IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 7 May 2013

Case Number: 16550/13

In the matter between:

VINCEMUS INVESTMENTS (PTY) LTD	Applicant
and	
LOUHEN CARRIERS CC (In Business Rescue)	First Respondent
COMPANIES and INTELLECTUAL PROPERTY COMMISSION	Second Respondent

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JUDGMENT

A B ROSSOUW A J

[1] The matter came before me on 25 March 2013 by way of urgency. There was no proper notice of the application given to all affected parties as envisaged in s 130 (3) (b) of the Act, in view of which I indicated that I was going to postpone the matter and order the applicant to pay the wasted costs. I requested the parties to prepare a draft order that would make

provision for proper notice to all affected parties including the costs order that I intended to make. The parties prepared a draft order, which I made an order of court on 27 March 2013. What follows, are my reasons for the order.

[2] This is an urgent application for, inter alia, the following relief as per the applicant's notice of motion:

> '1.2 That the Resolution adopted by the First Respondent in terms of Section 129 (1) of the Companies Act, 71 of 2008, be and is hereby set aside.
>
> 1.3 That the First Respondent, in terms of Section 130 (5) (c) (i) of the Companies Act, 71 of 2008 is herewith placed under liquidation.
>
> 1.4 That the costs of this application are costs in the liquidation.'

[3] The application is silent as to the statutory provisions upon which the applicant relies for approaching the court for the relief sought in terms of prayer 1.2. The relief sought in terms of prayer 1.3 is obviously dependent upon the granting of an order in terms of prayer 1.2.

[4] The relevant facts relating to the relief sought in terms of prayer 1.2 are the following:

[5] On 23 April 2012 the first respondent (a close corporation) ('the respondent') adopted a resolution in terms of s 129 (1) of the Companies Act 71 of 2008 ('the Act') to commence business rescue proceedings.

[6] On 13 July 2012 the respondent filed the following documents with the Companies and Intellectual Property Commission ('the Commission') (the second respondent): Form CoR 123.1 (Notice of Beginning of Business Rescue Proceedings), the respondent's s 129 (1) resolution to commence business rescue proceedings dated 23 April 2012 and the respondent's s 129 (3) (a) sworn statement dated 2 May 2012.

[7] In completing Form CoR 123.1, the respondent indicated that it adopted the resolution in terms of s 129 (1) on 23 April 2012 and that the respondent's business rescue proceedings commenced on 29 June 2012 'being the date on which the notice was filed with the Commission'. As per the Commission's official date stamp the aforesaid documents were only delivered to it on 13 July 2012.

[8] Mr Heysteck sent all the aforesaid documents per e-mail to the applicant's attorneys on 17 July 2012. This is borne out by the applicant's attorneys' letter addressed to Mr Heysteck dated 23 July 2012 and more in particular numbered paragraphs 4 and 8.5 thereof read with paragraph 5 of the respondent's answering affidavit.

[9] On 17 July 2012 the Commission issued a Registration Certificate (Form CoR 126.2) in terms of which Mr Heysteck has been licenced in terms of s 138 to serve as a business rescue practitioner.

[10] On 18 July 2012 the respondent appointed Mr Heysteck as business rescue practitioner and on 19 July 2012 it filed Form CoR 123.2 (Notice of Appointment of Business Rescue Practitioner) with the Commission. On this form the respondent indicated the date of commencement of the business rescue proceedings as 13 July 2012. The applicant's attorneys received form CoR 123.2 on 23 July 2012.

[11] The applicant seeks the relief in terms of prayer 1.2 on the basis that the respondent has not complied with the provisions of s 129 (3) (a) and (b) in that the respondent published the notice in terms of s 129 (3) (a) on 17 July 2012, some three months after the adoption of the s 129 (1) resolution and that the business rescue practitioner was not appointed within 5 days thereafter. In the result, so the applicant submitted, the resolution has lapsed and is a nullity by virtue of the provisions of s 129 (5) (a).

[12] The relevant subsections of s 129 read as follows:

‘(1) Subject to subsection 2 (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that –

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.

(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 or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must –

(a) publish a notice of the resolution and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as requested by subsection (3) (b), a company must –

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

(5) If a company fails to comply with any provision of subsection (3) or (4) –

(a) it's resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; . . . '

[13] Strict time limits are imposed for the publication of a notice of the resolution to place a company under business rescue and for the appointment of a business rescue practitioner. This is done to avoid unnecessary delay and the abuse of the procedure. From the wording of s 129 (5) read with the provisions of s 6 relating to form and delivery, it is clear that if a company fails to adhere to the prescribed *time limits* contained in s 129 (3) or (4) its resolution lapses and consequently becomes a nullity automatically. In order to establish whether a company has complied with the prescribed requirements relating to form and delivery within the prescribed time limits, one must have regard to the relevant provisions contained in s 6 of the Act and the applicable provisions contained in the Companies Regulations, 1911. (See *Advanced Technologies and Engineering Company (Pty) Ltd (In business rescue) v Aeronaufique Et Technologies and others*, unreported, North Gauteng High Court, case no 72522/11; *Madodza (Pty) Ltd (In business rescue) v Absa Bank Ltd and others*, unreported, North Gauteng High Court, case no 28906/12 and *Credit Suisse Group AG and others in re Van Steen NO and another*, unreported, case no 3624/2013).

[14] The relevant subsections of s 130 read as follows:

'(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order –

(a) setting aside the resolution, on the grounds that –

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 129; . . . '

(2) . . .

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

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

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

(4) Each affected person has a right to participate in the hearing of an application in terms of this section.'

[15] In *Henochsberg on the Companies Act 71 of 2008* vol 1 p 458 the following is stated by the authors:

'It is difficult to align the apparent automatic lapsing of a business rescue resolution under the provisions of s 129 (5) with [s 130 (1) (a) (iii)]. In terms of s 129 (5) it would appear that no Court application, or indeed any action at all, is required for the business rescue resolution to lapse and become a nullity where the procedural requirements of s

129 have not been met. Under 130 (1) (a) (iii) an affected person may approach the court for an order setting aside the business rescue resolution on the grounds that the company has failed to satisfy the procedural requirements set out in s 129. The approach under s 130 (1) seems a far more sensible approach in providing clarity regarding the status of the business rescue than the situation catered for under s 129 (5).'

[16] As I see it, the provisions of s 130 (1) (a) (iii) are complementary to the provisions of s 129 (5). If there is no dispute amongst the affected persons regarding the question as to whether a company has complied with the provisions of s 129, then *cadit quaestio*. If such a dispute does arise, then the only remedy available to an affected person is to approach the court in terms of s 130 (1) (a) (iii), which remedy must be exercised before the adoption of a business rescue plan, after which the remedy is no longer available.

[17] Although s 130 (1) (a) (iii) makes provision for the 'setting aside' of the resolution, a resolution that has lapsed and, consequently, has become a nullity *ex lege,* cannot, technically speaking, be set aside. Therefore, in my view, s 130 (1) (a) (iii) should be interpreted to mean that an affected person may apply to a court for a *declaratory order* that the resolution has lapsed and has become a nullity on the ground that the company has failed to satisfy the procedural requirements set out in s 129.

[18] With regard to the computation of business days between the happening of one event and another mentioned in s 129, the period is calculated excluding the first day on which the first event occurs including the last day on or by which the second event is to occur, excluding any public holiday, Saturday or Sunday that falls on or between the events. (See s 5 (3) of the Act).

[19] The respondent adopted the said resolution on 23 April 2012 and delivered the said notice in accordance with form CoR 123.1 together with a copy of the resolution to the Commission on 13 July 2012. In my view, the latter date is the effective date and not the date upon which the resolution was adopted. This much is clear from the provisions of s 129 (2) (b). This means that the last day on which the first respondent had to publish the documents mentioned in s 129 (3) (a) and to appoint a business rescue practitioner was 20 July 2012. As already stated, the applicant's attorneys received form CoR 123.1 together with a copy of the resolution and the respondent's s 129 (3) (a) sworn statement on 17 July 2012 and the business rescue practitioner was appointed on 18 July 2012.

[20] The last day upon which the notice to appoint a practitioner (Form CoR 123.2) had to be filed was 20 July 2012. The latter notice was filed on 19 July 2012, which means that the last day on which a copy of the notice had to be published was 26 July 2012. On 23 July 2012 the applicant's

attorneys received a letter from the business rescue practitioner to which form CoR 123.2 was attached.

[21] In the result, it appears as if there was compliance with section 129 (3) (a) and (b) and 129 (4) of the Act, at least insofar as the applicant is concerned.

[22] Be that as it may, this court can only adjudicate an application for the setting aside of a resolution on any of the grounds contained in section 130 (1) (a), if each affected person has been notified of the application by the applicant in the prescribed manner as provided in section 130 (3) (b) of the Act. Strict observance of this requirement is necessary in view of an affected person's right to participate in the hearing of an application in terms of 130 (4) (b) of the Act.

[23] A copy of the application was served on the respondent and the Commission as provided in s 130 (3) (a) of the Act. However, from page 34 of the paginated papers it appears as if there were at least 10 affected persons (creditors) who were not notified of the application in the prescribed manner as provided in s 130 (3) (b). (The prescribed manner is regulated by r 124 in terms whereof an applicant is required to deliver a copy of the application to each affected person in accordance with r 7. In terms of r 7 delivery may take place in any manner contemplated in s 6

(10) or (11) or in the manner set out in Annexure 3, Table CR 3 of the Companies Regulations, 1911). Although the first respondent did not make an issue of this in his answering affidavit or during argument, I am of the view that the court is duty bound to ensure that the provisions of s 130 (3) have been complied with.

[24] Because of the applicant's failure to comply with the provisions of s 130 (3) (b) a postponement is inevitable and I think that it would only be fair if the applicant is ordered to pay the wasted costs occasioned by the postponement.

[25] (I communicated my concerns and intention to the parties during argument and requested them to prepare a draft order that would make provision for proper notice to all affected parties including the costs order that I intended to make, which they presented to me in chambers on 27 March 2013).

[26] In the result, I make the following order:

The draft order, marked 'X', is made an order of court.

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A B ROSSOUW A J

DATE: 7 May 2013