IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED. ✓

11/2/2015.

DATE SIGNATURE

11/02/2015

Case Number: 19740/2014

In the matter between:

SULZER PUMPS (SOUTH AFRICA) (PTY) LTD

(Registration number: 1922/007245/07) Applicant

and

O & M ENGINEERING CC Respondent

JUDGMENT

POTTERILL J

[1] The applicant is applying for the provisional winding up, liquidation, of the respondent. The application is brought in terms of respondent's inability to pay its debts and that it would be just and equitable to liquidate the respondent. It is common cause that all the procedural requirements for a liquidation application were complied with.

[2] This application was launched on 10 March 2014. This matter was on 16 May 2014 postponed *sine die* and the respondent was ordered to pay the wasted costs, the scale of the costs to be determined by the trial court. The matter was set down again on 13 November 2014 and on that date the matter was by agreement postponed to 2 February 2015. This was to afford the employees of the respondent (prospective intervening party(s)) an opportunity to intervene.

[3] On 2 February 2015 the matter came before me. On the papers the matter was ripe for hearing. There were heads of argument filed on behalf of the applicant but no heads of argument were received from the respondent as required by the Practise Directives of this Court. My registrar enquired from the respondent why no heads were filed and a letter from the respondent's attorney was received informing me that I need not read the papers because it has come to their attention that on 16

January 2015 the respondent resolved to file for business rescue and that a Mr Cawood was on 19 January 2015 appointed as business rescue practitioner.

[4] At the hearing counsel for the respondent informed me that she was only briefed to attend to the postponement of the matter and since the applicant persisted with the hearing of the matter she held no instructions to argue the matter. A counsel appeared for the employee or employees without any application for intervention or opposing papers. The court thus had no idea who or how many employees the counsel represented. Counsel for the employee/s was however heard on legal issues raised on the papers.

THE APPLICANT'S CAUSE OF ACTION.

[5] The applicant is in the business of manufacturing industrial pumps. The respondent manufactures parts of the pumps for the applicant. The parties had an agreement that if there was not timeous performance by the respondent of its contracted obligations the applicant was entitled to hold the respondent liable for penalties for the standing period.

[6] During 2010/2011 the applicant engaged the services of the respondent for the Bambanani Project. The applicant held the respondent liable for standing time for the rotary pumps LLPS and extra labour costs. The respondent acknowledged these costs by signing an acknowledgement of debt for the amount of R747 904 00.

[7] In terms of the acknowledgment of debt this amount was to be paid off in instalments of R25 00.00 per month commencing on 1 June 2012. The acknowledgement off debt contained an acceleration clause.

[8] The respondent made certain payments but as on 19 November 2013 the respondent still owed the amount of R479 477.33. A letter of demand was served on the respondent.

[9] A notice in terms of Section 69 of the Close Corporations Act 69 of 1984 was also served on the respondent on 3 December 2013.

[10] Despite demand no further payments were made. On behalf of the respondent e-mails where sent to the applicant respectively on 9 April 2013, 26 November 2013 and 3 December 2013, wherein it was acknowledged that payments were not made,

that for two months, seemingly October and November 2013, it struggled to pay everybody and that monies owed to them were coming in slowly.

[11] In terms of a further agreement the respondent would construct five intermediate strainers against payment of R1 000 720.15. The applicant paid this amount. The applicant never received the strainers.

[12] Following a written demand the respondent informed the applicant that the strainers were delivered directly to the applicant's client, Eco Logistics (Pty) (Ltd)["Eco"] under delivery note 7483 with a vehicle with registration number VJF359 GP. The applicant ascertained that Eco had not received the strainers and no vehicle with the registration number provided by the respondent entered Eco's premises.

[13] Pursuant thereto the respondent delivered a new delivery note with number 5497 dated 24 August 2012 explicitly stating that the strainers were delivered to the applicant's client on that date. The logbook of Eco however did not reflect that a vehicle with such a registration number entered the premises. Mr Nel, the warehouse manager of Eco denied that the signature on the delivery note, purportedly his, was in fact his signature. Mr Nel also denied that the stamp on the

delivery note was their stamp. Mr Viljoen a forensic document Examiner concluded that neither the signature of Mr Nel nor the stamp was in fact authentic.

[14] When confronted the respondent concluded a new agreement acknowledging that he failed to deliver the strainers and that time to do so was of the essence. Furthermore that it would re- manufacture and deliver the missing strainers. If the respondent failed to deliver the missing strainers the applicant shall have the strainers manufactured at a cost of R315 600.00 excluding VAT which would be for the account of the Respondent. Respondent acknowledged that should it fail to deliver the strainers within the date of delivery it would be responsible for 1% per week of delay up to a maximum of 10% of the then current replacement value of the strainers.

[15] The respondent did not finish the strainers and Necsa completed the strainers. Necsa charged the Respondent R 535 480.00, the amount as agreed between the applicant and the respondent; the respondent thus owes the applicant this amount. The applicant is also owed the amount of R1 950 000.00 constituting the delay penalties amount. The respondent is also liable to pay a further amount of R1 000 720.50 on the first contract as delay penalties.

[16] The applicant thus avers that the respondent is unable to pay its debts and even resorted to fraudulent actions to side step its obligations due to its financial trouble. It would thus be just and equitable to liquidate the respondent. In the replying affidavit the applicant attached an e-mail from the respondent's attorney to the applicant pursuant to the receipt of this application. The applicant is *inter alia* informed that "*Our client also has other creditors where he signed as surety and if O & M Engineering CC is liquidated creditors will go for Mr Ockert M. Fourie in his capacity as surety and he will not be able to make payment of their claims....*and... "*It is a fact that should O & M Engineering be liquidated, concurrent creditors are not going to be left with much after preferential creditors were paid...*"

THE RESPONDENT'S OPPOSITION

[17] The respondent filed an opposing affidavit wherein the only member stated that he signed the acknowledgment of debt and has paid an amount of R380 000.00 in accordance therewith. He however signed the acknowledgement of debt without taking legal advice and the penalties are all out of proportion to the prejudice suffered by the applicant. In fact "*..a Court may well reduce the amount of the penalties to such an extent as the Court may consider it equitable in the*

circumstances in terms of the provisions of Section 3 of the Conventional Penalties Act, Act 15 of 1962. [par 6]"

[18] *"I say that the pumps where delivered to Echo Logistics (Pty) Ltd to be kept on behalf of the Applicant and I cannot say what happened to the 5 intermediate strainers whilst in the position[sic] of Echo Logistics (Pty)Ltd.* [par 8 .6.1.]." His staff delivered the pumps and bought back the delivery note. He takes note of the opinion of the forensic expert but he does not share this opinion.

[19] He admits signing the new agreement, but did not do so because the pumps where never delivered, but because he did not want to lose the applicant as a client and therefor undertook to re-manufacture the missing strainers. He denied that the replacement costs amount to R315 600.00, but he was prepared to pay the replacement costs out of his own pocket to retain the applicant as a client.

[20] The respondent did not complete the manufacturing of the strainers in time and it agreed that Necsa collect the strainers to complete the work. He denied that the reasonable cost of finishing the work could amount to R535 480.00.

[21] The respondent denied that it is unable to pay its debts or that it is just and equitable to be wound up. The respondent reiterated that it conducts a lucrative engineering business and its assets by far exceed its liabilities. The unencumbered movable property of the respondent exceeds fifteen million rand. The respondent has no immovable property. The respondent has no debt and its only financial obligations are the normal monthly expenses such as salaries of staff, water, electricity and cash purchases from suppliers.

APPLICANT'S ARGUMENT

[22] On behalf of the applicant it was argued that on the papers before me the need for business rescue could not arise as under oath the deponent sets out that he has no creditors and has a lucrative business. On the papers before me he is thus solvent and not at all financially distressed. A company that is not financially distressed can never apply for business rescue.

[23] On the other hand the respondent's own attorney and wife set out that there are such financial problems rendering the respondent insolvent and thus the respondent is not amenable to business rescue proceedings. This is so because a business plan cannot be invoked if the company is already insolvent - **Merchant West**

Working Capital Solutions (Pty) Ltd v Advanced technologies and Engineering Company Ltd 13/12406 10 May 2013 (GSJ) [2013] ZAGPJHC 109 and **Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others 18486/2013 14 June 2013 (GSJ) [2013] ZAGPJHC 148.** From the bar the court was informed that the respondent owes the receiver of revenue R5 million. The respondent has no fixed property. From his own business rescue application the respondent is admitting that it is not able to meet its commitments to certain creditors as they become due and payable. Despite many requests from the applicant they have never received a list of assets indicative thereof that there are no assets. This business cannot be rescued.

[24] A business rescue application must be brought at the first available opportunity and must not be brought as a knee-jerk reaction to the application for liquidation; *in casu* the facts clearly indicate that this is in fact what is happening. The opposition of the liquidation is tainted with dishonesty and the court cannot come to the mercy of the applicant condoning such dishonesty.

[25] Furthermore a distinction must be drawn between section 129(2)(a) and section 131(6) of the Companies Act 71 of 2008 ["the Act"]. Liquidation proceedings had commenced and the applicant could not adopt a resolution to begin business rescue

proceedings in terms of s129(2)(a). No court application has to be brought in terms of s129 whereas in s131 such an application is necessary.

[26] The applicant accordingly requested the provisional or final liquidation of the respondent.

ARGUMENT ON BEHALF OF EMPLOYEE/S

[27] It was argued that there is not a distinction to be drawn between s129(2)(a) and 131(6) of the Act. There is no application to proceed with the liquidation proceedings before me and the general moratorium [s133] against legal proceedings during business rescue proceedings is applicable. The court has no discretion to proceed with the liquidation and the application must be dismissed.

COURT'S FINDINGS

[28] The introduction of business rescue in chapter 6 of the Act places a duty on a court to balance the sanctity of entities with the interests of creditors. Business rescue

proceedings attempt to keep a company alive by diverting serious consequences for its members, creditors and employees. In South Africa retaining jobs is most certainly a priority. A court thus has a duty to judicially favour business rescue to liquidation. This must be the backdrop to liquidation proceedings versus business rescue proceedings. This being said, no court can allow business rescue proceedings to be utilized as an abuse of the court process. The court also has a duty to ensure that the entry into business rescue was not feigned. This is so because the Act does not shun liquidation proceedings within the business rescue provisions. Express provision for this is to be found in section 129 which reads as follows:

(1) *"Subject to subsection (2)(a) the board of a company may resolve that the company voluntarily begin business rescue proceedings...*

(2) A resolution contemplated in subsection (1)-

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force and effect until it has been filed."

Henochsberg on the Companies Act, Vol 1, p458 states that "*The reason for this is to prevent the board from thwarting an application to liquidate the company by adopting a business rescue resolution.*"

I can without hesitation find that the business rescue application was launched at this late stage with the sole purpose to thwart the application to liquidate it. I can make this finding without the necessity of entering into the merits of the business rescue which of course I do not have before me. The reasons for this finding follow.

[29] On the common cause facts before me I cannot find that the initiation of the business rescue proceedings was *bona fide* and for the purpose it was designed for. The notice in terms of Section 69 of the Act was served on the respondent on 3 December 2013. The respondent signed 2 acknowledgements of debts respectively dated 8 May 2012 and 29 July 2013. The application for the liquidation of the respondent was served on the respondent on 19 March 2014. Despite 2 postponements of the application for liquidation no application for business rescue was made. The respondent files no heads of argument for the liquidation proceedings and then 10 working days before the application is to be finally heard a resolution is taken by the respondent to begin with business rescue proceedings, taking for granted that the liquidation application will be postponed. This court can confidently find that this application was lodged to suspend the liquidation proceedings as an abuse of process. The respondent has not put before the court that it was not aware of business rescue proceedings, or only 10 days before the hearing became financially distressed. The respondent as far back as May 2012 acknowledged that it could not comply with its liabilities, was aware of the demand

in terms of s69 and the liquidation application. The Act does not set out a time frame within in which an application for business rescue must be launched, but it must be done at a time when the entity can still be rescued, not to thwart an application for liquidation. This is an attempt to use for ulterior purposes machinery devised for the better administration of justice constituting an abuse of process - **Hudson v Hudson and Another 1927 AD 259** at 268. In **Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA)** the court found that the mere application of a particular court process for a purpose other than for which it is primarily intended is however not complete proof of *mala fides.* An improper motive is the factor to sustain *mala fides* where the abuse of court process is an issue. The respondent could not address the court on why the business rescue application, despite the application of s129(2)(a) was initiated. The employees did not bring the application as an affected party in terms of section 131 or filed an affidavit as intervening parties in the liquidation proceedings. The only inference is that they cannot on the facts set up by the applicant oppose the application for liquidation. If a provisional order is granted they can still launch an application if they so wanted. The only motive for the business rescue application on the papers before me is *mala fide.* The deponent on behalf of the respondent declares that he has no creditors. On his own papers he is thus mala fide in launching the application at the time that he does. In **Swart v Beagles Run Investments 25 (Pty) Ltd 2011 (5) SA 422 (GNP)** a business rescue application was dismissed because it boiled down to an abuse of process.

[30] It must also be noted that section 133 places a general moratorium on *legal proceedings* during business rescue proceedings whereas Section 129(2)(a) and 133(6) both refer to *liquidation proceedings*. In **Absa Bank Ltd v Summer Lodge (Pty) Ltd 2014 (3) SA 90 (GP)** paragraph 12 it was found that the legal proceedings, in contrast with the liquidation proceedings, are not suspended and the granting of the final winding-up order is part of the legal proceedings. It is therefore only the implementation of the final winding-up order that is suspended and not the order itself. This was also the court's finding in **Absa Bank Ltd v Makuna Farms CC 2014 (3) SA 86 (GJ); ZAGPJHC (28 November 2013)** at paragraph 10. In **Richter v Bloem Pro CC and Others (69531/2012) [2014] ZAGPPHC 120 (14 March 2014)** the court did not follow the *ratio* of the **Summer Lodge** matter ***supra*** due to the fact that the cases referred to in that case is authority for the interpretation of section 348 of the 1973 Act. The court also reasoned that business rescue proceedings and a final liquidation order are two different concepts and are incompatible and cannot thus co-exist. Without having to make a finding on whether "legal proceedings" include "liquidation proceedings" before implementation of the liquidation, I am satisfied that section 129(2)(a) has application barring the respondent from taking a resolution in terms of section 129. In **Firstrand Bank v Imperial Crown Trading 2012 (4) SA 266 (KZD)** the court found in paragraph [16] as follows:

"[16] It is clear, however, that Act 71 of 2008 draws a distinction between the inter-relationship of business rescue proceedings and liquidation proceedings depending upon whether the source of business rescue proceedings lies in the resolution of the board of a company to begin such proceedings in terms of s 129(1), or whether the source of such proceedings lies in an application brought by an 'affected person' in terms of s 131(1), for an order placing the company under supervision and commencing business rescue proceedings.

[17] In the former case, as pointed out, in terms of s 129(2)(a) such a resolution may not be adopted 'if liquidation proceedings have been initiated by or against the company'. The reference to liquidation proceedings 'by or against the company', is clearly a reference to a voluntary winding-up of a company in terms of s 352 of Act 61 of 1973, as well as a reference to a winding-up of a company by the court in terms of s 348 of Act 61 of 1973 ..."

The court proceeded to grant the provisional liquidation finding that the respondent would not be able to proceed to take a resolution that the respondent begin with business rescue proceedings but that it did not bar an affected party to proceed with business rescue proceedings despite the provisional order being granted.

Thus even if my finding that the resort to business rescue proceedings was an abuse of process is wrong, then I am satisfied that s 129(2)(a) is a bar to the initiation of the business rescue proceedings due to the liquidation proceedings before the court.

[31] On the papers before me there is no bona fide dispute of fact. The applicant set out that no vehicle with such registration number entered the premises of Eco to deliver the applicant's pumps. The respondent, within whose knowledge it lies, did not traverse this fact with who entered the premises and who delivered the pumps. As a lay-man, without contradicting any of the facts of the forensic expert, he boldly disagrees with the opinion of the forensic expert; clearly not a dispute of fact. He in fact signs the agreement wherein he acknowledged that he did not deliver the pumps, yet disputes in the answering affidavit the non-delivery of the pumps. The respondent is accused of falsifying an invoice, a serious allegation against a business, yet it puts up no *bona fide* defence. The court accordingly has to accept the applicant's averments. The court has to find that the respondent committed fraud in order to escape its liabilities. No court can condone this action and choose business rescue above liquidation where the respondent is acting *mala fide* and abusing the process.

[32] The respondent acknowledges that he owes the applicant the monies in the acknowledgment of debt but now raises a defence that he cannot raise against the acknowledgment of debt, i.e. a reduction of the penalties in terms of the Conventional Penalties Act.

[33] A court cannot where the respondent insisted that he has no creditors afford the respondent the opportunity to proceed with business rescue proceedings. On these papers the beginning of the business rescue proceedings is a tactic, mala fide and the court would be closing its eyes to the untruths told by the respondent. A court is not a rubber stamp.

[34] All the defences raised by the respondent are spurious, do not set up a real dispute of fact and are rejected.

[35] This court can under these circumstances proceed to grant a provisional order for liquidation. Accordingly draft order "X" is made an order of court.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 31291/2012

HEARD ON: 5 February 2015

FOR THE APPLICANT: ADV. S.G. MARITZ

INSTRUCTED BY: VFV Attorneys

FOR THE RESPONDENT: ADV. M. FABRICIUS

INSTRUCTED BY: Rossouw & Rossouw Inc.

DATE OF JUDGMENT: 11 February 2015

"X" 11/2/15

11/2/2015 "X"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 19740/2014

On ~~5~~ 11 February 2015 before the Honourable MS Justice Potterill

In the matter between:

SULZER PUMPS (SOUTH AFRICA) PTY LTD
(Registration Number: 1922/007245/07) **APPLICANT**

and

O AND M ENGINEERING CC
(Registration Number: 1996/029953/23) **RESPONDENT**

~~DRAFT~~ ORDER

HAVING HEARD counsel for the applicant, and having considered the papers filed of record, it is herewith ordered as follows:

1. That the Respondent company be and is hereby placed under provisional winding-up;

'X'
11/2/2015.

2. That all persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final winding-up of the Respondent company on 6 March 2015 at 10h00;

3. That a copy of this order be forthwith served on the Respondent company at its registered office and be published in the Government Gazette and in the Beeld Newspaper;

4. That a copy of this order be forthwith forwarded to each known creditor by prepaid registered post.

By order

REGISTRAR

11/2/15