

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

5/11/13.

CASE NO: 16550/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
5/11/2013.....	<i>E. M. busi</i>
DATE	SIGNATURE

In the matter between:

VINCEMUS INVESTMENTS (PTY) LTD**REG NO. 1969/004762/07****APPLICANT**

and

LOUHEN CARRIERS CC (in business rescue)**REG NO. CK2009/008644/23****1ST RESPONDENT****COMPANIES & INTELLECTUAL PROPERTY****COMMISSION****2ND RESPONDENT**

J U D G M E N T

KUBUSHI, J

[1] This is an application in terms of s 130 of the Companies Act 71 of 2008 (the Act) for the setting aside of a resolution adopted by the 1st respondent's sole member to proceed with business rescue proceedings, in accordance with s 129 of the Act. The applicant seeks a further order in terms of s 130 (5) (c) (i) of the Act to have the 1st respondent finally wound-up.

[2] S 129 of the Companies Act 71 of 2008 provides that: –

(1) Subject to the provisions of 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.

and

S 130 of the Act reads as follows:–

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of s 129, until the adoption of a business rescue plan in terms of s 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 s 129.'

[3] The application was initially launched on an urgent basis for hearing on 26 March 2013. Having heard the parties the presiding judge, Rossouw AJ, made an order on 27 March 2013 which called upon the 1st respondent and other affected persons to show cause why the order should not be granted. In terms of paragraph 2 of the said order the applicant was ordered to serve the order on other affected persons. The applicant has complied with the provisions of that paragraph.

[4] The application is pursuant to seven written lease agreements concluded between the applicant and the 1st respondent. In terms of the agreements the 1st respondent rented certain goods from the applicant, to wit: a 2005 model Mercedes Benz Axor 18.5 horse; 2005 model Top Trailer Auxie trailer; 2005 model Scania R124 420 HP truck tractor; 2005 model Top trailer Tri Axle sloper; 2005 model Scania R124 420 HP truck tractor; 2003 model Burg trailer; and 2007 model Mercedes Benz Actros MP2 horse. The 1st respondent fell in arrears with payment of the said lease agreements and

at the time of the institution of these proceedings was in arrears in the amount of R1 456 554, 57.

[5] The applicant has raised a number of grounds why the resolution adopted by the 1st respondent in terms of s 129 (1) of the Act should be set aside. I will however, first consider the applicant's ground based on s 130 (1) (a) (iii) of the Act, in that the 1st respondent has failed to satisfy the procedural requirements set out in s 129 of the Act.

[6] According to the applicant, the 1st respondent's non-compliance with the requirements of s 129 of the Act is based on the ground that the 1st respondent failed to publish the s 129 (3) (a) notice to every affected person within the time required in terms of that subsection. It is the applicant's case that it did not receive the notice within the time specified in the subsection. The 1st respondent, through the business rescue practitioner, is opposing the application. It alleges that it has complied with the requirements of s 129 (3) (a) in particular it alleges that it notified the applicant in time. The 2nd respondent is not opposing the application and will abide the decision of the court on condition that the applicant does not insist on an order in terms of which the 2nd respondent will be liable for any costs. The applicant seeks no order against the 2nd respondent.

[7] It is common cause that the resolution was taken and/or adopted on 23 April 2012. S 129 (2) (b) stipulates that a resolution ‘has no force and effect unless it has been filed.’ It is also common cause that the resolution was filed on 13 July 2012. The resolution thus became of force and effect on 13 July 2012.

[8] S 129 (3) (a) provides that –

‘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 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.’ (my emphasis).

[9] The Act, in its definition section specifies that “Business days” has the meaning determined in accordance with s 5 (3) of the Act. S 5 (3) of the Act provides for the computation of time and states that –

‘When, in this Act, a particular number of “business days” is provided for between the happening of one event and another, the number of days must be calculated by –

(a) excluding the day on which the first such event occurs;

- (b) including the day on or by which the second event is to occur; and
- (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b), respectively.'

[10] It means that, in this instance, the calculation of the period would have started on 16 July 2012 and ended on 20 July 2012. The 'first such event' fell on 13 July 2012 which is the date on which the resolution was filed should be excluded. The 13 July 2012 fell on a Friday as such Saturday and Friday are excluded from the calculation. The first day of the calculation of the five days fell on Monday 16 July 2012. And the 'last day' 20 July 2012 which is the last day of the five days should be included in the calculation.

[11] The 1st respondent contends that it notified the applicant of the business rescue proceedings in time. This it alleges was done on the 17 July 2012 by means of email attached to its answering affidavit as annexure "JH01". Annexed to the said email is a copy of a letter which is purported to have been sent together with the email. In brief, the letter does notify the applicant that the 1st respondent has commenced with business rescue proceedings and also informs the applicant that a business rescue practitioner will be appointed and will contact the applicant in due course. The applicant does not dispute receipt of this email and annexure.

[12] The 17 July 2012 fell within the five days within which the affected persons should have been notified. If the applicant was notified on that day it therefore means that it was duly notified and the 1st respondent complied with the requirements of section 129 (3) (a) of the Act. However, to my mind, even if the applicant was notified in time, the 1st respondent did not comply with the provisions of the subsection. This is so because the 1st respondent did not publish the notice of the resolution, and its effective date, in the manner prescribed by the subsection.

[13] The manner in which the notice should be published is enunciated in the Companies Regulations (Published in terms of Act No. 71 of 2008) (the regulations).

Regulation 123: **Notices to be issued by a company concerning its business rescue proceedings.** – *See section 129 (3), (4) (b) and (7) and section 131 (8), states that –*

- (1) A Notice of Commencement of Business Rescue Proceedings, contemplated in s 129, must be in the form CoR 123.1, and filed in accordance with s 129, together with a copy of the board resolution to commence business rescue proceedings.
- (2) After filing its Notice of Commencement of Business Rescue Proceedings, the company must publish that Notice as required in s 129 (3) (a), by –

- (a) delivering a copy of the Notice and resolution to every affected person in accordance with regulation 7.

[14] In my opinion, by notifying the applicant as stated in paragraph [11] of this judgment, the 1st respondent did not comply with the provisions of s 129 (3) (a). The subsection is lucid. The notice must be as prescribed. The prescription of the notice is set out in the regulations. In order for the notice to have complied, the following should have happened: firstly, the notice contemplated in s 129 must be in form CoR 123.1; secondly, a copy of the board resolution to commence business rescue proceedings must be attached to the notice; thirdly, the notice must first be filed and after filing, the company must publish that notice to every affected person; lastly, s 129 (3) (a) requires the notice to include a sworn statement of the facts relevant to the grounds on which the board resolution was founded. The 1st respondent did not comply with all these requisites. It merely sent a letter which is not a proper notice as required in the regulations. The notice should be on form CoR 123.1. In that sense the letter or purported notice does not comply with the provisions of s 129 read with regulation 123. The purported notice was not filed before it was published to the affected persons. Although a copy of the board resolution to commence business rescue proceedings was attached but a sworn statement of the facts relevant to the grounds on which the board resolution was founded was not included. A proper notice, as required by the subsection read with regulation 123, was eventually sent to the applicant by the business rescue practitioner. However, this notice was emailed

(published) to the applicant out of time. That notice as per annexure “C” to the founding affidavit is dated 23 July 2012 and according to the fax date appearing at the top of the notice it was faxed to the applicant on 24 July 2012. As I have already determined the last date to notify the affected persons was the 20 July 2012, it means therefore that at the time the notice was drafted and faxed it was already late.

[15] S 129 (5) provides that – If a company fails to comply with any provision of subsection (3) or (4) –

- (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
- (b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.

[16] The purpose of s 129 (5), is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129 (3) or (4) the relevant resolution lapses and is a nullity. There is no other way out. The requirements contained in the relevant subsections are either complied with or not. See Advanced Technologies and Engineering Company (Pty) Ltd (In Business Rescue) v

Aeronautique Et Technologies and Others judgment of the NGHC given on 6 June 2012 quoted with approval in Madodza (Pty) Ltd (in business rescue) v ABSA Bank Limited & Others, judgment of the NGHC given on 15 August 2012.

- [17] It is clear that in this instance, the relevant provisions s 129 (3) (a) were not complied with. The 1st respondent did not give proper notice, as required by s 129 read with regulation 123, to the applicant. It is also evident that in sending the proper notice on 24 July 2012 the practitioner was trying to rectify the situation. However, it was already late. The resolution has therefore lapsed and it is a nullity.
- [18] Section 130 (1) provides that an affected person may apply to court at any time after the adoption of a resolution in terms of s 129, until the adoption of a business rescue plan in terms of s 152. There is a dispute between the parties as to whether the business rescue plan has been adopted or not and whether it complies with the requirements of the Act or not. I do not intend to go into that debate. I must however say that even if it can be found that the plan had been properly adopted it would not assist the 1st respondent in this instance. I have already found that the resolution is a nullity. An act which is a nullity is of no force or effect and cannot be revived by the subsection.

[19] The applicant also seeks an order in terms of s 130 (5) (c) (i) of the Act placing the 1st respondent under liquidation.

[20] The provisions of s 130 (5) (c)(i) are that: –

“When considering an application in terms of subsection (1) (a) to set aside the company’s resolution, the court may if it makes an order under paragraph (a) or (b) setting aside the company’s resolution may make any further necessary and appropriate order, including an order to place the company under liquidation.”

[21] The applicant prayer to place the 1st respondent under liquidation is in terms of the provisions of section 344 (f) and 346 of the Companies Act 61 of 1973 (the Act) which has been retained in terms of items 7 and 8 of schedule 3 to the new Companies Act 71 of 2008 and sections 66 and 69 (1) of the Close Corporations Act 69 of 1984

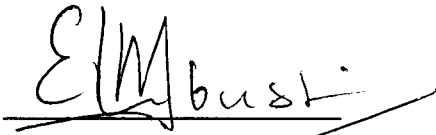
[22] In case of applications for a provisional winding-up, the court is not bound to follow practices evolved in sequestration proceedings. The court has an inherent power to order its own procedures and it does so having regard to the fair and expeditious administration of justice. See Kalil v Docotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 978H.

[23] In this instance, the application for setting aside the resolution adopted to proceed with business rescue proceedings is opposed by the practitioner. His answering affidavit does not touch on the request for the liquidation order. My approach in this instance would be to afford the 1st respondent an opportunity to respond to the applicant's request for an order placing it under liquidation. In the interest of justice it is only fair that the 1st respondent be provided an opportunity to answer to the applicant's prayer for an order for liquidation. The applicant has made out a *prima facie* case in the founding affidavit which entitles it to a provisional order of winding up. A provisional order must therefore be granted in its favour and a rule nisi be issued calling upon the 1st respondent to show cause why it should not be made a final order of court.

[24] In the circumstances I make the following order:

- a. The resolution adopted by the 1st respondent in terms of Section 129 (1) of the Companies Act, 71 of 2008 is hereby set aside.
- b. The 1st respondent is in terms of section 130 (5) (c) (i) of the Companies Act, 71 of 2008, placed under provisional liquidation.
- c. The 1st respondent is ordered to show cause to this court within fifteen (15) days of the service of this order upon it why this order should not be made a final order of the court.

- d. This order must be served on the 1st respondent by the sheriff of this court.
- e. Costs of this application are costs in the liquidation.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE	: 01 AUGUST 2013
DATE OF JUDGMENT	:
APPLICANT'S COUNSEL	: ADV F W BOTES
APPLICANT'S ATTORNEY	: DE JAGER LORDAN INC
	C/O HARTZENBERG INCORPORATED
1 ST RESPONDENT'S ATTORNEY	:MR M. COETZEE
1 ST RESPONDENTS' ATTORNEYS	:POTGIETER, PENZHORN & TAUTE INC