IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3885/2012

In the matter between:

JACOB JOHANNES VAN ZYL Applicant/Defendant

and

JOHAN FRANCOIS ENGELBRECHT N.O. Respondent/Plaintiff

CORAM:	LEKALE, J
HEARD ON:	20 FEBRUARY 2014
JUDGMENT BY:	LEKALE, J
DELIVERED ON:	27 FEBRUARY 2014

INTRODUCTION AND BACKGROUND:

[1] This is an opposed motion for payment of costs attendant on an application for separation of trial issues launched by the applicant in terms of Rule 33(4) of Uniform Rules of Court.

[2] The applicant is the defendant in an action instituted by the respondent in his capacity as the liquidator of a company of which the applicant was a director. In that action the respondent, as the plaintiff, effectively seeks to hold the applicant, as the defendant, liable for the debts of such a company.

[3] In resisting the claim the applicant, *inter alia*, raised a special plea of prescription which he desired to have adjudicated separately from the merits of the action.

The respondent could, however, not cosent to separation of issues and on the 5th December 2013 the applicant launched a Rule 33(4) application in terms of which it prayed for separation of issues and payment of associated costs by the respondent. The respondent, on his part, filed opposing papers on the 10th December 2013 and the 17th December 2013.

[4] On the 20th December 2013 an application seeking to place the company under supervision and commencing business rescue proceedings in terms of section 131(1) of Companies Act 71 of 2008 (the Act) was launched in the North Gauteng High Court by an affected party. On the 15th January 2014 the applicant filed his replying affidavit in the Rule 33(4) application. On the 24th January 2014 the respondent acceded to separation but did not tender costs. An order was, eventually, secured by agreement between the parties separating the issues and reserving the question of costs for argument on the 20th February 2014. It is that question of costs which now serves before me.

[5] The respondent opposes the motion for costs on, *inter alia*, the ground that following the issue and service of a section 131(1) business rescue application the liquidation proceedings were suspended in terms of section 131(6) of the Act and, as such, he cannot be held liable for the costs of an application heard after the fact of such a suspension. In his view an appropriate order is one which either allows costs to stand over for later adjudication pending the outcome of the business rescue application or directs that costs be costs in the cause.

DISPUTE:

[6] The parties are, effectively, at variance on whether or not the action between them is a step in the liquidation proceedings so as to bring it within the firing line of the provisions of section 131(6) of the Act. The applicant contends that the respondent is liable for the costs of the application for separation of issues while the latter, on his part, maintains that he cannot be saddled with such costs because his position as a liquidator got suspended when the business rescue application was launched.

CONTENTIONS FOR THE PARTIES:

[7] Ms Van Rhyn submits, *inter alia*, that the provisions of section 131(6) of the Act do not strike at and hamper the collection of debts in favour of a company in liquidation because such collections are for the benefit of such a company. In her view only proceedings against such a company, as well as its property, gets suspended as evidenced by section 133 of the Act which places a general moratorium on legal proceedings against a company placed under business rescue proceedings. In her opinion the fact that the respondent took steps in the separation application after the business rescue application had been launched, opens him up for costs of such an application. She contends, further, that the action between the parties concerns damages and is, as such, not in the nature of collection of debts owing to the company.

[8] Mr Benade contends, on behalf of the respondent, that the suspension comes into effect by operation of law and the respondent, *qua* liquidator, cannot, in law, assume the powers which the law does not confer upon him. He, further, retorts that damages are a species of a debt and in claiming the same the liquidator is engaged in collecting an asset belonging to the company.

APPLICABLE LEGAL PRINCIPLES:

[9] Section 131(6) of the Act provides that:

> "**(6) 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-**
>
> **(a) the court has adjudicated upon the application; or**
>
> **(b) the business rescue proceedings end, if the court makes the order applied for.**"

[10] The parties are correctly in agreement that the words **"liquidation proceedings**" have been held to

> "**refer to a process that consists of the collection of the assets, realising and reducing them to money, dealing with proof of creditors by admitting or rejecting them, and distributing the net proceeds after providing for costs and expenses by the liquidator to the persons entitled thereto. Thus, the words 'liquidation proceedings' have to do with the process that is overseen by the liquidator and the master in winding-up and not the legal proceedings before a court of law in order to obtain such order.**"

(See: **Absa Bank Ltd v Summer Lodge (Pty) Ltd** 2013 (5) SA 444 (GNP) at paragraph [12].)

[11] Section 136(4) of the Act provides that:

> "**(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.**"

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS:

[12] It is common cause between the parties that the respondent is and was the appointed liquidator of a company in liquidation as at the 20th December 2013 when an application seeking to place that company under business rescue proceedings was launched.

[13] It is further not in dispute that, by virtue of the provisions of section 131(6) of the Act the liquidation proceedings were suspended when the said application for business rescue proceedings was served, filed and all affected persons were notified of the same.

[14] It is clear from the provisions of section 131(6) read with section 136(4) of the Act that suspension of liquidation proceedings entails suspension of the office of the liquidator with the result that no collection of, *inter alia*, assets by the liquidator can take place during that period. As Ms Van Rhyn correctly submits, this allows for a company in liquidation to be placed under business rescue proceedings. The liquidator will still be able to get paid and compensated if the company is eventually placed under business rescue proceedings insofar as he is regarded as a creditor of the company in such circumstances. Contentions for the applicant to the effect that claims for the company are exempt from the provisions of section 131(6) of the Act because such claims stand to benefit the company and, as such, they serve to resuscitate it are, with respect, without merit for the legislature would have made an express provision therefor if it was its intention to do so. A claim in favour of a company under liquidation does not necessarily and without further ado stand to benefit it. Such a claim may succeed or fail and, if it eventually fails, it pushes an already financially distressed company into further financial doldrums. The fact that a claim is in favour of a company in liquidation does not *per se* signify its success.

[15] Mr Benade is correct in his submission that a claim for damages is, in fact, a claim for recovery of a debt because it is a claim in favour of the company for something allegedly owing to it. It is, as such, a step in the liquidation process and it is implicated by the provisions of section 136(6) of the Act. In my judgment all legal proceedings instituted by the liquidator in the liquidation proceedings, which are pending as at the date an application for business rescue proceedings is made against a company under liquidation, get automatically suspended when such an application is made. Any steps taken by the liquidator in such proceedings after such an application is made, are futile and of no legal

consequence. Such steps, in my view, may be ratified by the liquidator himself at the end of the suspension period as contemplated by section 131(6)(a) and (b) of the Act or possibly by the appointed business rescue practitioner where liquidation proceedings were converted into business rescue proceedings.

[16] An appropriate order in the circumstances of the instant matter is, in my view, one which allows costs to stand over for determination at a later stage pending finalisation of the business rescue application.

ORDER:

[17] The question of costs stands over for later adjudication pending the outcome of the business rescue application.

L. J. LEKALE, J

On behalf of applicant/defendant: Adv Ben Pretorius
With him:
Adv Ilse van Rhyn
Instructed by:
Christo Dippenaar Inc
BLOEMFONTEIN

On behalf of respondent/plaintiff: Adv H.J. Benade
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