory, when furnishing them to the respondent's employees, that this be done in any of the ways specified in s 346(4A)(a)(ii). If those modes of service

are impossible or ineffectual another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section. If the applicant is unable to furnish the application papers to employees in one of the methods specified in the section, or those methods are ineffective to achieve that purpose and it has not devised some other effective manner, the court should be approached to give directions as to the manner in which this is to be done. Throughout the emphasis must be on achieving the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees.

[24] That leaves one final question, namely whether the inability of the applicant, for whatever reason, to furnish the application papers to the employees before the hearing precludes the court from granting any relief. Certainly the failure to provide a security certificate in terms of s 346(3) or the failure to lodge the papers with the master in terms of s 346(4) is fatal to the grant of immediate relief. However, that is because of the nature and purpose of these requirements…..The position in regard to the notification provisions in s 346(4A) is different. Their purpose is to ensure that certain specified persons, who may have an interest in the winding-up, in order to protect their own interests, are, so far as reasonably possible, furnished with the application papers in order to assess their own position in the light of the case made by the applicant.…" (footnotes omitted)

[42] I am not persuaded that there is any merit in the arguments raised by the employees. More importantly, the employees have known of this matter since June 2016 (on their version) and claim that their livelihoods are at risk and want to place their views before this Court as to why a winding-up order should not be granted. They have had ample opportunity and yet have remained silent, without explanation. That they have done so even after the electricity has been cut at the premises where they render their services, and from which the company has been evicted with immediate effect on 18 August 2016, is telling.

[43] In light of the above, I am satisfied that the applicant has made out a case for the granting of a provisional winding-up order.

[44] I accordingly make the following Orders:

(a) In the interlocutory application, *Mohamed Salim Khan NO, Farhana Khan NO and Abdool Rahim Khan NO* are granted leave to intervene as the second, third and fourth applicants in the business rescue application under case number <u>5924/2016</u>.

(b) The business rescue application under case number <u>5924/2016</u> is dismissed with costs.

(c) In the application under case number <u>12824/2015</u>, I issue the following Order:

1. Sprint Logistics SA (Pty) and all other interested parties are called upon to show cause, if any, before this court on **9th day of December 2016** at 09h30 in the forenoon or as soon thereafter as counsel may be heard, why the respondent should not be finally wound up.
2. This order shall operate as an order provisionally winding up the respondent.
3. A copy of this order shall be served upon:-
   (a) The South African Revenue Service; and
   (b) The respondent at:-
      (i) Its registered address at 26 Eutectic Point, Alton, Richards Bay KwaZulu- Natal; and
      (ii) Its principal place of business at 110 South Coast Road, Congella Durban, KwaZulu Natal.
4. This order shall be published on or before the **25th day of November 2016** once in Government Gazette and one in a daily newspaper published in Durban and circulating in KwaZulu-Natal.

(d) That the liquidation application under case number <u>3167/2016</u> by Spode Marketing CC is adjourned *sine die*, with costs reserved;

(e) The application by Momentum Property Investments (Pty) Ltd under case number <u>78/2016</u> is adjourned *sine die*, with costs reserved.

CHETTY J

APPEARANCES

Case no. 5924/2016

For the Applicant:	Adv. RGB Choudree SC & Adv. A Moodley
Instructed by:	Yugan Naidu & Associates , Reservoir Hills
	(Ref: YN/16/S685)
For the Respondent:	Adv. GR Thatcher SC
Instructed by:	Shepstone & Wylie Umhlanga Rocks – 031 575 700 (Ref: JCS/mr/NEDC115761)
For the intervening Applicants	Adv. R Kisten
Instructed by:	Yugan Naidu & Associates , Reservoir Hills

Case no. 12824/2015

For the Applicant:	Adv. GR Thatcher SC
Instructed by:	Shepstone & Wylie, Umhlanga Rocks
	(Ref: AF Donnelly.NEDC1.5761)
For the Respondent:	Adv. U Lennard
Instructed by:	Yugan Naidu, Reservoir Hills

For intervening employees	Ms V Singh
Instructed by:	Yugan Naidu, Reservoir Hills

<u>Case No. 78/2016</u>

For the Applicant:	Adv. RM Van Rooyen
Instructed by:	Shepstone & Wylie
	Umhlanga Rocks – 031 575 700
	(Ref: AF Donnelly.NEDC1.5761)
For the Respondent:	Adv.U Lennard
Instructed by:	Yugan Naidu, Reservoir Hills

Case number <u>78/2016</u>

For the Applicant:	Adv. M Bingham
Instructed by:	Kritzinger Ellish Attorneys, Durban
	Ref: A Kritzinger / MM/2/0001
For the Respondent:	no appearance

Date of hearing:	25 August 2016
Date of judgment:	4 November 2016