IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.
DATE 23/5/2013 SIGNATURE

DATE: 23/5/2013

CASE NO: 63188/2012

IN THE MATTER BETWEEN

ABSA BANK LIMITED APPLICANT

AND

SUMMER LODGE (PTY) LTD RESPONDENT

CASE NO: 63189/2012

IN THE MATTER BETWEEN

ABSA BANK LIMITED APPLICANT

AND

JVL BELEGGINGS (PTY) LTD RESPONDENT

CASE NO: 63190/2012

IN THE MATTER BETWEEN

ABSA BANK LIMITED APPLICANT

AND

EARTHQUAKE INVESTMENTS (PTY) LTD RESPONDENT

JUDGMENT

MAKGOBA, J

[1] The applicant launched three different applications under the above case numbers for the winding-up of the respondents on the grounds that the respondents are insolvent and did not react to or comply with notices served in terms of section 345 of the previous Companies Act no 61 of 1973 ("*the previous Companies Act*"). The respondents are insolvent entities belonging to the same group of companies, which group is indebted to the applicant in the sum of R53 981 416,00.

[2] 0n 22 February 2013 VAN DER BYL AJ granted provisional winding-up orders in respect of all three respondents, the return day of the provisional orders being 27 March 2013, which was extended to

13 May 2013. By arrangements and agreement the matters were heard simultaneously on 15 May 2013 as the legal issue raised for determination is the same in each case.

[3] The pivotal question before VAN DER BYL AJ was whether the launching of the business rescue applications to place the respondents under supervision and to commence business rescue proceedings in respect of each of them would suspend the applications for liquidation **ex lege**/automatically. Thus, as **in casu**, VAN DER BYL AJ was also requested to interpret section 131(6) of the Companies Act no 71 of 2008. VAN DER BYL AJ held that liquidation proceedings only "*commence*" by the granting of a liquidation order, whether provisional or final, and therefore the mere issue and service of a business rescue application would not suspend legal proceedings in order to obtain a liquidation order. That essentially, because there is no liquidation order in existence, there is still no "*liquidation proceedings*" and therefore nothing to "*suspend*". Consequently, VAN DER BYL AJ granted provisional winding-up orders in respect of each of the respondents. The legal question was kept open for determination by this court on the return day of the **rule nisi**.

[4] The legal question for determination by this court concerns the construction of the words "*liquidation proceedings*" as it appears in section 131(6) of the Companies Act, no 71 of 2008 ("*the Act*"). Section 131(6) of the Act provides 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-*
>
> *(a) the Court has adjudicated upon the application; or*
>
> *(b) the business rescue proceedings end, if the Court makes the order applied for.*"

[5] With regard to the legal question posed to this court the parties are at loggerheads as to the correct interpretation of the words "*liquidation proceedings*" as it appears in section 131(6) of the Act.

[6] The respondents contend that by virtue of the three business rescue applications launched by the affected parties, this court is precluded from granting a final liquidation order. This is because, respondents

contend, the applications for liquidation constitute "*liquidation proceedings*" as envisaged in section 131(6) of the Act. Thus the respondents contend that the liquidation applications are therefore automatically and/or **ex lege** suspended and the court's jurisdiction is ousted to grant final winding-up orders.

[7] In the respondents' contention the words "*liquidation proceedings*" refer to the substantive application (ie legal process) to obtain a winding-up order and also to the collective processes followed by the Master and the liquidator in the actual winding-up of the respondents. 0n the other hand the applicant's interpretation of the words is that the words refer only to the collective proceedings in the actual winding-up of the respondents followed by the Master and the liquidator. Thus, excluding the legal proceedings in order to obtain a winding-up order.

[8] For reasons that follow, I am inclined to align myself with the applicant's interpretation or contention and I reject the respondents' contention. It needs be mentioned that VAN DER BYL AJ, with reference to the decision in **Firstrand Bank Ltd v Imperial Crown**

Trading 143 (Pty) Ltd 2012 4 SA 266 (KZD), found that liquidation proceedings as referred to in section 131(6) of the Act only commence by the granting of a liquidation order, whether provisional or final. That the provisions of section 131(6) of the Act do not suspend any liquidation proceedings prior to the granting of a provisional or final order.

[9] The ultimate decision of VAN DER BYL AJ is in line with the applicant's contention that the words "*liquidation proceedings*" only relate to the actual process of winding-up following an order of winding-up and therefore excluding the legal proceedings and/or substantive application and/or steps taken by a creditor to obtain a winding-up order.

[10] The ordinary grammatical meaning of the words "*liquidation*" and "*proceedings*" needs to be looked into. According to Webster's *Third New International Dictionary* the words have the following meanings: "*Liquidate*" means: to determine the liabilities and apportion assets towards discharging the indebtedness of; to settle (a debt) by payment or other adjustment or settlement; to get rid of; dispose of; to convert

(assets) into cash; to liquidate debts or damages or accounts; to determine liabilities and to apportion assets towards discharging indebtedness.

"*Proceeding*" means: the action of proceeding; a particular way of doing or accomplishing something; a particular action or cause of action; a particular step or series of steps adopted for doing or accomplishing something.

[11] Thus, in my view 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. This clearly suggests that the words "*liquidation proceedings*" in section 131(6) of the Act is concerned with the actual process of winding-up followed by the liquidator and the Master after the winding-up order has been granted. It therefore excludes the legal action and/or process taken in order to obtain such a state of affairs.

[12] Consequently, I agree with the submission made by Mr Meintjies, counsel for the applicant, that the words "*liquidation proceedings*"

refer to a process that consists of the collection of the assets, realizing 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.

[13] The interpretation ascribed to the words "*liquidation proceedings*" above, is fortified by the use of the word "*commenced*" as it appears in section 131(6) of the Act. The legislature used the word "*commenced*" and not for instance the word "*launch*" or "*start*". The word "*commenced*" has a particular meaning in company law. Thus, in South African law, the word "*commenced*" is used in section 348 of the Companies Act no 61 of 1973 (which is still applicable to date).

[14] Section 348 of the previous Act provides as follows:

> "*A winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up.*"

In terms of section 348 of the previous Act a winding-up order by the court is by way of a fiction "*deemed to commence at the time of the presentation to the court of the application for the winding-up*" but this deeming clause only comes into operation after it has been determined **ex post facto** that a winding-up order had been granted. If no such order has been granted any liquidation proceedings cannot be deemed to have commenced.

[15] The Full Bench in **Vermeulen & Another v CC Bauermeister (Edms) Bpk 1982 4 SA 159 (T)** considered the meaning of section 348 and held as follows:

> "*Section 348 is a deeming provision, whereby a winding-up by the court is deemed to have commenced when the application is presented ... in the case of section 348, that which is deemed to take effect at an earlier date is a winding-up by the court. Section 348 refers expressly to a winding-up by the court, and*

that is the event which is deemed to commence at an earlier stage. Thus, before the deeming provision can operate there must be a winding-up by the court. By the deeming provision, Parliament has antedated the operation of a winding-up by the court, but without such a winding-up there is nothing to antedate. To hold the contrary would lead to manifest absurdity, in that the mere filing of an application for a winding-up order, however ill-founded or even vexatious, would **ipso jure** *have the effect of a winding-up order."*

This decision was approved and applied in **Kalil v Decotex 1988 1 SA 943 (A).**

[16] In the context of the present case I am of the opinion that section 131(6) of the Act means that once the 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 in terms of section 131(1) of the Act would suspend the liquidation process. VAN DER BYL AJ was accordingly correct in granting provisional orders on 22 February 2013 since as at that time

there were no liquidation proceedings to be "*suspended*" by the business rescue applications.

[17] It is common cause that as matters stand now, the business rescue applications have been duly launched and the matters are pending. Furthermore the provisional orders have been granted but remain suspended by the pending business rescue applications.

Order

[18] 18.1 I accordingly issue a declarator to the following effect:

"*The meaning of the words 'liquidation proceedings' in section 131(6) of the Companies Act, no 71 of 2008, is confined to the actual process of winding-up a company consequent upon an order of winding-up having been issued by a court and is the actual process followed in winding-up and overseen by the liquidators and the Masters. The words 'liquidation proceedings' do not include the legal proceedings taken by a creditor for purposes of obtaining an order that a company be wound-up.*"

18.2 Consequent to the above, the provisional orders granted on 22 February 2013 are suspended and the return days are extended until the court has adjudicated upon the business rescue applications or the business rescue proceedings end, if the court makes the order applied for.

18.3 The costs of the present proceedings shall be paid by the respondents.

E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

63188-2012

HEARD ON: 15 MAY 2013
FOR THE APPLICANTS: L MEINTJIES
INSTRUCTED BY: RORICH WOLMARANS & LUDERITZ ATTORNEYS
FOR THE RESPONDENTS: M M W VAN ZYL SC
INSTRUCTED BY: DIEMONT INCORPORATED