REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 12910/2011

In the matter between:

FIRSTRAND BANK LIMITED

(Registration No. 1929/001225/06) APPLICANT

and

IMPERIAL CROWN TRADING 143 (PTY) LIMITED

(Registration No. 2006/020250/07) RESPONDENT

JUDGMENT Delivered on 15 December 2011

SWAIN J

[1] Firstrand Bank Limited (the applicant) seeks an order provisionally liquidating Imperial Crown Trading 143 (Pty) Limited (the respondent), on the ground that the respondent is unable to pay its debts, as contemplated in Section 345 (1) (c), read with Section 344 (f) of the Companies Act 61 of 1973. In terms of Section 9 (1) of Schedule 5 of the Companies Act 71 of 2008, Chapter 14 of Act 61 of 1973, dealing with the winding up of companies, continues to apply to the winding up and liquidation of companies, under Act 71 of 2008.

[2] It is common cause that the applicant granted a Commercial Property Finance Loan Facility to the respondent in an amount or R82,155,294.00, on 11 July 2007 which was repayable by the respondent on 28 February 2011.

[3] The loan was used by the respondent to construct a sixteen story block of flats, comprising commercial premises on the ground floor, parking floors above the commercial level and above that two hundred and sixty five residential flats. The block is situated in St. George's Street, in the residential area known as Albert Park, adjacent to the central business district and harbour in Durban.

[4] The plan of the respondent was to sell the individual flats in the block and in order to obtain the development loan from the applicant, the respondent had to achieve an eighty percent pre-sale of the units. The recession then intervened, development market conditions deteriorated and as a consequence a large number of pre-sales were cancelled, prior to transfer. Consequently, and in order to generate income, the respondent let the majority of the residential units to the University of Kwa-Zulu Natal, as serviced student accommodation. This contract was concluded during 2010 and was renewed in 2011.

[5] The loan was advanced to the respondent against receipt by the applicant of a number of different securities, the most important of which are three mortgage bonds registered over the property in

favour of the applicant in the respective amounts of R3,500,000.00 (with an additional amount of R700,000.00), an amount of R83,000,000.00 (with an additional amount of R16,600,000.00) and an amount of R16,200,000.00 (with an additional amount of R2,700,000.00.

[6] A number of widely disparate views as to the present value of the building appear on the papers. The valuer engaged by the applicant, Auction Alliance, was asked to value a number of different scenarios, regard being had in certain respects to the value of the full maintenance lease agreement with the University of KwaZulu-Natal. The market value of one hundred and forty residential units, plus one hundred and thirty parking bays and the commercial component is estimated to be R50M, which is reduced to R30M in the event of a forced sale. This value is disputed by the respondent and reference is made to a valuation conducted by Yanush Investments Estate Agents, who place a value upon the property of R104M.

[7] The respondents annual financial statements for the year ended 28 February 2011 record its total assets, as per its balance sheet, at a value of R68,509,815.00 and its total liabilities are recorded as R69,589,478.00, including the applicant's claim in an amount of R55,028,127.00 (as at that date) which is admitted.

[8] The case advanced by the applicant however, is that even if

the respondent's assets exceed its liabilities (which is not admitted) the respondent is nevertheless commercially insolvent, because the respondent is unable to pay its debts in terms of Section 345 (1) (c) of Act 61 of 1973. It is clear that the failure of a company to pay its debts in the sense of it being unable to meet the current demands upon it, and its day to day liabilities in the ordinary course of business, means that it is in a state of commercial insolvency.

Rosenbach & Company (Pty) Ltd. v Singhs Bazaar (Pty) Ltd. 1962 (4) SA 593 D at 597 D

A company "which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources"

Rosenbach *supra a*t 597 H

In addition, a creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order of liquidation, if he brings his case within the Act and is not bound to give time to the debtor. If there is due to the petitioner a liquidated sum, which is not disputed and the petitioner has demanded payment, without success, this affords cogent *prima facie* evidence of the company's inability to pay its debts.

Rosenbach at 597 F – G and authorities there cited

At the stage of a provisional order where on the affidavits there is a *prima facie* case (i.e. a balance of probabilities) in favour of the applicant, a provisional order of winding up should normally be granted

Kalil v Decotex (Pty) Ltd. & another
1988 (1) SA 943 (A) at 979 B

[9] It is common cause that the respondent failed to make payment of the amount of R55,432,294.00 to the applicant as at 28 February 2011. The respondent states that it has never disputed the amount outstanding, but has requested the applicant to restructure the finance, as a mortgage bond repaying the capital with interest, over a twelve year period. The deponent on behalf of the respondent adds the following:

"It is impossible without finding a buyer to expect the respondent to repay the R55M outstanding. In my humble submission, twelve years is an eminently reasonable period".

[10] In the context of this admission, the main thrust of the respondent's opposition to the grant of a provisional order at this stage was the following:

(a) The application had been brought as a matter of urgency and the respondent needed time to engage the services of a financial expert, to examine the proposals made by the respondent to the applicant for the repayment of the loan, to determine whether they were workable or not. This exercise could only be conducted in the latter half of January 2012, once professionals returned to their offices, after the Christmas holiday.

(b) Building work under way at the building, to convert

portion of the retail component to residential space was sixty five per cent complete. This work was being carried out with money supplied from the personal funds of the Directors of the respondent. Ten units would be ready in December which would house a further one hundred and sixty students. Development to house a further fifty students would be ready by the end of January 2012, which would increase the student numbers to seven hundred and sixteen by January 2012. With the additional units the business would operate at a profit.

c) It was impossible for the respondent in the time available and because of the University vacation, to obtain confirmation from the University officials, whether the University would need accommodation for students in the short to medium term. The lease agreement with the University having ended at the end of 2011.

d) In the time available, it had been impossible to launch a detailed application for business rescue, as contemplated by Section 128 (1) (b) of the Companies Act 71 of 2008. An important aspect of any such application, would be the financial experts' opinion on the proposals put forward to the applicant, by the respondent.

[11] In the light of these contentions and at the hearing of the matter, I asked Mr. Harcourt S C, who appeared for the applicant, what the attitude of the applicant was, to an adjournment of the

matter to the end of January 2012, to be heard before me. It seemed obvious that a provisional liquidator would not be able to sell the building by the end of January 2012. In addition, it seemed unlikely that a liquidator would terminate the incomplete building alterations, the object of which was to increase the return of income from the property. In addition the representatives of the respondent, would possibly be in a better position to re-negotiate the lease with the University. This was on the assumption that a provisional liquidator would wish to rent the flats to the University for at least the year 2012, because of the difficulty of selling the building in the present depressed market.

[12] Mr. Harcourt S C consequently took instructions from the applicant and advised me that the applicant's overriding concern, was to obtain control over the building by way of the appointment of a provisional liquidator. A provisional liquidator would be able to negotiate any lease agreement with the University and take control of the alterations to the building, which had been undertaken without the consent of the applicant and in breach of the conditions of the mortgage bonds. A provisional liquidator would also be able to take control over the negotiations with the Municipality, concerning unpaid rates on the building, which were disputed by the respondent. In addition, a provisional liquidator would be able to investigate and take control of the non-payment of levies to the Body Corporate. Control could also be exercised over the servicing of the units, if a further lease was negotiated. In addition the applicant undertook that no application would be made for special powers to be afforded to the provisional liquidator, to sell the

property in the interim. Furthermore, the applicant tendered an extended return date in respect of the provisional order of liquidation, to afford the respondents sufficient time to investigate and if necessary, launch any application for business rescue of the respondent.

[13] The response of Mr. Pillay S C, who appeared for the respondent, was to submit that once a provisional order of liquidation was granted, an application for business rescue was precluded in terms of Act 71 of 2008. He submitted that before an application for business rescue could be entertained, the provisional order for liquidation, would have to be set aside. He accordingly applied for an adjournment of the matter to 10 February 2012 to enable the respondent to investigate and if deemed advisable, to launch an application for business rescue of the respondent.

[14] In aid of his submission, Mr. Pillay S C referred to Section 129 (2) (a) of Act 71 of 2008, which provides that the board of a company may not adopt a resolution that the company voluntarily begin business rescue proceedings, and place the company under supervision in terms of sub-Section 1, "if liquidation proceedings have been initiated by or against the company".

[15] The answer of Mr. Harcourt S C to this submission, was to refer to the provisions of Sections 131 (6) and (7) of Act 71 of 2008, which provide as follows:

"(6) 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 .

(7) In addition to the powers of a 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".

[16] It is clear however that Act 71 of 2008 draws a distinction, regarding the inter-relationship of business rescue proceedings and liquidation proceedings, depending upon whether the source of business rescue proceedings, lies in the resolution of the board of a company to begin such proceedings in terms of Section 129 (1), or whether the source of such proceedings, lies in an application brought by an "affected person" in terms of Section 131 (1), for an order placing the company under supervision and commencing business rescue proceedings.

[17] In the former case, as pointed out, in terms of Section 129 (2) (a), such a resolution may not be adopted "if liquidation proceedings have been initiated by or against the company". The reference to liquidation proceedings "by" or "against" the company, is clearly a reference to a voluntary winding up of a company in terms of Section 352 of Act 61 of 1973, as well as a reference to a winding

up of a company by the Court, in terms of Section 348 of Act 61 of 1973. In this regard, the authors of the work

Companies and other Business Structures in South Africa
2nd Edition – Davis et al pg 229, Note 6

express the view that it is unfortunate that it is unclear whether the word "initiated" (which is not defined) is intended to have the same meaning as the word "commenced" contained in the aforesaid sections of Act 61 of 1973 and which is clearly defined in Act 61 of 1973. In this regard, it should be noted that Section 131 (6) of Act 71 of 2008, refers to liquidation proceedings having "been commenced by or against the company" at the time application is made for an order placing the company under supervision and commencing business rescue proceedings, in terms of Section 131 (1) of Act 71 of 2008. It would be anomalous if what was meant by liquidation proceedings being "initiated" by or against the company for the purposes of Section 129 (2) (a), differed from what was meant by liquidation proceedings being "commenced" by or against the company, for the purposes of Section 131 (6). In my view, due regard being had to the fact that these provisions of Act 61 of 1973, expressly continue to be applicable to the winding up of companies the word "initiated" must be intended to have the same meaning as the word "commenced" in the applicable sections. To conclude otherwise would be to introduce uncertainty, where none is justified, by virtue of the clear definition of the "commencement" of proceedings, in Sections 348 and 352 of Act 61 of 1973.

[18] In terms of Section 129 (6) of Act 71 of 2008, once a company has taken a resolution to voluntarily begin business rescue proceedings and place the company under supervision, it may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of sub-Section 129 (5), or until the business rescue proceedings have ended, as determined in accordance with Section 132 (2).

[19] However, where a company has not adopted a resolution contemplated in Section 129 of Act 71 of 2008, an "affected person" may apply to a court at any time, for an order placing the company under supervision and commencing business rescue proceedings, in terms of Section 131 of Act 71 of 2008. If liquidation proceedings have already been commenced, by or against the company at the time such an application is made, the application has the effect of suspending those liquidation proceedings in terms of Section 131 (6) of Act 71 of 2008. This suspension endures in terms of sub-Sections 131 (6) (a) and (b) until the court has adjudicated upon the business rescue application or "the business rescue proceedings end, if the court makes the order applied for". Mr. Pillay S C and Mr. Harcourt S C differed however on what was meant by the phrase "if the court makes the order applied for". As I understood the argument of Mr. Pillay S C, it was that "the order applied for" referred to the order for the liquidation of the company. Consequently, a court was entitled, as an alternative to adjudicating upon the application for business rescue in terms of Section 31 (6) (a), to grant an order of liquidation in terms of Section 31 (6) (b) and thereby bring to an end the business rescue proceedings and simultaneously the suspension of

the liquidation proceedings. Mr. Harcourt S C however contended that "the order applied for" referred to the application for business rescue. In other words, if the court grants the order for business rescue, the suspension of the liquidation proceedings, will endure until the business proceedings end in terms of Section 132 (2). On this interpretation, the provisions of Section 131 (6) (a), which provides for adjudication upon the application for business rescue, will only have the effect of terminating the suspension of the liquidation proceedings, if the application is refused.

[20] I understood the significance of Mr. Pillay's argument, to lie in the fact that the benefit to the respondent of the suspension of the liquidation proceedings in terms of Section 131 (6), was greatly diminished, by the power of the court, as an alternative to adjudicating upon the application for business rescue, to simply grant a liquidation order in terms of Section 131 (6) (b) and thereby bring to an end the suspension of the liquidation proceedings themselves.

[21] In my view, such a consequence was never intended by the Legislature. Simply put, Section 131 (6) provides that if the application for business rescue, after adjudication is refused, the suspension of liquidation proceedings is ended. If however, the application is granted, the suspension of liquidation proceedings endures until the business rescue proceedings end, in terms of Section 132 (2).

[22] Consequently, on the facts of this case, if a provisional order of liquidation is granted, the Board of the respondent will be precluded from resolving, that the respondent voluntarily begin business rescue proceedings and place the company under supervision. The grant of such an order will however not preclude an "affected person" from applying to court, to place the respondent under supervision and the commencement of business rescue proceedings. An affected person is defined in terms of Section 128 (1) (a) as including "a shareholder or creditor of the company". The shareholding of the two Directors namely Went and Jhupsee in the respondent, are held by the instrumentality of Trusts, which are controlled by these persons. The Trusts would accordingly qualify as "affected persons", for the purposes of this section. In addition, in the light of the fact that it is alleged that the building alterations to the premises, have been carried out with funds advanced personally by the Directors, they would on this basis, qualify as creditors and have the necessary *locus standi,* to launch such an application.

[23] Due regard being had to the aforegoing and especially the admission by the respondent that the amount claimed by the applicant is due and payable and the contention advanced by the respondent that a reasonable period within which the respondent could be expected to make payment to the applicant, in the absence of a sale of the building, is a period of twelve years, no valid ground exists for the refusal of a provisional order of liquidation, or an adjournment of the application, as sought by the respondent. As tendered by the applicant, I intend granting an extended return date, to enable an application for business rescue to be brought by any

"affected person" if so advised.

I grant the following order:

1. A *rule nisi* is to be issued calling upon all persons interested to show cause, if any, to this Court on 29 February 2012 at 09h30 or so soon thereafter as the matter may be heard, why the respondent should not be finally wound-up and why the costs of this application should not be costs in the liquidation.

2. The order will operate, with immediate effect, as a provisional order for the winding-up of the respondent.

3. The service of this order will be effected:

by one publication on or before 31 January 2012 in both the Government Gazette and a daily newspaper published and circulating in KwaZulu-Natal;

by service on the South African Revenue Service at corner of Albany Grove and Victoria Embankment, Durban;

by service on the registered address of the respondent at 96 Armstrong Avenue, Villa Avant-Garde, La Lucia, Durban;

by service on the respondent's employees, if any; and

by service on the registered trade unions representing the respondent's employees, if any.

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SWAIN J

Appearances: /

Appearances:

For the Applicant	**:**	Mr. A. W. M. Harcourt S C
Instructed by	**:**	Edward Nathan Sonnenbergs Inc. Umhlanga, Durban
For Respondent	**:**	Mr. L. Pillay S C
Instructed by	**:**	T. Giyapersad & Associates Durban North
Date of Hearing	**:**	25 November 2011 09 December 2011
Filing of Judgment	**:**	15 December 2011