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IN THE HIGH COURT OF SOUTH AFRICA

KWA ZULU-NATAL, DURBAN

CASE NO.:5304/2013

In the matter between:

FINANCE FACTORS CC	Applicant
v	
JAYESEM (PTY) LTD	First Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
TREVOR K MORRIS N.O.	Third Respondent

J U D G M E N T

KOEN J

INTRODUCTION:

[1] The applicant claims the following relief:

'1.

That the resolution of the first respondent in terms of Section 129 of the Companies Act, No. 71 of 2008[1] passed on 6 May 2013 that the first

[1] Hereinafter referred to as 'the Act'.

respondent voluntarily begin business rescue proceedings be and is hereby set aside.

2.

That the first respondent pays the costs of this application.

3.

Alternative relief'.

[2] In opposition to the claim, a preliminary answering affidavit by Mr Ranjith Ramnarain, the sole director of the first respondent, was filed.

[3] An affidavit by the business rescue practitioner[2] appointed pursuant to the resolution was also filed. He proposes a business rescue plan, a copy whereof is annexed to his affidavit.

[4] In reply, the applicant filed an affidavit which records that the contents thereof is also to be considered 'for the purpose of establishing the basis why the first respondent should be placed in liquidation in terms of s 130 (5) of the Act'. In the applicant's heads of argument notice is given that in the event of an order being granted as sought in the original notice of motion, that an order will also be sought that the first respondent be placed in final liquidation as contemplated in section 130 (5) (c) (i) of the Act.

[2] The business rescue practitioner has been joined as the Third Respondent in the application.

BACKGROUND:

[5] The resolution sought to be set aside, was passed on the 6 May 2013 by the board of the first respondent, represented by its sole director Mr Ramnarain. This resolution was passed shortly before the hearing of oral evidence in the application under case no. 12900/2011 between the applicant and first respondent which was to have commenced on the 20 May 2013. In that application the applicant claims judgment against the first respondent as surety for the indebtedness of Ramnarain Holdings (Pty) Ltd to it, for payment of the sum of R12 000 000, interest thereon *a tempore morae* at the rate of 15,5% per annum from date of judgment to date of payment, the costs of the application, and an order that the immovable properties described as Erf 2181 Durban North, Registration Division FU, Province of KwaZulu–Natal in extent 3944 square metres and Erf 1710 Durban North, Registration Division FU, Province of KwaZulu-Natal in extent 4818 square metres be declared executable.

[6] The notice of the resolution was duly filed with the second respondent, the Companies and Intellectual Property Commission on 8 May 2013.

[7] The sworn statement of the facts relevant to the grounds on which the board resolution was founded, as required by s 129 (3) (a) of the Act, forms part of the papers. In summarized terms, it provides that:

(a) The sole director of the first respondent reasonably believes that the first respondent is financially distressed due to the fact that it is reasonably unlikely that it will be able to pay off all its debts as they fall due and payable within the immediately ensuing 6 months;

(b) It is not insolvent because the value of its assets exceed that of its liabilities;

(c) It has an admitted debt of approximately R12 000 000, the major portion of which is secured by means of an immovable property owned by it;

(d) It employs 'approximately' two people;

(e) It came into difficulty when a secured creditor sought to declare the only asset owned by it executable for the debts of a liquidated entity Ramnarain Holdings (Pty) Ltd. Despite attempts at settling the mortgage bond amount the creditor persists with litigation thus creating undue financial distress for the first respondent and its affected parties;

(f) The first respondent, if given the opportunity under the supervision of a business rescue practitioner, will most likely be able to settle the full extent of its creditors. In order to achieve this, it is crucial for it to be allowed to trade unhindered in the ordinary course of business, pursuant to the provisions of chapter 6 of the Company's Act. A sale of the immovable property may settle all debts;

(g) The first respondent's nature of business and principal activities incorporate the investment in immovable property;

(h) If management, in conjunction with the appointed business rescue practitioner, is afforded a fair opportunity and reasonable prospect to restructure it affairs, business debt and other liabilities and implements such plans, the director is of the opinion that the first respondent has reasonable prospects of success and therefore it can be rescued.

[8] The properties owned by the first respondent referred to above and sought to be declared executable are the only immovable properties owned by it and comprise an extensive and substantial residential dwelling occupied by the sole director of the first respondent[3].

[9] Due notice of the present application has been given to the first respondent and the second respondent as required in terms of s 130 (3) (a) of the Act.

[10] It also emerged only from the proposed business rescue plan that the known creditors of the first respondent are:

[3] In terms of a signed agreement of lease concluded between the first respondent and Itemba Transport (Pty) Ltd. (a company represented by the son-in-law and another family member of the sole director of the first respondent), the property generates a rental income of R40 000 per month. The occupation date of that lease agreement is 1 January 2012. This lease agreement is stated to be for a period of 60 months with a renewal option. However, at any time during the duration of the lease, the tenant may on one months' written notice terminate the lease, it being expressly recorded that this option is available to the lessee and not the lessor.

(a) The applicant in respect of a secured indebtedness of R12 000 000 secured by a bond (the balance of the applicant's claim to make up R51 725 682,52 is concurrent and remains disputed by the first respondent);

(b) K Maharaj Attorneys Incorporated, attorneys of the first respondent, for a concurrent claim of R260 000;

(c) One D Singh, of whom no further details are provided, for a concurrent claim of R210 000;

(d) R Ramnarain[4] for a concurrent claim of R4 500 000.

These creditors are all 'affected persons' as contemplated in s 128 (1) (a) (i) of the Act. No details are provided in the papers as to the identity of the shareholder of the first respondent. There is also no reference to any registered trade union representing any employees of the first respondent. In an annexure to the preliminary affidavit by the sole director, six employees namely two security guards, a maid, housekeeper, secretary and accounts person are identified. Notice to these persons was given informally by a notice being delivered to Mr R Ramnarain at the address of the properties. The provisions of s 130 (3) (b) relating to the notification to each affected person of the application accordingly also appear to have been complied with. The first respondent accepted that this was so and did not place the question of service and notification of the application in dispute.

[11] Whatever disputes there may be in earlier litigation, it is common cause on the papers before me that the applicant is a secured creditor of the first respondent for an amount of R12 000 000 secured by a surety mortgage bond registered against the properties. The applicant is therefore clearly an affected person as contemplated in the Act.

[4] Presumably the sole director of the first respondent.

LEGISLATIVE FRAMEWORK:

[12] In terms of s 130 (1) (a) of the Act an affected person may apply to a court for an order setting aside a resolution in terms of s 129 resolving that the first respondent voluntarily begin business rescue proceedings and placing it under supervision on the grounds:

> '(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'.

[13] In terms of s 130 (5) of the Act:

> 'When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may –
>
> (a) set aside the resolution-
>
> (i) on any grounds set out in subsection (1); or
>
> (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;
>
> (b) ....[5]
>
> (c) 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-
>
> (i) an order placing the company under liquidation; or
>
> (ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of

[5] Subparagraph (b) provides that the business rescue practitioner may be afforded sufficient time to form an opinion whether or not the company is financially distressed or whether there is a reasonable prospect of rescuing the company. The practitioner has already formed an opinion on these issues.

> information that the director was entitled to rely upon in terms of section 76 (4) and (5)'.[6]

[14] *Prima facie* on the papers, the first respondent complied with the procedural requirements set out in s 129. The case made out by the applicant in any event did not rely on the grounds contained in s 130 (1) (a) (iii) as a basis or ground for setting aside the resolution.

[15] On the papers the application was based on sub paragraphs (i) and (ii) of s 130 (1)(a) of the Act. In argument before me, Mr Hollis SC on behalf of the applicant however accepted that the resolution could not be set aside on the grounds that there is no reasonable basis for believing that the first respondent is financially distressed. In terms of s128(1)(f), the term 'financially distressed' refers to a particular company at any particular time appearing 'reasonably unlikely... to pay all of its debts as they become due and payable within the immediately ensuing six months; or ... (it appearing) to be reasonably likely that the company will become insolvent within the immediately ensuing six months'. On the first respondent's version it is commercially insolvent and unable to pay all of its debts as they become due and payable.

[16] The sole ground persisted with by the applicant was that contained in s 130 (1) (a) (ii) namely that 'there is no reasonable prospect for rescuing the company'.

<u>DISCUSSION:</u>

[17] Mr King SC, on behalf of the first respondent, has stressed that business rescue proceedings can either be commenced voluntarily by the board of a company in terms of s 129 or pursuant to a court order in terms of s 131 of the Act. In regard

[6] *In casu*, no order was sought pursuant to the provisions of s 130(5)(c)(ii).

to the latter he submitted that the requirement in s131(4)(a)(iii) that the court must be satisfied that there is 'a reasonable prospect for rescuing the company' had to be distinguished from the requirement in s129 (1) (b) that the 'board has reasonable grounds to believe that ... there appears to be a reasonable prospect of rescuing the company'. In my view nothing material, with respect, turns on this distinction in the context of the present case..

[18] A more important consideration is the similarity between s 130 (1) (a) (ii) requiring an affected person applying to court to set aside a resolution to advance grounds that 'that there is no reasonable prospect for rescuing the company' and that in s 131 (4) sub paragraph (a) (iii) which requires that a court granting such an order be satisfied that 'it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company...'. In both instances the court must be satisfied as to whether there is a reasonable prospect of[7] rescuing the company. The requirement in s 130 (1) (a) (ii) is just a mirror image of that contained in s 131 (4) (a) (iii). The case law relating to the latter would be of equal application, or certainly of considerable persuasive value in considering the negative requirement that an affected person has to show in an application to set aside a resolution, that there is 'no reasonable prospect for rescuing the company'. The only difference is that in respect of an application to set aside a resolution, although it might involve a negative, the onus would be on the applicant, seeking the setting aside of the resolution to begin business rescue proceedings, to prove on a balance of probabilities that 'that there is no reasonable prospect for rescuing the company', whereas in an application pursuant to s 131, the applicant for an order that a company be placed under business rescue proceedings has the onus to show that there is a reasonable prospect for rescuing the company.

[19] Judicial pronouncements on what is meant by 'reasonable prospect for rescuing the company' in the context of s 131, as in *Oakdene Square Properties*

[7] The Act uses the proposition 'for' rather than 'of'. Nothing appears to turn on this.

(Pty) Ltd. v Farm Bothasfontein (Kyalami) (Pty) Ltd.[8] are of equal application to the present application.

[20] At the outset, it is important to note that the definition of 'business rescue' in s 128 (1)(b)[9] of the Act contemplates not only a primary goal namely the continued existence of the company, but also a secondary goal namely to facilitate a better return for the creditors or shareholders of a company than would result from immediate liquidation[10]. The parties were *ad idem* that at best for the first respondent any reasonable prospect for rescuing it would have to be found in respect of the secondary goal as there is no likelihood of it continuing on a solvent basis[11]. Business rescue must be understood in the context of these special meanings given to the words 'business rescue' and not in the ordinary meaning one might wish to assign to the word 'rescuing'[12].

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[8] [2013] ZASCA 68 (27 May 2013).

[9] 'business rescue' is defined to mean 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company'

[10] See *Oakdene* case para 23.

[11] According to a valuation attached to the business rescue plan, the open market value of the properties amounts to R10 500 000 and the comparative forced sale value amounts to R 7 300 000. Either will be insufficient to discharge the debt owing to the applicant alone. The replying affidavit suggests with reference to an extract from the Pam Golding estate agent's website that the property has been placed on the market for R17 500 000. Even if it could fetch that price, after deduction of the costs relating to the sale such as commission and the like, the nett proceeds will still be insufficient to pay the total liabilities of the first respondent on its version.

[12] See *Oakdene* case para [26].

[21] The pertinent question therefore becomes whether the applicant has established grounds demonstrating that there is no reasonable prospect for rescuing the company on the facts of the case. That enquiry requires demonstrating that there is no reasonable prospect based on reasonable grounds that it could be rescued i.e. that it would result in a better return for the first respondent's creditors or shareholders than would result from the immediate liquidation of the first respondent.

[22] In deciding that issue, it is not for the applicant to negative every conceivable plan or scheme which could be devised if a preliminary business plan was to be submitted to creditors and allowed to be developed by any amendments or refinements thereof. As was remarked in the *Oakdene* case[13], 'the development of a plan cannot be a goal in itself. It can only be the means to an end'. As much as an affected person in an application in terms of s 131 might not be required to set out a detailed plan, this being left to the business rescue practitioner after proper investigation in terms of s 141, where a business rescue practitioner has been appointed and proposed a plan, it will be sufficient for the applicant to show that the terms of such plan, being the basis advanced for 'rescuing the company' has no reasonable prospect of doing so. The answer to the question as to whether there are no reasonable prospects for rescuing a company can only be based on the basis advanced for contending that there are such grounds, objectively viewed and evaluated, demonstrating 'no reasonable grounds'. Answering that question does not involve the exercise of a discretion in the strict sense, but the exercise of a value judgment[14].

[13] At para [31].

[14] Sometimes also referred to as a discretion in the wide sense, a term which should rather be avoided – see *Oakdene* case paras [18] to [21], particularly para [20].

[23] The proposal advanced by the business rescue practitioner includes the following:

(a) That a moratorium be exercised for a further three months' until 31 August 2013 with 'ring fenced debt' being reduced by payment of the sum of R20 000 per month commencing from the 31 August 2013 in the statutory order of preference and with this proposal to be revisited annually;

(b) There is no release sought from the payment of the first respondent's debt save for a reservation of rights regarding the concurrent portion of the applicant's claim;

(c) The on-going role of the business of the first respondent is to facilitate the existing lease agreement with Ithemba Transport, with same to be honoured on the terms and conditions of such lease agreement;

(d) The free residue derived from the income generated from the lease agreement shall be utilized to pay creditors claims. The proceeds of the immovable asset, if sold, will likewise be used to settle the creditor's claims;

(e) Preference shall be given to the secured creditor, followed by preferent and concurrent creditors in that order;

(f) Regarding the benefits of adopting the business rescue plan, a liquidation would result in the preferred and concurrent creditors receiving no dividend, the costs of the failed rescue business proceedings being added to the administrative costs in liquidation thus resulting in a reduction of any dividend to all affected parties, including the secure creditor. The adoption of a business rescue plan will mean that the business will be on going and will also be generating a meaningful monthly income which can be used to reduce the ring fence creditor's claims and meet its contractual obligation.

(g) Should the business rescue plan be adopted, it shall have the added benefit to allow for an indulgence to comprehensively market the property under more favourable conditions;

(h) The projective statement of income and expenses is that the income for the next three years' be R480 000 per year and the expenditure increase from R170 000 in the first year to R187 000 in the second year and R205 700 in the third year;

(i) The material assumption made is that the lease remains in place for the next three years.

[24] Most of the debate centred on the proper interpretation of the terms of the proposed business plan, which are unclear and vague in many respects.[15] Apart from the reference to the proceeds of the immovable asset 'if sold'[16] being used to settle creditor's claims, there is no reference to it being a term of the plan that the property will be sold, or when or on what terms. On the contrary, the material assumption that the lease remains in place for the next three years with the predicted income flow, presupposes the property not being disposed of and that the business plan will continue with the lease being intact with the income flow derived therefrom accruing to the first respondent. Obviously during that time there would be an opportunity to 'comprehensively market the property', but that result would not flow as a term or obligation in terms of the business rescue plan.

[25] I was also urged to have regard to the sole director's report, summarised earlier in this judgment, in determining the question whether there is no reasonable basis for rescuing the first respondent. This report also does not expressly refer to the property being sold, but it was argued that this was necessarily implied as the report referred to an admitted debt of approximately R12 000 000 (the indebtedness to the applicant) and continued that 'if given the opportunity under the supervision of a business rescue practitioner' [it would be] able to settle the full extent of the creditors' and 'may settle all debts', which, the argument ran, would only be possible if the immovable properties were indeed sold.

[26] The problem however, is that the business rescue plan does not state that there will be a sale of the properties. As it stands, it is not a term that the properties will be sold. The properties could be retained for the foreseeable future with the only benefit accruing to creditors being that derived from the rental income. It is patently clear that a payment of R20 000 per month, being that contemplated in terms of the plan, will not even assist in respect of the secondary goal of business rescue. The

[15] In *Prospec Investments (Pty) Ltd v Pacific Coats Investments 97 Ltd* 2013 (1) SA 542 (FB) Van der Merwe J held that vague and mere speculative suggestions will not suffice.

[16] Not 'when sold'.

business plan, without expressly providing for a sale and on what terms and within what time, and indeed postulating and proceeding on the assumption that the lease will remain in place for the next three years, does not disclose a reasonable prospect for rescuing the first respondent. All it will achieve and ensure is keeping the lease intact for the benefit of the lessee.

[27] However, even if the business plan could be construed as involving a sale, even at R17 500 000, if that was possible and realisable, such a sale by the business rescue practitioner (as opposed to a liquidator selling the property as a whole) 'offers no more than an alternative, informal kind of winding up of the company, outside the liquidation provisions of the 1973 Companies Act ...'[17] In the *Oakdene* case Brand JA remarked[18] that he did "... not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. *A fortiori*, I do not believe that business rescue was intended to achieve a winding up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve'. I fully agree with that statement.

[28] The potential prospect for rescuing the company by a business practitioner being able to obtain a better price for the property than a liquidator, was also dismissed on the grounds that this 'appears to rest on no more than pure speculation'. Brand JA stated at para [34]:

'[The appellants'] second ground was that the remuneration of the liquidator would exceed that of the business rescue practitioner. It departs from the premise that the fees of the liquidator are calculated as a percentage of the assets of the company, while those of the business rescue practitioner are based on a daily rate.'

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[17] *Oakdene* case at para [33].

[18] At para [33]

Although the facts *in casu* obviously differ from those in the *Oakdene* case, there are other disputes remaining between the applicant and first respondent, notably that relating to the extent of the concurrent portion of the applicant's claim which would have to be addressed and might form the subject of ongoing litigation involving the business rescue practitioner. Although perhaps not quite a 'litany' as in the *Oakdene* matter, this dispute will cause considerable delays, whereas if the first respondent is liquidated the applicant would have to submit its claim which would then be scrutinised by a professional liquidator objectively and either be admitted or rejected. This leads me to a similar conclusion to that arrived at in the *Oakdene* matter that:

'... liquidation proceedings are in fact better geared for the situation that arose in this case'. [19]

[29] Although there has been no expressly declared intent by the applicant to vote against the business plan which has been proposed, it is clear that the applicant will not vote in favour of the adoption of the business plan. It was argued on behalf of the first respondent that this is not a conclusive answer as the vote by the applicant against the business plan when it is put to the vote, would not be the end of the matter but could result in further remedies being pursued in terms of s 153 (1) (a) (ii) or s 153 (1) (b) (ii) of the Act. The possibility of a business rescue plan not being sanctioned by the required majority of creditors, thus making it an exercise in futility, was also considered in the *Oakdene* case. Brand JA[20] said the following:

> 'If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless of course, that attitude can be said to be unreasonable or mala fide.'

[19] At para [35].

[20] At para [38].

Referring to further action which could be taken following the rejection of a proposed rescue plan he commented:

'But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable'.

I fully endorse these statements. Having regard to what is proposed by the rescue business practitioner it is highly improbable that a court would conclude that a vote by the applicant against the plan would be unreasonable or mala fide[21].

[30] Even if the sale of the properties was to proceed on a valuation of R17 500 000, and after deduction of costs there would be sufficient funds to discharge all liabilities, it would mean at best that the first respondent might be left with a small residue, which itself is inconsistent with its stated objective of being a property holding company. No purpose will be served in allowing a business rescue plan to proceed to achieve that purpose and if that was the likely factual scenario to arise, it could not in my view be said that there was a reasonable prospect for rescuing the company. Indeed, it would show there is no reasonable prospect for rescuing the company for its stated and intended objective and purpose.

[31] It follows that the resolution should be set aside. I am also satisfied, insofar as relevant, that it is just and equitable that the resolution be set aside.

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[21] Having regard to the extent of the applicant's admitted claim *in casu* and what has been proposed as an income stream, the decision by the applicant to vote against the business plan would not seem to me to be an unreasonable attitude to adopt. The voting power wielded by the applicant would defeat any vote for an adoption of the plan in terms of s 152 (2) of the Act.

THE LIQUIDATION OF THE FIRST RESPONDENT:

[32] In that event, I was urged to employ the discretionary power I have in terms of s 130 (5) of the Act to 'make any further necessary and appropriate order, including (an) order placing the company under liquidation ...'. No such relief was of course foreshadowed in the Notice of Motion.

[33] In *Oakdene*, after the court of first instance had concluded that there was no reasonable prospect for rescuing the company, an order for its liquidation was granted. In that matter however such an order had been sought by the remaining respondents, admitted creditors of the company concerned, claiming an order of liquidation.

[34] Although a discretionary power, s 130 (5) (c) (i) certainly contemplates that an order may be granted placing the first respondent under liquidation upon an order being made setting aside a resolution that it be placed under business rescue.

[35] All the requirements relating to filing the necessary security and notice being given to the South African Revenue Services have been attended to in reply.

[36] The request that the first respondent be placed under liquidation following the setting aside of the resolution, is opposed by the first respondent on the basis that procedurally it had not been appraised of the possibility of such an order being sought, until this possibility was raised in reply and then confirmed in the applicant's heads of argument. The submission was that there might be grounds upon which such liquidation might legitimately be capable of being opposed.

[37] It is difficult to conceive of any substantive grounds upon which the final liquidation of the first respondent may be opposed, but this is not for me to speculate. The power is granted in terms of s 130 (5) (c) to grant an order placing the first respondent under liquidation. *Prima facie* a case for at least its provisional liquidation has been made out. If there are grounds upon which to oppose such a provisional order, then these can always be advanced in opposition to the grant of the final winding up order. In the circumstances it seems to me that the interests of justice require that a provisional winding up order should be granted.

[38] The order granted is accordingly as follows:

1. The resolution of the first respondent in terms of s 129 of the Company's Act No. 71 of 2008 passed on 6 May 2013 that the first respondent voluntarily begins business rescue proceedings, be and is hereby set aside.

2. The first respondent is directed to pay the costs of the application.

3. In terms of s 130 (5) (c) (i) of Act 71 of 2008 an order is granted placing the first respondent under provisional winding up.

4. The respondent and all other interested parties are called upon to show cause before this court sitting at Durban at 9h30 on the 26th day of September 2013 why a final winding up order shall not be granted.

5. It is directed that a copy of this order be served on the respondent at its registered office forthwith and be published once in the Government Gazette and the Mercury Newspaper on or before the 20th day of September 2013.

DATE OF HEARING: 13/8/13.

DATE JUDGMENT DELIVERED: 22nd August 2013

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