

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-012285

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
30/5/24	
DATE	SIGNATURE

In the matter between:

STS TYRES (PTY) LTD

Applicant

and

BAMBOO ROCK PLANT (PTY) LTD

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10:00 am on 30 May 2024.

Summary: Reconsideration of the provisional liquidation order within the contemplation of rule 6(12)(c) of the Uniform Rules of Court. Court finding that such cannot be done under the rule. What is the legal effect of a provisional order issued in the face of a 'made' application for business rescue? Where an application for business rescue is properly *made*, its effect is to suspend the liquidation proceedings and not to nullify an order issued or prevent the

issuance of an order in the face such a *made* application. Held: (1) The reconsideration application is dismissed. Held: (2) The applicant is to pay the costs of the respondent at scale B.

JUDGMENT

MOSHOANA, J

Introduction

[1] Once a Court issues an order, such an order binds all persons to whom it applies.¹ A provisional liquidation order serves as an interim step within the liquidation process. Usually, it is granted when there is *prima facie* evidence that the company to be placed under provisional liquidation is unable to pay its debts. Primarily, the aim of a provisional liquidation order is to protect the company's assets from mismanagement or dissipation in the period between the filing of the liquidation application and the Court's final decision. The provisional liquidation order ensures that creditors and other stakeholders' interests are safeguarded during the liquidation process. When a provisional liquidation order is made, a provisional liquidator would generally take control of the company and its assets and the preservation thereof pending the appointment of a liquidator to attend to its winding-up.

[2] In practice, when a provisional order is made, a Court would also fix a return date, at which date, the Court would consider whether its order must be made final or not. Ordinarily, a party (company placed under provisional liquidation) shall await the return date fixed by a Court in order to show cause why the company should not be placed under a final winding-up order. Bringing forward a date fixed by a Court is not provided for in the Uniform Rules of Court. Such is permitted in the Rules only when the order involved was made in an urgent application.

¹ Section 165(5) of the Constitution.

[3] Rule 6(12) of the Uniform Rules of Court deals with urgent applications brought before the High Court. The same rule specifically provides that a person against whom an order was granted in such persons' absence in an urgent application, may, by notice, set down the matter for reconsideration (rule 6(12)(c)). It must be stated upfront that the order that the applicant before me seeks to have re-considered was not issued in an urgent application but in the normal unopposed motion proceedings. At present, although conveniently dubbed "anticipation application", what serves before me is an application seeking the following relief:-

- i. That the matter be heard on an urgent basis in terms of Rule 6(12);
- ii. That the provisional order of winding-up granted on 22 April 2024;
 1. Is anticipated for hearing on 30 April 2024; and
 2. Is discharged.

[4] The present application was enrolled for hearing on 30 April 2024. My sister Kooverjie J directed the application to the office of the Deputy Judge President of the Division for case management and special allocation. Ultimately, the application was allocated to me and was heard on 16 May 2024. In congruent to each other, both parties informed the Court that the issue of urgency needed not to arrest the attention of this Court anymore. Although this Court remained doubtful that an adequate remedy is unavailable in due course to the applicant, it, based on that agreement, entertained the present application as one of urgency.

Background facts pertinent to the application

[5] On or about 6 February 2024, the STS Tyres (Pty) Ltd (STS), the respondent in the proceedings before me, caused a notice of motion to be issued for an order placing Bamboo Rock Plant (Pty) Ltd (Bamboo), the applicant before me, under provisional liquidation in the hands of the Master of the High Court. Prior to the issuing of the said notice of motion on or about 18 January 2024, the STS served a notice in terms of section 345 of the Companies Act, 1973 through the office of the Sheriff Centurion West. In that notice, Bamboo was notified that the STS intends proceeding with an application for liquidation after the expiry of the period set out in the Act.

[6] On 18 April 2024, Bamboo, perspicuously with the knowledge that a liquidation application is in the offing, as already been notified in January 2024, launched an application seeking an order to place it under business rescue in terms of section 131(1) of the Companies Act, 2008. This application is pending before Court and was not enrolled before me. On 22 April 2024, the application launched on 6 February 2024, served before the unopposed motion Court beaoned by my sister Collis J. Being satisfied that a case for a provisional liquidation order was made, Collis J issued an order placing Bamboo under provisional liquidation and also called upon Bamboo to show cause on 18 June 2024, why the order must not be made final.

[7] Instead of awaiting the return date, on 25 April 2024, Bamboo launched the present urgent application seeking the reliefs stated at the dawn of this judgment. The application was duly opposed by the STS.

Analysis

[8] Before the present application is considered on its merits, it is significant to consider the question whether the present application is one authorised by rule 6(12)(c) of the Uniform Rules or not. As indicated earlier, rule 6(12) is applicable to urgent applications only. All that is required is for a party seeking a reconsideration of the urgent order to set the matter down without filing any motion supported by an affidavit. The order made by Collis J arises from unopposed motion proceedings and not urgent proceedings. Therefore, rule 6(12)(c) does not, in my considered view, find application to the order by Collis J. The purpose of the rule is to afford an aggrieved party a mechanism to revisit and redress imbalances and the injustices flowing from an urgent application that was granted in a party's absence.²

[9] Given how the rule prescribes that a reconsideration must happen (notice of set down only), it must axiomatically follow that the present application is a distinct application different from the one contemplated in the rule. It must be stated that when

² See *Oosthuizen v Mijis* 2009 (6) SA 266 (W) at 267G. See also *Ultimate Sports Nutrition (Pty) Ltd v Bezuidenhout* [2020] ZAGPPHC 694 at para 11.

a Court fixes a return date, it also states what is to happen on that date. In *casu*, on 18 June 2024, a date not too far, this Court must remark, Bamboo will be afforded an *audi alteram partem* in order to demonstrate to the Court why the provisional order should not be made final. The procedure of bringing forward the return date fixed by a Court is foreign to the Uniform Rules.

[10] If, for any reason, that is not readily discernible to this Court at this juncture, the procedure is permissible, what a Court should be detained for is to establish whether the provisional order already made be made final or discharged. The question that arises is, what is urgent with transforming a provisional order to one that is final or discharge of it? My preliminary view, although not specifically expressed in *casu*, is that there is nothing urgent about that transformation process.

[11] Owing to the fact that Collis J's order was not issued in an urgent Court, it is incapable of being reconsidered in terms of the rule invoked by Bamboo. Rule 42 empowers a Court to, on its own or on application, exercise a discretion to rescind or vary an order or judgment sought or erroneously granted in the absence of any party. Despite being available for deployment, decidedly, Bamboo opted not to invoke this rule. During oral submissions, counsel for Bamboo disavowed the possibility of invoking rule 42.

[12] This, despite it being suggested by the bench and the opposition as a suitable rule in the circumstances. In addition, rule 45A empowers a Court to suspend the operation of any order for such period it may deem fit. Again, despite availability of this rule, Bamboo chose not to invoke the rule.

[13] On the above basis alone, the present discrete application falls to be dismissed. The only time the order of Collis J may be lawfully altered is on 18 June 2024. It is on that date, as fixed by the Court, that the issue of whether the order may be made final or not would arise. This date is incapable of being brought forward, except in the circumstances contemplated in rule 42 and or rule 45A in which event the order may either be set aside or varied and or its operation shall be suspended.

[14] In the event that this Court is wrong that rule 6(12)(c) is incapable of being invoked, the singular basis upon which Bamboo seeks to vacate the order of Collis J is that the Madam Justice was not empowered to grant the provisional order by virtue of the provisions of section 131(6)(a)(b) of the Companies Act, 2008. Bamboo contends that as at 19 April 2024, the business rescue application was already made, as such, on 22 April 2024, an order was legally impermissible. This Court disagrees with this contention. This contention compels this Court to engage in an interpretative exercise. In order to commence that exercise, it is apposite to flash out the provisions of the subsection. It provides: -

“(6) If liquidation proceedings have already been commenced by or against that 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.”

[15] The elementary question in this instance is when were the liquidation proceedings commenced? In motion proceedings, proceedings are commenced by way of a notice of motion supported by an affidavit. In terms of section 348 of the Companies Act, 1973, a winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up. In *casu*, the STS commenced liquidation proceedings on 6 February 2024. At the time when the business rescue application was made, the liquidation proceedings had already commenced. On a literal reading of the section, once the application is made, the application will suspend those liquidation proceedings.

[16] This Court does not hesitate to conclude that Bamboo conceived the business rescue application with full knowledge that liquidation proceedings are being contemplated. As at January 2024, Bamboo was notified that it is failing to pay debts, an act that will enable a Court to wound it up. At the very least, as at this date, January 2024, Bamboo must have been in financial distress. The cardinal question on those elementary facts is, why did Bamboo choose to launch the business rescue application

in April 2024, when it has been in financial distress for a period of three months already? The answer to this cardinal question is a simple one, the business rescue application is not a genuine application but one launched with turpitude. It is perspicuous that Bamboo used the legal process for an ulterior purpose. Its purpose is to thwart the known imminent liquidation proceedings. The question is not necessarily that Bamboo has an arguable business rescue application, but it is why the application was launched at the time it was launched.

[17] As indicated earlier, on a literal interpretation of the section, the making of a business rescue application will suspend the liquidation proceedings. Regard being had to the timing of the business rescue application; it is not far-fetched to conclude that it was made with a motive to suspend the liquidation proceedings. It was not genuinely made. If it was genuine, having been in financial distress for, at the very least, three months before the making of the application, a *bona fide* applicant would have launched the application much earlier. Clearly, the application was launched frivolously and vexatiously in order to stymie the liquidation proceedings.

[18] As it shall be demonstrated in due course, this Court takes a view that even in an instance where a business rescue application is application is genuinely made, its making does not prevent a Court from making a winding up order. As such, if the application is launched as a stratagem, such will be an ineffective one, not only because of the perspicuous abuse of the law but because on a literal, contextual and purposive interpretation of the section, no such prevention is apparent.³

[19] In the matter before me, the application having been made within the contemplation of subsection (1) of section 131, Collis J nevertheless, aware or unaware, made an order to place Bamboo under provisional liquidation. The veritable question before me then becomes whether suspending those proceedings means placing a gag on the Court or not? What was extensively argued before me was

³ See the interpretative approach suggested in *Cool Ideas 1186 CC v Hubbard and another* 2014 (8) BCLR 869 (CC).

whether the business rescue application was made within the contemplation of section 131(6). The Supreme Court of Appeal (SCA) in *PFC Properties (Pty) Ltd v Commissioner, South African Revenue Service and others (PFC)*,⁴ held that where the application contemplated in the section is tainted by abuse as discussed in the judgment of *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH (Villa Crop)*,⁵ such an application is not made and is incapable of suspending the winding-up proceedings. In my view, the SCA in *PFC* did not find it necessary to interpret the relevant sections.⁶ In this case, given the fact that an order was made in the face of an application for a business rescue, this Court finds it necessary to interpret section 131(6) so as to emerge with the proper legal consequences of the launching of the business rescue application.

[20] This particular issue was squarely raised before me when the present application was argued. It became apparent to both counsel that the question was not answered by any Court in such circumstances as they obtained in this matter. Just to recap, the question is whether the making of an application for business rescue is a bar to an order of provisional or final liquidation? Other cases that sought to interpret the section dealt with instances where the application is made after the making of a provisional order and not before. Collis J having issued a provisional order, after 19 April 2024, being the date when the application for business rescue was made, did she issue a nullity? Is it a nullity because the section, properly interpreted, means that an order cannot be issued once the suspension sets in?

[21] On the submission of Mr Hollander, appearing on behalf of Bamboo, once a determination is made by a Court that such an application was not an abuse nor used as a stratagem, then with effect from the date when the application is made, in this instance, 19 April 2024, then the suspension sets in. If this submission is accepted, it must follow that any order issued in the proceedings that are suspended is an order issued in error. Nevertheless, as correctly submitted by counsel for the STS, a Court

⁴ 2024 (1) SA 400 (SCA) at para 38.

⁵ 2024 (1) SA 331 (CC) at para 77.

⁶ *PFC* above n 4 at para 21.

grants an order on the strength of what is before it. What was before Collis J was an unopposed provisional liquidation application. Having refused to accept opposing papers, Collis J was perfectly permitted to make an order once satisfied that such an order was justified.

[22] To my mind, it cannot be said that a Court is barred from making an order. Section 347 of the Companies Act, 1973, specifically empowers a Court to, amongst other orders, make any interim order or any other order it may deem fit. With such wide powers, it is incongruent to contend that section 131(6) places a gag on the powers of a Court faced with a section 346 application. It may well be so that in some instances, a Court may grant an order in the circumstances where for an example it is unaware that a copy of the application has not been lodged with the Master within the contemplation of section 346(4)(a) of the Companies Act.

[23] In those circumstances, the order would be erroneously granted and not invalidly granted. Generally, an order would be erroneously granted if there existed, at the time of its issue, a fact of which the Court was not aware of which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the order.⁷

[24] Mr Hollander was unable to direct this Court to any authority in support of the proposition that the section means that a Court is barred from making an order. In the papers before me, Bamboo alleges that Collis J was aware of the existence of the business rescue application before making an order. If accepted, this statement, must imply that Collis J must have taken a view that the existence of the application does not bar any order she is empowered to make. In such circumstances, the order would not have been erroneously granted. In any event, it is unnecessary to speculate, even if Collis J was aware of a floating and or pending application, since she was faced with

⁷ See *Promedia Drukkers & Uitgawers (Edms) (Bpk) v Kaimowitz and Others* 1966 (4) SA 411 (C).

an unopposed application, she was bound to look at what was before her and not what might or might not exist elsewhere.

[25] The Court in *Richter v ABSA Bank Ltd (Richter)*⁸ had the following to say with regard to section 131(6):

“For these reasons a proper interpretation of “liquidation proceedings” in relation to section 131(6) of the Act must include proceedings that occur after the winding-up order to liquidate the assets and account to creditors up to deregistration of a company.”

[26] Based on the above statement of law, the SCA in *GCC Engineering (Pty) Ltd and Others v Maroos and Others (Maroos)*⁹ expressly stated that section 131(6) does not suspend the Court order that placed the company under liquidation. Mr Hollander sought to distinguish *Maroos* on the basis that the business rescue application was made after an order of liquidation was made. This Court does not believe that such factor affects the legal principle expressed in *Maroos*. To my mind, the following, which was said in *Maroos*, is instructive:

“[17] In terms of s 131(6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to various creditors.

[19] In s 131(6) the legislature used the word ‘suspend’ and which not mean termination of the office of the liquidator. In my view the term ‘liquidation proceedings’ refers only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation in order to bring about its dissolution. What is suspended is the process of winding up and not the legal consequences of a winding up order.” [Own emphasis]

[27] Fortified by *Maroos*, this Court concludes that the making of the application does not have the effect of preventing a Court to make a winding up order, be it provisional or final. Having reached this finding, it is unnecessary for this Court to decide the much debated legal point of what it means to have the business rescue

⁸ 2015 (5) SA 57 (SCA) at para18.

⁹ 2019 (2) SA 379 (SCA).

application made. This conclusion I reach obtains even in an instance where a business rescue application is properly made. A submission that a business rescue and liquidation order may not live side by side or co-exists is, in my view, an invalid one.

[28] A company that begins business rescue proceedings is one that is financially distressed. A company that is financially distressed is no different from a company that is unable to pay its debts when they fall due. In terms of section 344(f) of the Companies Act, 1973, a company that is unable to pay its debts may be wound up by the Court. The reality is that a company in financial distress is a candidate for both winding up and business rescue. Should one of the possible processes commence before the other, different legal consequences may arise. For an example, a company which is unable to pay its debts, although a candidate for winding up, may be rescued to a point of being able to pay its debts. However, in my view, such does not detract from the fact that a Court may, if it is proved to its satisfaction that a company is unable to pay its debts, taking into account the contingent and prospective liabilities, wound up that company.

[29] In a situation of business rescue proceedings, the only glimmer of hope is the belief that there appears to be a reasonable prospect of rescuing the company. That being the case, it must be so, as correctly held in *Maroos* that the suspension is aimed at the realisation process as opposed to the winding up order. Should a company be rescued, such does not mean that it was not at some stage unable to pay its debts. Such a status will remain irrespective of the effect of a section 131(6) situation. In order to continue surviving, after reaching a rescue status, is the presence of protected assets of the company as opposed to its label (once wound up). It must be remembered that in terms of section 354(1) of the Companies Act, 1973, a liquidator, creditor or member may, on proof to the satisfaction of the Court, have the winding up proceedings set aside. When a company is placed in provisional liquidation, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors.

[30] Equally, in terms of section 354(2), a Court is obliged to have regard to the wishes of the creditors or members as proved to it with sufficient evidence. In all the circumstances, the winding up order, which may set into motion the liquidation proceedings (realisation of assets), is not inimical to business rescue proceedings and both may live side by side. In both instances, the control of the company is placed in the hands of a third party. Successful liquidation proceedings constitute a complete process by which a company is brought to an end and a liquidation process culminates in the dissolution of the company up to its deregistration. On the other hand, a successful business rescue means life being injected to a once financially distressed company.

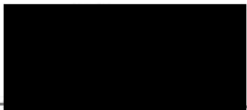
Conclusions

[31] In summary, in this Court's view, the present application is incapable of being launched in terms of rule 6(12)(c) of the Uniform Rules. If it is capable of being launched, a section 131(1) application does not prevent a Court from granting a liquidation order. As such, there exists no legal basis to set aside nor invalidate the order of Collis J at this stage. It may well be possible for Bamboo to persuade a Court on the return date (18 June 2024) not to make the order final. Should it succeed, the provisional order may be extended and or discharged. I do state *en passant* that counsel for Bamboo conceded before me that Bamboo is commercially insolvent. This concession makes Bamboo a possible candidate for final liquidation.

[32] For all the above reasons, I make the following order:

Order

1. The application is dismissed.
2. The applicant is to pay the costs of this application on a party and party to be taxed or settled at scale C.



GN MOSHOANA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:

Mr L Hollander

Instructed by:

Schindlers SI Attorneys, Johannesburg

For Respondent:

Mr A Vorster

Instructed by:

Strydom & Bredenkamp Inc, Pretoria

Date of the hearing:

16 May 2024

Date of judgment:

27 May 2024