

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Case no: 4817/2014

In the matter between:

JDJ KNIPE
ABJ KNIPE
JMD VIGNE

First Applicant
Second Applicant
Third Applicant

and

OA NOORDMAN NO
CB ST CLAIR COOPER NO
SM RAMPORORO NO

(in their capacity as provisional liquidators
of Kameelhoek (Pty) Ltd)

First Respondent
Second Respondent
Third Respondent

OA NOORDMAN NO
CB ST CLAIR COOPER NO
SM RAMPORORO NO

(in their capacity as provisional liquidators
of Schaapplaatz 978 (Pty) Ltd)

Fourth Respondent
Fifth Respondent
Sixth Respondent

CAROL JESSIE KATHLEEN LOTZ
ROBERT PETRUS JANSEN KNIPE
THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION

Seventh Respondent
Eighth Respondent
Ninth Respondent

JUDGMENT BY: G. J. M. WRIGHT, AJ

HEARD ON: 19 MARCH 2015

DELIVERED ON: 25 JUNE 2015

INTRODUCTION

[1] This is an application for the business rescue of two companies,
Kameelhoek (Pty) Ltd and Schaapplaatz 978 (Pty) Ltd (“the

companies”). The launching of such an application may present as an innocuous fact. However, for these two companies the application is just one instalment in a long line of bitter and acrimonious litigation between siblings.

- [2] Mr Henry Bazzett Louis John Knipe (now deceased) was a shrewd farmer and businessman. His children (known throughout various prior litigation as Johnny, Andre, Jackie, Carol and Pieter) were the beneficiaries of trusts administered by the deceased. After his death the deceased's wife (the children's mother) took over as trustee. Mrs Knipe terminated the trusts during 2009 and allocated the assets of the trusts amongst the siblings equally. These assets included the shares in the two companies.
- [3] During their existence the trusts held shares in various companies, amongst others the two companies that form the subject of this application. Both companies were finally liquidated by order of this court on 27 June 2013. The process of liquidating the companies has not been finally concluded. In order to better understand the reasons why the process of liquidation has not been proceeding at the pace one would expect, it is necessary to shortly refer to some of the litigation leading up to the present application
 - (i) Mrs Knipe applied for the liquidation of the two companies. On 23 June 2011 Jordaan J dismissed the applications.
 - (ii) Mrs Knipe appealed against the dismissal of the liquidation applications. On 23 July 2012 a Full Bench of this Court granted orders for the provisional winding up of the two companies.

- (iii) The return date of the provisional orders was extended various times to afford parties and shareholders the opportunity to oppose and / or be joined as intervening parties.
- (iv) On 27 June 2013 the companies were placed in final liquidation after Daffue J confirmed the provisional winding-up orders.
- (v) On 13 September 2013 an application for leave to appeal against the final orders of liquidation was argued. Leave was refused on 25 September 2013.
- (vi) On 24 October 2013 some of the shareholders lodged a petition to the Supreme Court of Appeal, which petition was refused on 5 February 2014.
- (vii) Some of the shareholders of the companies brought an application for the review and setting aside of the general meeting of creditors and members of the two companies that was held during June 2013. The review was granted and the meeting set aside. An application for leave to appeal has since been lodged. The matter is to my knowledge still pending.
- (viii) The provisional liquidators of the companies applied for leave and authority to sell the property belonging to the companies as soon as possible. On 14 August 2014 relief was granted in favour of the provisional liquidators. Leave was later granted to appeal against that decision. The appeal itself is yet to be heard.

- [4] The Applicants in this application for business rescue are three of the Knipe siblings, namely Johnny, Andre and Jackie. The other two siblings, Carol and Pieter, were cited as Seventh and Eighth Respondents respectively. The provisional liquidators of the two companies in liquidation have been cited in their respective representative capacities as First to Sixth Respondents. The Companies and Intellectual Property Commission (“CIPRO”) was cited as Ninth Respondent. The First to Eighth Respondents are opposing the application.

POWERS OF PROVISIONAL LIQUIDATORS

- [5] The provisional liquidators of the companies (First to Sixth Respondents) requested that they be authorised, to the extent necessary, to oppose the application on behalf of the two liquidated companies. Section 386(4)(a), read with section 386(5), of the Companies Act, 61 of 1973, empowers a liquidator to bring or defend legal proceedings on behalf of the company. None of the other parties presented with oral arguments against extending the powers of the provisional liquidators to include the authority to oppose this application. In their replying affidavit the Applicants made it clear however that the liquidators may be entitled to oppose this application, but that their powers may be extended for such limited purpose only.
- [6] In as far as it is necessary, the request by the First to Sixth Respondents for leave to oppose this application is granted. The basis for the provisional liquidators opposing the application for business rescue is twofold in essence. It is firstly submitted that

business rescue proceedings are not competent as final orders of liquidations have been granted. Secondly the liquidators submit that the Applicants had failed to make out a proper case for business rescue.

SHAREHOLDING RATIO

- [7] A serious dispute developed between the siblings as to the exact ratio in which the shares are held by the siblings. The present application was argued on the same date as the application relating to a determination of the shareholding ratio. During argument Mr Newton submitted on behalf of the Applicants that, should the Applicants not be successful in that application, this application for business rescue will not serve any purpose.
- [8] Following that submission the present application may be summarily dismissed as the Applicants were indeed not successful in the shareholding application. In light of the manner in which all litigation regarding these two companies and the liquidation have so far been driven by the siblings, I find it prudent however to deal with the matter more comprehensively.

PURPOSE OF BUSINESS RESCUE PROCEEDINGS

- [9] Business rescue in general contemplates two goals. The primary goal is to facilitate the continued existence of the company in a state of solvency. The second goal is provided for as an alternative in the event that achievement of the primary goal proves not to be viable and is directed at facilitating a better return for creditors or

shareholders than would result from immediate liquidation (See **Oakdene Square Properties v Farm Bothasfontein (Kyalami)** 2013 (4) SA 539 (SCA) at 549 G – H). In this regard the Applicants contend that the companies are “comfortably” factually solvent and should be able to continue with their business.

- [10] If the Applicants feel so strongly about rescuing the companies and proceeding with the business of the companies, I find it inexplicable that they waited this long to launch an application for business rescue. The companies have been in liquidation since the provisional order was granted on 23 July 2012. Since then, the Applicants engaged in a variety of litigation concerning the companies. There was more than enough time and opportunity to apply for business rescue, if indeed the Applicants seriously considered that to be a viable option.
- [11] In a recent SCA judgment it was stated that “*a court can dismiss any application for business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved*”. See: **Richter v ABSA Bank Ltd** (20181/2014) [2015] ZASCA 100 (1 June 2015).

TIMING OF APPLICATION FOR BUSINESS RESCUE

- [12] As final orders of liquidation have already been granted, the question arose as to whether it is still possible and / or permissible to apply for business rescue. At the time that the present application was argued, different divisions of the high court dealt with the issue in different ways. For purposes of arguing the application, counsel for the various parties in the present matter

found it relatively easy to find one or more cases supporting their respective arguments in this regard. So it was submitted on behalf of the Applicants that the fact that final winding up orders have already been granted in respect of both companies is no bar to the relief sought since final liquidators have not yet been appointed. The Respondents on the other hand argued that business rescue proceedings are not competent after a final liquidation order has been granted. I proceed to deal with the cases used by the parties initially used in their arguments.

- [13] In **Richter v Bloempro CC and Others** 2014 (6) SA 38 (GP) Bam J considered the question “*whether it is in law permissible, or possible, to grant business rescue procedure after a final liquidation order was granted*”. In paragraph 17 he comes to the conclusion that “*business rescue proceedings and a final liquidation order are two different concepts that are incompatible and separate considerations that cannot coexist*”. He proceeds to find that –

“It also appears that, more specifically from the definition of ‘business rescue’ and ‘financially distressed’ in ss 128(b) and 128(f) respectively, that the legislature intended to provide for business rescue proceedings before a final liquidation order is made.”

- [14] The matter was dealt with from a different angle in other judgements such as **Absa Bank Ltd v Summer Lodge (Pty) Ltd** 2013 (5) SA 444 (GNP) [judgment given by Makgoba J] and **Absa Bank Ltd v Summer Lodge (Pty) Ltd** 2014 (3) SA 90 (GP) [judgment given by Van Der Byl AJ]. In the **Summer Lodge** cases an application to provisionally liquidate the respondent company was still pending when application was made for the business rescue of the respondent company. The courts had to adjudicate

whether the subsequent business rescue applications suspended the liquidation proceedings and even the mere application for a provisional winding-up order. The courts therefore concerned themselves with the interpretation of section 131(6) of the Companies Act, 71 of 2008. Van Der Byl AJ who initially dealt with the application found that liquidation *proceedings* commence by the granting of a liquidation order, whether provisional or final. This was in line with an argument that the words “*liquidation proceedings*” only relate to the actual process of winding-up, and that it excludes the process of obtaining a winding-up order.

- [15] When Makgoba J later dealt with the **Summerwood** application, the learned judge found that the grammatical meaning of the word ‘*liquidation*’ “*is the process of liquidating or of being liquidated which is again to determine the liabilities and apportion the assets towards discharging the indebtedness of the debtor*” [2013 (5) SA 444 (GNP) at 446 F – G]. According to Makgoba J that clearly suggests that the words “*liquidation proceedings*” are concerned with the actual process of winding-up after a winding-up order has been granted. Both judges dealing with the **Summerwood** cases in essence decided that an application for business rescue may be launched after liquidation proceedings have commenced by the granting of a liquidation order, whether provisional or final.
- [16] The case of **Van Staden v Angel Ozone Products** 2013 (4) SA 630 (GNP) also dealt with a situation where an application for the business rescue of a company was launched after a liquidation order had been issued. Legodi J considered the distinctions between “*liquidation proceedings*” and “*winding-up proceedings*”. He finds at 635 B that –

“While a distinction can be made between liquidation and winding-up proceedings, for example, the former being legal proceedings before a court of law, and the latter being a process that is overseen by the liquidators and the master, the winding-up proceedings should in my view be seen as a continuation of liquidation proceedings.”

- [17] The learned judge then proceeds to explain at 635 D: *“You do not grant a final liquidation order and execute on it. You execute on a confirmed liquidation and distribution account. Winding-up proceedings are part and parcel of the liquidation proceedings.”* Following through on these *dicta* Legodi J converted the liquidation into business rescue proceedings, thereby allowing the application for business rescue even though a final order of liquidation had already been granted.
- [18] There is one relevant reported case that has already been decided in this Division. In the matter of Van Zyl v Engelbrecht 2014 (5) SA 312 (FB) Lekale J associated himself with the reasoning in Absa Bank Ltd v Summer Lodge (Pty) Ltd 2013 (5) SA 444 (GNP). At 315 D of his judgment Lekale J found that a company already placed in liquidation by means of a winding-up order may be placed under business rescue proceedings.
- [19] The Bloempro matter dealt with above met with one more chapter in the courts, this time in the Supreme Court of Appeal. The judgment in this regard followed after the present application has been argued and judgment reserved. Legal representatives for the Applicants and First to Sixth Respondents acted responsibly by alerting me to the judgment. In the matter of Richter v ABSA Bank Ltd (20181/2014) [2015] ZASCA 100 (1 June 2015) the Supreme Court of Appeal had the opportunity to consider the

question whether it is competent to apply for business rescue in terms of section 131(6) of the Companies Act after a final liquidation order has been granted against a company. In the judgment Dambuza AJA notes that generally “*liquidation is the exhaustive process by which a company is brought to an end*” (in paragraph [9]). After analyzing the various stages in the liquidation of a company, and the purpose and effect of each relevant stage, the Court concluded that an application for business rescue is indeed competent after a final order of liquidation has been granted. This judgment brings an end to the different approaches in the various divisions and I am bound by this decision.

- [20] In the premises, the Applicants were entitled to launch an application for business rescue even though final orders of liquidation have been granted against both companies. This however does not mean that the Applicants could ever have succeeded with the relief they claim.

BASIS FOR LIQUIDATIONS

- [21] Kameelhoek and Schaapplaatz were liquidated on a just and equitable basis. When granting the final winding-up orders Daffue J dissected the status of the relationship between the siblings and made the following findings:

“It is apparent that members of the Knipe Family are at loggerheads with each other and that a family feud of tremendous proportions exists which will not be terminated, whether or not final orders are granted herein.” (at 57 C – D)

“No meaningful dialogue between the parties is possible. They cannot approach any issue with open minds and in good faith.” (at 57 E – F).

- [22] Daffue J proceeded to come to the conclusion that *“no working relationship can ever be restored in such circumstances”*. (at 69 G)
- [23] The present application for business rescue is premised on the assumption that the First and Second Applicants (Johnny and Andre) each hold 42% of the shares in each company. The Applicants contended that, should the shareholding ratio have been decided in their favour, the companies were imminently capable of restoration to full functionality. The reason for this would have been that they were then controlled by directors and shareholders holding a clear majority of 92% of the shares. Furthermore, the Applicants shall then be in a position to raise sufficient finance to (i) purchase Carol’s 8% shareholding and (ii) discharge all of the companies’ liabilities.
- [24] The Applicants’ application for an order declaring their version of the shareholding ratio to be the correct one, has failed. The counter-application which was brought in that matter was granted and it was in essence ordered that the registers of members of the two companies be rectified so as to show an equal shareholding ratio amongst all the siblings. In the scenario where the siblings hold equal shares, business rescue proceedings were always doomed to fail as the shareholders will be unable to work together towards a successful running of the businesses of the companies. In at least two previous judgments it had been found that there is an irreparable breakdown in the relationship between the shareholders. The contents of the various affidavits filed in this business rescue application, as well as in the related shareholding

application, are further proof of the irreconcilable differences between the siblings. Even before the present applicant had been launched, courts have considered whether business rescue should not be ordered for both companies. Daffue J dealt with the question, but came to the conclusions that are too many factual disputes, especially relating to the shareholding issue. See **Knipe and Others v Kameelhoek (Pty) Ltd and Another** 2014 (1) SA 52 (FB) at paragraph 47.

- [25] It is against this background that the Applicants quite correctly conceded that, should they fail to obtain the necessary relief regarding the shareholding issue in their favour, the application for business rescue is not feasible. What raises an eyebrow though, is the fact that the Applicants (with full knowledge of the many hurdles that they have to overcome in order to succeed with any application for business rescue) still chose to (i) wait this long to apply for business rescue and (ii) then launch this application before ascertaining the shareholding ratio.

REQUIREMENTS FOR BUSINESS RESCUE

- [26] In light of my findings above it is not necessary to consider whether the prescribed requirements for an application for business rescue have been met.

COSTS

- [27] The Applicants as the losing party should pay the costs of the application, including the costs of opposition. The Respondents

were entitled to oppose the application and in doing so, they acted reasonably and responsibly. I proceed to consider the appropriate scale for this cost order.

[28] Considering (i) how strongly the Applicants feel about their version regarding the shareholding ratio, and (ii) that their contentions in this regard form the very basis for the business rescue application, it is odd that the Applicants chose to first launch the application for business rescue and only thereafter the application for a declaratory order regarding the shareholding ratio. They were quite rightly aware of the importance of an order in their favour in the application concerning the shareholding issue. And it is for this very reason that they conceded that, should they fail with that application, the present application for business rescue should also fail.

[29] But then again, the Applicants waited for an inexplicably long time to even approach this Court for business rescue. It has been documented in previous judgments concerning the companies and the Knipe siblings that Johnny and Andre especially are vehemently opposed to the winding-up of the two companies. They want to continue with the business of the companies as before. This gives even more colour and perspective to the timing of the application for business rescue. The Respondents appear to be correct in their contention that the application for business rescue was merely a way of further frustrating the liquidation process.

[30] The Respondents, with special reference to Carol and Pieter, had no choice other than to oppose both applications simultaneously. The applications are intertwined, with the present application

dependent on (amongst other factors) the outcome of the *lis* regarding the shareholding issue. The provisional liquidators (First to Sixth Respondents) act in their official capacities. No reasons have been provided as to why they and the estates of the liquidated companies should be burdened with even the smallest of items on a taxed bill of costs, especially as they are succeeding in their opposition.

[31] Taking all these factors and circumstances into account, I am of the view that the Applicants should be held liable for more than just party and party costs. The punitive scale of attorney and client costs will be appropriate in the circumstances.

[32] The Seventh Respondent employed the services of two counsel. No arguments were advanced as to why she should not be entitled to the costs of two counsel.

ORDER

[33] In the premises I make the following orders:

1. Leave is granted to the First to Sixth Respondents in terms of section 386(4)(a) of the Companies Act, 61 of 1973, to oppose this application;
2. The application for business rescue is dismissed;

3. The Applicants, jointly and severally, are to pay the costs of the application, including the costs of opposition, on the scale as between attorney and client;
4. In as far as the costs order relates to the Seventh Respondent, such order shall include the costs occasioned by the employment of two counsel.

G.J.M. WRIGHT AJ

On behalf of the applicants: Adv. AR Newton
Instructed by:
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BLOEMFONTEIN

On behalf of first to sixth respondents: Adv. PF Rossouw SC
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