FIRSTRAND BANK LTD v IMPERIAL CROWN TRADING 143 (PTY) LTD 2012 (4) SA 266 (KZD) F

Citation	2012 (4) SA 266 (KZD)
Case No	12910/2011
Court	KwaZulu-Natal High Court, Durban
Judge	Swain J
Heard	November 25, 2011
Judgment	December 9, 2011
Counsel	*AWM Harcourt SC* for the applicant. *L Pillay SC* for the respondent.
Annotations	Link to Case Annotations

G

Flynote : Sleutelwoorde

Company — Business rescue — Where liquidation proceedings already initiated — Once liquidation proceedings initiated, board precluded from H launching business rescue proceedings — Affected persons may, however, still do so — Meaning of 'liquidation proceedings . . . initiated' — Referring to 'commencement' of winding-up (voluntarily or by order of court) as intended in Companies Act 61 of 1973 — Companies Act 71 of 2008, s 129(2)(a), s 131(1) and s 131(6).

Headnote : Kopnota

I Section 129(2)*(a)* of the Companies Act 71 of 2008 (the Act) provides that the board of a company may not adopt a resolution that the company voluntarily begin business rescue proceedings 'if liquidation proceedings have been initiated by or against the company'. Respondent invoked this subsection as one of its grounds for the adjournment of an application for its provisional liquidation, arguing that it would be precluded by J s 129(2)*(a)* of the Act from launching its intended application for business

rescue, should the provisional order be granted. Applicant countered by A referring, inter alia, to s 136(6) of the Act, which provides that, 'if liquidation proceedings have already been commenced by or against the company at the time an application (for business rescue) is made . . . the application will suspend those proceedings . . . .'. The court, called upon to interpret the relevant sections,

Held: The Act determined the interrelationship between business rescue B proceedings and liquidation proceedings with reference to the source of the business rescue proceedings, ie whether such proceedings originated in a resolution of a company's board in terms of s 129(1), or in an application brought by an affected person to commence business rescue proceedings in terms of s 131(1). In the latter case, the application could be 'commenced' with at any time, provided that the company had not yet adopted a C resolution to begin business rescue proceedings. However, in the former case — as pointed out in s 129(2)*(a)* — such a resolution could not be adopted 'if liquidation proceedings ha(d) already been initiated by or against the company'. Consequently, on the facts of the case, if a provisional order of liquidation were granted, the board of the respondent would be precluded from resolving that the respondent

voluntarily began business D rescue proceedings. The grant of such an order would, however, not have precluded an affected person from applying to court for the commencement of business rescue proceedings and to have the respondent placed under supervision. The Act's reference to 'liquidation proceedings' was clearly a reference to a company's voluntary winding-up or winding-up by order of court in terms of ss 348 and 352 E of Act 61 of 1973 348 and 352 respectively, which expressly continued to be applicable to the winding-up of companies. The word 'initiated' in s 129(1) must have been intended to have the same meaning as the word 'commenced' in s 131(6) — to conclude otherwise would be to introduce uncertainty where none is justified by virtue of the clear definition of the 'commencement' of proceedings in ss 348 and 352 of Act 61 of 1973. (Paragraphs [16] – [19] and [23] F at 271F – 272J and 273G – H.) The provisional liquidation order was granted with an extended return intended to enable an application for business rescue to be brought by any affected person.

Cases Considered

Annotations:

Case law G

*Kalil v Decotex (Pty) Ltd and Another*1988 (1) SA 943 (A): dictum at 979B applied

*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*1962 (4) SA 593 (D): dictum at 597D – G applied.

Statutes Considered

Statutes H

The Companies Act 71 of 2008, s 129(2)*(a)*, s 131(1) and s 131(6): see *Juta's Statutes of South Africa 2010/11* vol 2 at 1-464 and 1-465.

Case Information

Application for the provisional liquidation of a company. I

AWM Harcourt SC for the applicant.

L Pillay SC for the respondent.

Cur adv vult.

Postea (December 9). J

Judgment

A **Swain J:**

[1] FirstRand Bank Ltd (the applicant) seeks an order provisionally liquidating Imperial Crown Trading 143 (Pty) Ltd (the respondent) on the ground that the respondent is unable to pay its debts as contemplated in s 345(1)*(c)*, read with s 344*(f)* of the Companies Act 61 of 1973. The B terms of s 9(1) of sch 5, ch 14 of the Companies Act 71 of 2008, dealing with the winding-up of companies, continue 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 on C 11 July 2007, which was repayable by the respondent on 28 February 2011.

[3] The loan was used by the respondent to construct a 16-storey block of flats, comprising commercial premises on the ground floor, parking floors above the commercial level and, above that, 265 residential flats. D 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, E the respondent had to achieve an 80 % presale of the

units. The recession then intervened, development-market conditions deteriorated and, as a consequence, a large number of presales 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 KwaZulu-Natal as serviced student accommodation. This contract was concluded F 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 G the applicant in the respective amounts of R3 500 000 (with an additional amount of R700 000), an amount of R83 000 000 (with an additional amount of R16 600 000) and an amount of R16 200 000 (with an additional amount of R2 700 000).

[6] A number of widely disparate views as to the present value of the H 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 140 residential units, plus 130 parking bays, and the commercial I component, is estimated to be R50 million, which is reduced to R30 million 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 R104 million.

[7] The respondent's annual financial statements for the year ended J 28 February 2011 record its total assets, as per its balance sheet, at a

value of R68 509 815, and its total liabilities are recorded as A R69 589 478, including the applicant's claim in an amount of R55 028 127 (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 B respondent is nevertheless commercially insolvent because the respondent is unable to pay its debts in terms of s 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 C commercial insolvency. See *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*1962 (4) SA 593 (D) at 597D. A company 'which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources'. See *Rosenbach* (supra) at 597H. 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 D 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. See *Rosenbach* supra at 597F – G and authorities E there cited. At the stage of a provisional order, where on the affidavits there is a prima facie case (ie a balance of probabilities) in favour of the applicant, a provisional order of winding-up should normally be granted. See *Kalil v Decotex (Pty) Ltd and Another*1988 (1) SA 943 (A) at 979B.

[9] It is common cause that the respondent failed to make payment of F the amount of R55 432 294 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 12-year period. The deponent on behalf of the respondent adds the following: G

> '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 H following:

- 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 so as to determine whether they were I 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.

- Building work under way at the building, to convert portion of the retail component to residential space, was 65% complete. This work was being carried out with money supplied from the personal funds J

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A of the directors of the respondent. Ten units would be ready in December, which would house a further 160 students. Development to house a further 50 students would be ready by the end of January 2012, which would increase the student numbers to 716 by January 2012. With the additional units, the business would operate at a profit.

B • 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.

C • In the time available, it had been impossible to launch a detailed application for business rescue, as contemplated by s 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.

D [11] In the light of these contentions, and at the hearing of the matter, I asked Mr *Harcourt SC*, 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 E 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 renegotiate the lease with the university. This was on the assumption F 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 SC* consequently took instructions from the applicant G 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. H 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 I exercised over the servicing of the units if a further lease were 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 respondent sufficient time to investigate and, if necessary, J launch any application for business rescue of the respondent.

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[13] The response of Mr *Pillay SC*, who appeared for the respondent, A 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 B advisable, to launch an application for business rescue of the respondent.

[14] In aid of his submission Mr *Pillay SC* referred to s 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 C and place the company under supervision in terms of ss (1), 'if liquidation proceedings have been initiated by or against the company'.

[15] The answer of Mr *Harcourt SC* to this submission was to refer to the provisions of ss 131(6) and 131(7) of Act 71 of 2008, which provide as follows: D

> '(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 E
>
> *(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 ss (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.' F

[16] It is clear, however, that Act 71 of 2008 draws a distinction between 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 s 129(1), or whether the source of such G proceedings lies in an application brought by an 'affected person' in terms of s 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 s 129(2)*(a)* such a H 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 s 352 of Act 61 of 1973, as well as a reference to a winding-up of a company by the court in terms of s 348 of Act 61 of 1973. In this regard, the authors of the work I Davis et al *Companies and other Business Structures in South Africa* 2 ed at 229 n6 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 s 131(6) of Act 71 of 2008 refers to J

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A 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 s 131(1) of Act 71 of 2008. It would be anomalous if what was meant by liquidation proceedings being 'initiated' by or against B the company for the purposes of s 129(2)*(a)* differed from what was meant by liquidation proceedings being 'commenced' by or against the company for the purposes of s 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 C 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 ss 348 and 352 of Act 61 of 1973.

[18] In terms of s 129(6) of Act 71 of 2008, once a company has taken D 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 s 129(5) or until the business rescue proceedings have ended as determined in accordance with s 132(2).

E [19] However, where a company has not adopted a resolution contemplated in s 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 s 131 of Act 71 of 2008. If liquidation proceedings have already been commenced by F 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 s 131(6) of Act 71 of 2008. This suspension endures in terms of ss 131(6)*(a)* and 131(6)*(b)* until the court has adjudicated upon the business rescue application or 'the business rescue proceedings end, if G the court makes the order applied for'. Mr *Pillay SC* and Mr *Harcourt SC* 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 SC*, 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 H adjudicating upon the application for business rescue in terms of s 131(6)*(a)*, to grant an order of liquidation in terms of s 131(6)*(b)* and thereby bring to an end the business rescue proceedings and simultaneously the suspension of the liquidation proceedings. Mr *Harcourt SC*, however, contended that 'the order applied for' referred to the application I 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 s 132(2). On this interpretation, the provisions of s 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 J application is refused.

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[20] I understood the significance of *Mr Pillay*'s argument to lie in the A fact that the benefit to the respondent of the suspension of the liquidation proceedings in terms of s 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 s 131(6)*(b)*, and thereby bring to an end the suspension of the liquidation proceedings themselves. B

[21] In my view, such a consequence was never intended by the legislature. Simply put, s 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 C suspension of liquidation proceedings endures until the business rescue proceedings end in terms of s 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 D 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 E defined in terms of s 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 is 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 F 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 G 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 12 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 H granting an extended return date to enable an application for business rescue to be brought by any 'affected person' if so advised.

[24] I grant the following order:

1. A rule nisi is to be issued calling upon all persons interested to I 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. J

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A 3. The service of this order will be effected —

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

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

B 3.3 by service at the registered address of the respondent at 96 Armstrong Avenue, Villa Avant-Garde, La Lucia, Durban;

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

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

Applicant's Attorneys: *Edward Nathan Sonnenbergs Inc*, Umhlanga.

Respondent's Attorneys: *T Giyapersad & Associates*, Durban North. D