

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT – PRETORIA)

Case number: 54009/11

DELETE WHICHEVER NOT APPLICABLE	
1. REPORTABLE	YES/NO
2. OF IMPORTANCE TO OTHER JUDGES	YES/NO
3. REVISED	
2012/10/12	
DATE	SIGNATURE

In the matter between:

12/10/2012

P T VAN STADEN

Applicant

and

ANGEL OZONE PRODUCTS CC (in liquidation) 1st Respondent
Registration number: 2002/095564/23

PIETER BERNADUS VAN ROOYEN N.O. 2nd Respondent
LEONARDSUS JOHANNES STRYDOM N.O. 3rd Respondent
GERDS MARYKE VAN TONDER N.O. 4th Respondent

and

MARGARET MARTHA PATEL 1st Intervening Party
PETER MASELELA 2nd Intervening Party
MARIA MABUSELA 3rd Intervening Party

JUDGMENT

LEGODI J

[1] The first issue before me is whether the intervening parties, Margaret Martha Patel, Peter Maselela and Maria Mabusela should be allowed to intervene in an application filed by one P T van Staden (hereinafter referred to as the applicant).

[2] In the application, the applicant is asking for relief as follows:

- "1. Placing the First Respondent under supervision and commencing business rescue proceedings as contemplated in section 131(4)(a) of the Companies Act of 2008 ("the Act").*
- 2. Appointing Jean-Pierre Jordaan or such other person as the Honourable Court sees fit as the business rescue practitioner as contemplated in Section 131(5) of the Act;*
- 3. In the alternative to 2 above; Directing the Companies and Intellectual Property Commission to appoint Jean-Pierre Jordaan as the business rescue practitioner as contemplated in Section 131(5) of the Act;*
- 4. Further in the alternative to 2 and 3 above: Directing the Companies and Intellectual Property Commission to appoint such suitably qualified person as business rescue practitioner*

("the practitioner") who satisfies the requirements of section 138 of the Act;

5. *Costs of the application, only in the event of it being opposed.*
6. *Further and/or alternative relief".*

[3] The second issue is, whether the applicant in the main application is entitled to bring the application for the rescue of Angel Ozone Products as envisaged in Section 131, seen in the light of the final liquidation order granted against the Close Corporation before the commencement of the New Companies Act no. 71 of 2008 (hereinafter referred to as the Act), and if so whether the applicant has made a case for placing Angel Ozone Products cc under supervision and commencing business rescue proceedings.

[4] The applicant wanted the application to intervene to be dismissed on the ground that the intervening parties were not affected persons as defined in the Act. Section 131 (3) of the Act provides that each affected person has a right to participate in the hearing of an application to place a company, in this case, (Angel Ozone Products CC) under supervision and commencing business rescue proceedings.

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- [5] Section 131(1) provides that unless a Company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.
- [6] In terms of subsection (2)(b) of section 131, the applicant in terms of subsection (1) is obliged to notify each affected person of the application in the prescribed manner.
- [7] The applicant was the sole member of Angel Ozone Products CC (hereinafter referred to as the corporation), which corporation was placed under final liquidation order granted by Magistrate Pretoria on the 23 February 2011.
- [8] The application for the liquidation was brought by the applicant. The application was brought before the commencement of the Act, which came into operation on the 1 May 2011, the liquidation having been launched during March 2010 and the provisional liquidation order having been granted on the 15 August 2010.

[9] The corporation started conducting business in 2007. Its main business was to develop and market ozone gel to be utilized in ozone products for medical health and cosmetic industries. The ozone gel that was produced was used as healing balm on its own.

[10] The product provided by the corporation consisted of extra olive oil that was ozonated over a period to form a unique ozonated gel. The corporation approached medical, health and cosmetic industries to research the possibility of utilizing the gel as a component in various products.

[11] Because of its business market on mass consumption and mass production, it developed a unique business model and marketing strategy. To produce the mass production, it needed to introduce a model whereby interested parties could start their own business by renting a mini Ozonated Gel Purifier machine from the corporation. The machine was to produce ozone gel which was then sold to the corporation and the corporation in turn sold the gel at a good market price.

[12] The corporation entered into manufacturing contracts with the parties who had rented the purifying machine from the corporation and these parties were referred to as manufacturers. The strategy was meant to cut down on startup capital and labor.

[13] In a relatively short period, say about three years, the corporation managed to contract with about 2500 manufacturers who rented approximately 8500 purifier machines.

[14] However, in 2009, the corporation started to experience cash flow problems due to a number of factors. For example, the manufacturers just produced the ozone gels and failed to market them for the corporation. There was increase percentage of defective products delivered to the corporation by the manufacturers; and at the same time, the manufacturers demanded payment from the corporation.

[15] Because of the cash flow problem the corporation experienced, it could not manage to pay manufacturers timeously as the time between the delivery testing and eventual production of the various products which

could finally be sold by the corporation was too long. The manufacturers stopped producing ozone gel due to non-payment.

[16] At the time liquidation proceedings were instituted, the assets of the corporation consisted of 9000 purifier machines at the value of R18 000 000 and approximately 50 tons of processed ozone gel at an estimated value of R37 500 000.

[17] Now, coming back to the issue identified in paragraph 1 of this judgment, the intervening parties were manufacturers. They allege that the corporation was owing them some money for the produced ozonated gel that was sold to the corporation. They are therefore the creditors of the close corporation and therefore affected persons as envisaged in the Act.

[18] In terms of section 128 (1) (a) (i) of the Act, affected person means a shareholder or creditor of the company. Counsel for the applicant sought to suggest that, whilst the intervening parties could have entered into a manufacturing agreement with the corporation, it was in dispute that they were entitled to get anything from the corporation.

The contention around this aspect was that they could not be reckoned as creditors if they had not complied with the terms and conditions of the manufacturing agreement. For example, that they may not have delivered quality ozonated gel.

[19] Without making a final determination around the issue, I do not think that the applicant could have succeeded. The contention was however abandoned when counsel for the applicant was warned that he runs the risk of having the matter postponed if the first issue cannot be resolved. The intervening parties alleged having entered into manufacturing contracts with the corporation. They further alleged delivery of the ozonated gel to the corporation, non payment by the corporation and lastly, the applicant in the application for liquidation of the corporation in a way is said to have admitted that the intervening parties were the corporation's creditors.

[20] I now turn to deal with the issue identified in paragraph 3 of this judgment. As I said earlier in this judgment, the suggestion was that the provisions of section 131 were not applicable to the corporation and

therefore the applicant cannot seek to invoke section 131. I understood counsel for the intervening parties to be saying liquidation proceedings should not be confused with winding up proceedings. In his view, the liquidation proceedings came to an end when a final liquidation order was granted on the 23 February 2011. The effect of the contention is that the applicant cannot seek to undo what has already been finalized through judicial process.

[21] The applicant instituted the present proceedings on the 20 September 2011. The second to the fifth respondents are cited as the corporation's liquidators. They did not oppose the application. I want to believe that they decided to abide by the decision of this court. In dealing with the issue under discussion, it might be necessary to refer to the some provisions of the Act relevant to the issue. The issue is somewhat relevant to the retrospective issue that was also raised by counsel on behalf of the intervening parties.

[22] Starting with section 131, subsection (3) (a) thereof, provides that if the application 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 the court has adjudicated upon the application.

[23] On the other hand, subsection (7) provides that in addition to the powers of court on an application contemplated in this section, a court may make an order contemplated in subsection (4) or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.

[24] Subsections (4) and (5) referred to above read as follows:

"(4) After considering an application in terms of subsection (1), the court may-

(a) make an order placing the company under supervision and commencing business rescue proceedings, the court is satisfied that-

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters;

or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

(5) If the court makes an order in terms of subsection (4)(a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

[25] The point taken was that, liquidation proceedings had come to an end when a final liquidation order was granted and that such proceedings should not be confused with the winding up proceedings, which come to an end when the Master approves the liquidation and distribution account at it was originally the case in terms section 408 of the repealed Companies Act.

[26] Whilst a distinction can be made between liquidation and winding up proceedings for example, the former being legal proceedings before a court of law, and the latter being a process that is overseen by the liquidators and the Master, the winding up proceedings in my view, should be seen as a continuation of liquidation proceedings. In other

words, liquidation proceedings are processes that are concluded once there is a final liquidation and distribution account which is confirmed by the Master. Such a confirmation in terms of section 408(c) of the repealed Companies Act was tantamount to a judgment upon which an execution can take place.

[27] Put it simply, you do not grant a final liquidation order and execute on it. You execute on a confirmed liquidation and distribution account. Winding up proceedings are part and parcel of the liquidation proceedings.

[28] Whilst in terms of item 10 (2) of Schedule 5 of the Act, any order of a court in terms of the previous Act and in force immediately before the effective date, continues to have the same force and effect as if that Act has not been repealed, such an order is however subject to any further order as the court may make under the new Act. (underlining is my own emphasis).

[29] The liquidation order that was granted on the 11 February 2011 was in force immediately before the commencement date of the Act on the 1

May 2011 and continued to be so in force. But that did not mean that such an order cannot be substituted by any further order in terms of section 131 of the Act. Item 10(2) of Schedule 5 makes it very clear that an order that was made in terms of the old Act is subject to any further order that could be made under the new Act. The applicant seeks an order placing the corporation in liquidation under supervision and rescue as envisaged in section 131.

[30] I share the view expressed in *Henochoberg on the Companies Act 71 of 2008, Volume I page 471*, wherein it is suggested that it appears for more likely that the provisions of section 131(7) read with section 135(4) contemplate the conversion of a liquidation into rescue proceedings no matter how far the liquidation and winding up proceedings might have progressed.

[31] One of the objects of the Act is to provide for the efficient and recovery of financial distressed companies, in a manner that protects the rights and interests of all relevant stakeholders. (see section 7 (K). In terms of the repealed Act, the liquidation proceedings' major stakeholders are the creditors. Liquidation proceedings are meant to ensure that no one

particular stakeholder (creditor) gains an advantage over other creditors.

[32] Now, if the rescue proceedings are a better option than the liquidation proceedings, I see no reason why such liquidation proceedings cannot be converted into supervision and rescue proceedings irrespective of how far advanced the liquidation or the winding up proceedings might be.

[33] The process that has to be followed once conversion has taken place in my view, is mindful of the fact that minimum disturbance to the liquidation proceedings takes place. For example, the following steps are envisaged:

33.1 In terms of section 131 (5), a court making an order to place the company under supervision and commencing business rescue proceedings may further make an order appointing an interim practitioner who satisfies the requirements of section 138 and who has been nominated by the affected person who applied for

supervision and rescue order in terms of subsection (1) of section 131.

33.2 Upon appointment of a practitioner under section 131(5), the appointment has to be ratified by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors as contemplated in section 147.

33.3 In terms of section 147(1) within 10 business days after being appointed, the practitioner must convene and preside over a first meeting of creditors, at which;

(a) *the practitioner –*

(i) *must inform the creditors whether the practitioner believed that there is a reasonable prospect of rescuing the company; and*

(ii) *may receive proof of claims by the creditors, and*

(b) *the creditors may determine whether or not a committee of creditors should be appointed and if so, may appoint the members of the committee.*

33.4 It is at the first meeting of the creditors that a practitioner's appointment in terms of section 131 might be confirmed. But as soon as practicable after being appointed, a practitioner must in terms of section 141(1) investigate the company's affairs, business, property and financial situation and after having done so, consider whether there is any reasonable prospect of the company being rescued.

33.5 In terms of section 141(2) if at any time during rescue proceedings, the practitioner concludes that –

(a) there is no reasonable prospect for the company to be rescued, the practitioner must –

(i) so inform the court, the Company and all affected persons in prescribed manner,

and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation.

[34] All of the above, in my view serve to expedite the rescue proceedings with limited amount of costs and time relating to return to liquidation proceedings, should rescue proceedings be found not to be viable.

[35] In terms of subsection (6) of section 131, liquidation proceedings are suspended until the court has (a) adjudicated upon the application for supervision and rescue or (b) the business rescue proceedings have ended if the court makes the order applied for in terms of section 141(2)(a)(ii). I now turn to deal with another issue raised on behalf of the intervening parties.

[36] The issue is whether the Act applies retrospectively seen in the light of the fact that the final liquidation order was granted before the commencement of the Act. In paragraph 25 to 26 of this judgment, I indicated that winding up proceedings is a continuation of liquidation proceedings. The order under liquidation proceedings is followed by winding up proceedings. A final liquidation order is tantamount to allowing winding up proceedings to take place. That is, a liquidator to be appointed or already appointed should take charge and wind up the insolvent estate.

[37] I understood the suggestion on behalf of the intervening parties to be that the applicant, as the only member of the corporation in liquidation, cannot be allowed to have more rights under the new Act, than he could have had in terms of the old Act.

[38] Generally, legislation is not to be interpreted to extinguish existing rights and obligations. The legislation will affect only future matters and not take away existing right as basic to notions of fairness and justice which are integral to the rule of law, a fundamental principle of our Constitution. (See **Donald Veldman v The Director of Public Prosecutions CCT 19/05 par 26**).

[39] I do not think that section 131 of the Act brought about significant infringement to the rights of the intervening parties and general community of the creditors to the corporation. Judging by the object of the new Act, read together with other provisions of the Act relating to rescue proceedings, more or less same purpose is given to the affected persons and or creditors as it was under the old Act. The new Act as I see it, for the purpose of the issue under discussion, seeks to

improve without creating new rights that were not there under the old Act or extinguishing rights that were there under the old Act. For example:

39.1 In terms of section 354(1) of the old Act, the court may at anytime after the commencement of the winding up, on the application of any liquidator, creditor or member and on proof of the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding up on such terms and conditions as the court may deem fit. In terms of subsection (2), the court may as to all matters relating to winding up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence. It is clear that the court was given a discretionary power, which discretionary power still seems to be present under section 131 proceedings. Secondly, the creditors' or affected persons' views as in the new Act, seem to have played or to be playing important role in the

exercise of the discretion. Therefore, there is no taking away of the rights that existed before the commencement of the new Act.

39.2 Section 427 of the old Act dealt with circumstances under which a company may be placed under judicial management. Of importance and relevance, subsection (3) thereof provided that when an application for the winding up of a company is made to court under the Act (old Act), and it appears to the court that if the company is placed under judicial management, the grounds for its winding up may be removed and that it will become a successful concern and that the granting of a judicial management order would be just and equitable, the court may grant such an order in respect of that company. Clearly, the proceedings under section 131 of the new Act can be likened to the proceedings under section 427 of the old Act-

39.2.1 In terms of subsection (1) of section 427 of the

Old Act, it was envisaged that when any company by reason of mismanagement or for any other cause –

- (a) *is unable to pay its debts or is probably unable to meet its obligations, and*
- (b) *has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be able to pay its debts or to meet its obligations and become a successful concern, the court may, if it appears just and equitable, grant a judicial management order in respect of that company.*

39.2.2 More or less similar provisions can be found in section 131 of the new Act. It deals with reasonable prospects of rescuing the company, after having found or satisfied that the company is financially distressed, it has failed to pay over any amount in terms of an obligation under or in terms

of a public regulation or contract, with respect to employment-related matters or it is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect of rescuing the company (**see subsection (4) of section 131**).

[40] Based on all of the above, the contention based on the general principle that legislation is not to be interpreted to extinguish existing rights and obligations is not applicable in the present case as section 131 does not take away any such rights.

[41] Before I conclude on the issue under discussion, one would have expected the liquidators in the present case to come forward and tell the court how far they are with the winding up process. The provisional liquidation order was granted on 13 April 2010 and final liquidation order on the 23 February 2011. The suggestion that the corporation has not been operating since the liquidation proceedings in my view does not take the matter any further. The only member of the corporation, that is, the deponent to the founding affidavit, continued to take charge and care of the ozonated gel which according to him could

still be marketed and sold. The purifier machines could still be utilized to produce or manufacture the ozonated gel. On the other hand, the liquidators one of whom was in court when the matter was argued filed no affidavit to update the court on the status of the winding up process. Their silent suggests that they are prepared to abide by the decision of this court.

[42] Having allowed the other parties to intervene, it was agreed that I can deal with the matter on merits based on the papers as they stand. In terms of the Act, and in particular in terms of subsection (4) of section 131, I need to be satisfied as it is quoted in paragraph 24 of this judgment. I think it would be just and equitable to grant the application. Based on what is envisaged by the applicant as set out in the founding affidavit, I see no basis to suggest that seeking to rescue the corporation is not a reasonable thing to do. In any event, the practitioner once appointed would report fully on the prospect of success or otherwise in rescuing the corporation.

[43] A certain Jean-Piere Jordaan has been suggested by the applicant as a suitable person to be appointed as a rescue practitioner as envisaged

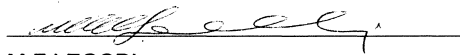
in section 131(5) of the Act. Jean-Piere Jordaan is a practicing attorney with experience in business rescue. He had already been appointed as such in two separate matters. His curriculum vitae is annexure TV57 to the founding affidavit. I did not understand the intervening parties to be challenging Jean-Piere Jordaan's ability to deal with rescue matters under section 131. Therefore, there is no basis to suggest that he does not meet the requirements as envisaged in section 138 of the Act. The section deals with qualifications for appointment as a rescue practitioner. On two occasions, the Commission issued license to him as a rescue practitioner in two different matters referred to earlier in this judgment. Should such a certification or accreditation still be necessary, despite appointment by this court, he can always obtain it from the Commission.

[44] Consequently I hereby make an order as follows:

44.1 Angel Ozone Product CC (in liquidation) is hereby placed under supervision and commencing business rescue proceedings as contemplated in section 131 (4)(a) of the Companies Act no 71 of 2008.

44.2 Jean-Pierre Jordaan is hereby appointed as an interim rescue practitioner as envisaged in section 131(5) of the Act pending ratification by the creditors of such an appointment at their first meeting as envisaged in section 147 of the Act.

44.3 The intervening parties are hereby ordered to pay costs of the application, the one paying the other to be absolved.


M F LEGODI
JUDGE OF THE HIGH COURT

Judgment reserved: 18/09/2012

Judgment handed down: 12/10/2012

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