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[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

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Business rescue -practitioner appointed by board of company in terms of s 129(3)*(b)* – resignation of practitioner – board's power to appoint substitute under s 139(3) not subject to authority or approval of practitioner.

[1] In this application for leave to appeal, the question on the merits is this. Where, in the case of a voluntary business rescue initiated in terms of section 129 of the Companies Act (Act), a business rescue practitioner appointed by a court in terms of section 130(6)(a) in place of the company-appointed practitioner resigns, who has the power to appoint the court-appointed practitioner's replacement? The answer depends on a proper interpretation of section 139(3) of the Act. The Supreme Court of Appeal held that the power of appointment resided with the company's board. The second applicant contends that it resides with the majority of the independent creditors' voting interests who were represented in the proceedings giving rise to the court's appointment in terms of section 130(6)(a).

[2] All statutory references in what follows are to the Act. It is doubtful whether the first applicant, Shiva Uranium (Pty) Limited (Shiva), is properly before us at the instance of the second applicant, Mr Christopher Monyela. Since Mr Monyela is properly before us, I treat him as the applicant.

Factual background

[3] In February 2018, Shiva's board resolved to place the company under business rescue and to appoint Messrs Kurt Knoop and Louis Klopper as its business rescue practitioners. The Companies Regulations**[2]** distinguish, for purposes of business rescue proceedings, between "large companies", "medium companies" and "small companies" and between a "senior practitioner", "experienced practitioner" and "junior practitioner". Shiva is a large company. In terms of the Companies Regulations, a junior practitioner or experienced practitioner may not be appointed as the practitioner of a large company except as an assistant to a senior practitioner. Messrs Knoop and Klopper were both senior practitioners.

[4] In March 2018, Shiva's largest independent creditor, the Industrial Development Corporation of South Africa Limited (IDC), launched an application in the High Court (Gauteng Division, Pretoria) in terms of section 130(1)(b) for the removal of Messrs Knoop and Klopper. Another creditor, Westdawn Investments (Pty) Limited, and a group of Shiva employees intervened to support the IDC's application. Messrs Knoop and Klopper opposed the application.

[5] Section 130(6)(a) provides:

"If, after considering an application in terms of subsection (1)(b), the court makes an order setting aside the appointment of a practitioner—

(a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court.

29. In terms of section 139 (3) of the Act only two individuals or entities are competent to appoint a practitioner in the event a practitioner resigns, as it is the case in this matter. However, subject to the right of the affected person to bring a fresh application in terms of section 130 (1) (b) to set aside that new appointment. No application was brought in terms of section 130 (l) (b) for the setting aside of the new appointment, of the applicants and it can be safely assumed that section 130 (l) (b) is not applicable in *casu.*

Section 140 (1) - During a company's business rescue proceedings, the practitioner, in addition to any other power and duties set out in this Chapter-

(a) has full management control of the company in substitution for its board and pre-existing management.

The Act does not make the work of the board of directors obsolete once the company is placed under business rescue. Such submission finds support in section 137 (2) of the Act which provides as follows;

"137 (2) - During a company's business rescue proceedings, each director of the company-

(a) must continue to exercise the functions of director, subject to the authority of the practitioner ….

Evocatus Security Services SA (Pty) Limited v Ntamo Technologies (Pty) Limited (46328/2020) [2021] ZAGPPHC 785 (9 November 2021)

Winding up application-section 344(f) read with section 345(1)(a) of the Companies Act on the basis that the Respondent is unable to pay its debts- respondent demonstrated that it can pay-application dismissed

[1] This is an application for the winding up of the respondent pursuant to the provisions of section 344(f) read with section 345(1)(a) of the Companies Act on the basis that the Respondent is unable to pay its debts. According to the applicant, the respondent is indebted to the applicant in an amount of at least R3 065 285.49 in respect of guarding and armed response services rendered in terms of two agreements concluded between the parties.

[2] Despite that it is the practice in this division to ask for a final winding up order in the Notice of Motion with this court retaining a discretion to grant a provisional order, the applicant prayed for the granting of a provisional order only.

[3] Condonation was granted for the late filing of the applicant's reply and leave was granted to the respondent to file a further affidavit in which it is confirmed that the amount which the applicant claims is outstanding has been paid into the trust account of the respondent's attorney. This was ostensibly done to thwart the applicant's submission that the respondent is unable to pay the entire amount the applicant claims is outstanding.

[4] The applicant claims that the respondent has failed to pay the full amount due for the months of February 2020, March 2020 and April 2020 despite the fact that it had delivered the services as it was contractually obliged to do.

<u>The applicant's case</u>

[5] The applicant states that the parties entered into two written Service Level Agreements ("*SLA"*) commencing on 1 November 2019 in terms of which the applicant was obliged to render guarding service to all buildings within the jurisdiction of the City of Ekurhuleni Municipality ("*Ekurhuleni"*). The applicant was further obliged to render armed response services at specific sites or as determined by the

respondent. The parties had agreed that the payment terms would be 30 days after the first of every month.

[6] Although the operation of the two agreements fell within the time period within which the President invoked the provisions of the Disaster Management Act**[4]** ("*the DMA"*), the services rendered by the applicant were considered "*essential services*". The applicant continued to render services in terms of the respondent.

[7] On 3 April 2020 the respondent informed the applicant that it intended to rely on the "*force majeure*" clause. At that time the respondent was already indebted to the applicant and in arrears with the payments due for February and March 2020. On 28 April 2020 the applicant demanded payment of the amounts then outstanding under the armed response agreement in terms of clause 6.1.4.

[27] Lastly, it was submitted on behalf of the respondent that this is not a matter where there is an inability to pay. The respondent can pay and has demonstrated this ability by paying the disputed amount into its attorneys' trust account.

[28] Ultimately, this court must exercise a discretion taking into account all the circumstances such as the fact that the respondent is not in fact commercially insolvent and where there is a *bona fide* dispute about the claim. The court in *Orestisolve* explains:

> "*[21] Another circumstance which, in my view, would favour an exercise of the court's discretion against winding-up is where, despite the deemed inability to pay debts created by s 345(1)(a), the evidence shows that the company is not in fact commercially insolvent. It may also be relevant in this regard that the company's failure to pay is attributable to a genuine dispute concerning the claim, even if the court in the event considers the grounds of dispute are ill-founded."*

[29] Returning to the facts of this matter. The respondent is not unable to pay its debts and is not commercially or factually insolvent. Is the claim *bona fide* disputed *and* on reasonable grounds? It was submitted on behalf of the

respondent that whether the defence against the claim is valid is not something that is before this court. I agree. It is not, as was pointed out in *Orestisolve*,***[8]*** for this court to necessarily have to hold the view that the claim will succeed or even that it is likely that the claim will succeed: "*It would be sufficient, I think, that the company genuinely wishes to contest the claim and believes it has reasonable prospects of success*."

[30] Having regard to the papers, I am persuaded that the claim is *bona fide* disputed on reasonable grounds: The respondent is saying that the amount claimed is not due and payable and disputed on the basis that the invoices were not accompanied by the necessary documents – most notably the timesheets – which would have enabled the respondent to determine whether the amount claimed is due and payable. Coupled with the fact that the respondent is not unable to pay its debts, I am not persuaded that a provisional order should be granted. The application is therefore dismissed. The respondent argued that the application should be dismissed on the scale as between attorney and client. I do not see any reason for dismissing the order with costs on such scale.

Order

[31] The application is dismissed with costs.

Prinsloo v The Master of the High Court and Others (28039/2017) [2021] ZAGPJHC 594 (3 November 2021)

Liquidators-removal-did not properly complied with their obligations to investigate the claim including its quantum as envisaged by s45(2) of the Insolvency Act - statutory duties not complied with -removed

[1] This is an opposed application, conducted via a virtual hearing for the removal of liquidators and reviewing certain actions and decisions of the first respondent (" the Master") under s6 of the Promotion of Administrative Justice Act. The amended notice of motion and founding papers were cast in broad terms and included the review of

the Master's actions. Costs were sought only against any respondents who opposed the application.

[2] In terms of the applicant's draft order provided at the hearing, the applicant sought slightly different relief, including orders: (i) removing the third and fourth respondents as joint liquidators of PMC Waterproofing and Roofing CC ("PMC") and directing them to repay any fees paid to them, (ii) appointing new liquidators tasked with the administration of the estate and the investigation of fees and certain objections raised by the applicant in correspondence to the Master dated 5 October 2016 and 28 January 2020 respectively; (iii) setting aside decisions of the Master (a) to admit the claim of Stand 244 Hughes Ext 29 CC ("Stand 244"), an entity of which the fifth respondent is the sole member and (b) to reject the applicant's claim and (iv) a costs order against the second to fifth respondents.

[3] Only the third and fourth respondents ("the liquidators") together with the second respondent opposed the application, by way of affidavits deposed to by the third respondent, Mr Smit. The confirmatory affidavit of the fourth respondent is unsigned. From the papers, it does not appear that the fourth respondent has been actively involved in the administration of the PMC estate. The second respondent, the entity through which the third respondent conducts business as a liquidator, plays no real role in these proceedings. The fifth respondent did not oppose the application. The Master filed a report dated 7 December 2020, pursuant to an order granted on 5 February 2019 for him to conduct an investigation, but did not actively participate in the proceedings. He abided the decision of the court.

[4] The liquidators did not persist with the three points *in limine* raised in their answering papers. On the papers, the primary issues requiring determination are: first, whether the liquidators should be removed and whether the ancillary relief sought pursuant thereto should be granted; second, whether the Master's decisions to respectively admit and reject certain claims should be set aside; and third, whether the Master's failure to uphold the applicant's complaints should be reviewed or be subjected to a further investigation.

[5] This application has its genesis in the conduct of the liquidators in relation to the administration of the PMC estate.

[6] It was common cause that the applicant and the fifth respondent were the sole members of PMC, which was placed under final winding up at the instance of the fifth respondent by order of court on 7 January 2016. Pursuant thereto, the liquidators were appointed on 25 January 2016. The present application was instituted during July 2017, after the applicant had applied to the Master to remove the liquidators during October 2016 on the grounds that certain assets of PMC had been removed and the liquidators were not acting independently or in the best interest of its creditors. The Master did not make a formal determination of the issue, nor were formal determinations made pertaining to the various complaints raised by the applicant.

[7] In summary, the applicant's case is that the conduct of the liquidators has not been impartial, has been irregular in numerous respects and that she has a reasonable apprehension of bias on their part in favour of the fifth respondent and his business entities. She complained of various irregularities, including that the liquidators released substantial assets of PMC to the fifth respondent, some of which were subsequently sold by him. The applicant further alleged that the liquidators did not take proper control of the estate assets and its books and records, that debtors of PMC were not collected and that there was conduct on the part of the liquidators to the prejudice of PMC and its creditors.

14] The liquidators averred that they were not given the books and records of PMC, which were in the control of the applicant and that the applicant manipulated the 2015 financial statements of PMC to include various items not hitherto contained in the financial statements. According to the liquidators, they are in possession of only limited financial records obtained from PMC's auditors, including its financial statements for 2009 to 2014 and bank statements obtained from PMC's bankers. The financial statements provided by the liquidators reflected members' loans, moderate amounts in respect of rental and limited assets. No equipment or vehicles were reflected as assets. According to the applicant, both she and the fifth respondent are creditors of the estate. She further avers that there are unproved claims of other employees and that one of the fifth respondent's other entities is a substantial debtor of PMC, which debt has not been collected by the liquidators.

[15] It was undisputed that the fifth respondent was given free access to the premises. According to the liquidators it was because one of his entities, Stand 244,

owned the property and the fifth respondent conducted business from those premises through another of his entities, PMC Contractors CC.

[16] It was common cause that a valuation report of the assets was prepared by Mr Bolton who attended the premises with Mr Smit on 25 January 2016, particularizing certain assets**[11]** and ascribing a forced sale value of R655 610 thereto. This valuation included only some of the numerous vehicles of PMC. The applicant complained that she was not provided with an asset list of all PMC's assets, despite various requests and contended that all PMC was the owner of all the vehicles.

[17] A claim by the landlord of the PMC business premises, Stand 244, represented by the fifth respondent, was admitted to proof at a first meeting of creditors on 1 April 2016. The Master accepted the claim. At the behest of the fifth respondent, the sole member of the landlord, an enquiry was convened at which the applicant was to be interrogated. The first meeting of creditors was postponed for this purpose. The applicant was warned to appear at the enquiry on 6 July 2016 and to produce certain documents. The enquiry did not proceed.

[18] The liquidators were notified by the applicant that she objected to the claim of Stand 244 as there was no rental agreement and rental was not paid by PMC. She contended that the claim also included arrear municipal charges for which PMC was not liable. There is no evidence that this claim was fully interrogated by the liquidators or that the applicant's complaint was properly considered by the liquidators. The liquidators concluded that as it was common cause that Stand 244 was the owner of the premises, rental would have to be paid and the applicant had to provide proof of her contention. The applicant in turn, alleged that the PMC bank statements and the records would reflect that no rental was paid.

[19] Various further disputes arose between the liquidators and the applicant regarding PMC's records, assets, vehicles and claims both by and against the PMC estate in relation to entities owned by the fifth respondent. This resulted in the applicant applying to the Master on 5 October 2016 for the urgent removal of the

liquidators on the basis that they were not acting independently and in the best interests of creditors. This request was repeated in further correspondence dated 19 October 2016 and 9 December 2016. The applicant raised further objections to the liquidators' conduct in correspondence dated 22 January 2019.

[20] The objections raised by the applicant primarily pertained to the liquidators' conduct in failing to properly secure PMC's records and assets and in allowing the fifth respondent access thereto and the removal of PMC's assets from the premises, including vehicles and equipment by the fifth respondent. Those assets were later released to the fifth respondent. Further complaints were raised pertaining to a Volkswagen motor vehicle which applicant contended a court had ruled was to be returned to PMC and the damage to the applicant's personal laptop and the destruction of information thereon. A further objection was raised regarding the liquidators' conflict of interest in using the fifth respondent's legal team, attorney Christofides and Adv Saldino at the enquiry. It was alleged that Adv Saladino had made an improper settlement proposal to the applicant to avoid the enquiry and any criminal charges by paying fifth respondent an amount as damages. The Applicant further objected to the acceptance of the Stand 244 claim, without proper investigation. A bias on the part of the liquidators was alleged as personal information had been sought only from the applicant but not from fifth respondent.

[21] In essence, the same complaints are raised by the applicant in these proceedings as those raised before the Master, save for further complaints pertaining to the sale of PMC assets which occurred later.

[50] I grant the following order:

> [1] The third and fourth respondents are removed as joint liquidators of PMC Waterproofing and Roofing CC (in liquidation);
>
> [2] The Master is directed to forthwith appoint alternative liquidators within 20 days of service of this order to:

[2.1] wind up the estate of PMC Waterproofing and Roofing CC (in liquidation);

[2.2] fully and comprehensively investigate:

[2.2.1] the asset and liability position of PMC Waterproofing and Roofing CC (in liquidation) at the date of its winding up;

[2.2.2] whether any assets of PMC Waterproofing and Roofing CC (in liquidation) were improperly released to the fifth respondent, what transpired with these assets and whether the estate has any claims against the fifth respondent or any of his associated entities;

[2.2.3] the administration of the said estate by the third and fourth respondents; and

[2.2.4] the applicant's objections referred to in this application, including the objections set out in the applicant's correspondence to the Master dated 5 October 2016 and 28 January 2020;

[3] The Master is directed to notify the applicant and the third to sixth respondents via email of the identities and contact details of the newly appointed liquidators forthwith upon their appointment;

[4] In addition to the ordinary execution and performance of their duties and obligations as liquidators to wind up the estate of PMC Waterproofing and Roofing CC, the newly appointed liquidators are directed to provide a detailed report pertaining to the issues in [2.2] above to the Master, the parties and the court within 90 days of date of their appointment;

[5] The Master's decision to admit the claim of Stand 244 Hughes Ext 29 CC is set aside and the claim is rejected;

[6] The remaining relief pertaining to the Master's failure to consider and uphold the applicant's objections is postponed sine die;

[7] The parties and the newly appointed liquidators are authorized to deliver supplementary affidavits which in clear and concise terms deal with the applicant's objections and the contents of the report referred to in [4] above, within 10 days of being provided with that report;

[8] The third and fourth respondents are directed to pay the costs of the application to date;

[9] A copy of this order is to be served on the Master, the fourth, fifth and sixth respondents, Stand 244 Hughes Ext 29 CC and, once appointed, on the newly appointed liquidators;

[10] A full copy of the application papers is to be provided by the applicant to the newly appointed liquidators forthwith upon their appointment.

Rooplal N.O v Khangela and Another (11111 / 2020) [2021] ZAGPJHC 667 (5 November 2021)

Liquidator-of bank- seller of motor vehicle on instalments thus liquidated-effect

Liquidator-of bank- bondholder thus liquidated-effect

1 The applicant, Mr. Rooplal, is the liquidator of VBS Bank. In 2017, VBS entered into two credit agreements with the first and second respondents, Mr. and Mrs. Khangela. The first agreement, a motor vehicle credit agreement, financed the purchase of a Mercedes Benz. The second agreement, a mortgage credit agreement, financed the purchase of Mr. and Mrs. Khangela's home.

2 VBS went into liquidation in 2018. Apparently because Mr. Khangela's income was derived from a contract he had with VBS at the time, and which Mr. Rooplal cancelled on VBS' liquidation, Mr. and Mrs. Khangela fell into arrears on their repayments due under both the credit agreements.

3 In this application, Mr. Rooplal seeks the return of the motor vehicle, and judgment for the amount outstanding on the motor vehicle credit agreement, less the market value of the Mercedes at the point of its return. Mr. Rooplal also seeks judgment for the full accelerated amount due on the mortgage credit agreement.

4 My sister Robinson AJ granted the relief sought in relation to the motor vehicle credit agreement on 28 April 2021. She postponed the application for the money judgment on the mortgage credit agreement *sine die*, in order to allow Mr. Rooplal to comply properly with section 129 (1) of the National Credit Act 34 of 2005 ("the Act"). Robinson AJ's judgment is reported as *Rooplal N.O. v Khangela* [2021] ZAGPJHC 516 (28 April 2021).

5 Mr. Rooplal re-enrolled the application for a money judgment on the mortgage credit agreement before me on 28 October 2021.

6 The general rule, established in *Absa Bank v Mokebe* **2018 (6) SA 492** (GJ) ("*Mokebe*"), is that, where the mortgaged property is a home, Judges of this Division will not entertain and determine an application for a money judgment on a mortgage credit agreement separately from the application to execute against the mortgaged property. The money judgment forms part of the cause of action for the application for leave to execute. Whether or not the money judgment should be granted is inextricably bound up with the question of whether execution against the mortgaged property is proportionate, within the meaning of the decisions of the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz* **[2004] ZACC 25**; **2005 (2) SA 140** (CC) and in *Gundwana v Steko Development CC* **2011 (3) SA 608** (CC).

In the circumstances I make the following order:

[29.1] The cancellation of the Sale on Suspensive conditions, concluded between VBS Mutual Bank and the first respondent ("the vehicle finance agreement") (FA8 to the founding affidavit) is confirmed;

[29.2] The first respondent is ordered to return the Mercedes Benz vehicle being the subject matter of the vehicle finance agreement to the applicant;

[29.3] The first respondent is ordered to pay the sum of R2,555,191.66 plus interest at the agreed rate of prime, calculated daily and compounded monthly in arrears from 29 February 2020 until date of full payment, less the market value of the vehicle as determined in terms of the vehicle finance agreement;

[29.4] As against the respondents and in respect of the relief sought in respect of the Large Mortgage Credit Agreement concluded between VBS Mutual Bank and the respondents (FA4 to the founding affidavit)

[29.4.1] this application is adjourned;

[29.4.2] the applicant is ordered to deliver a section 129(1) notice to the second respondent by sending such notice by prepaid registered post to the following address: 77 Milkwood Ext 23, Ormonde, Johannesburg, 2091.

[29.5] The costs of this application are reserved.

[29.6] The applicant is permitted to approach this court with its papers suitably supplemented to provide proof of notification.

Blue Nightingale 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd and Others (28760/21) [2021] ZAGPJHC 660 (9 November 2021)

Business rescue- plan –time to publish- by notice-possible to do this- extension granted by Under s 150(5) of the Act, a business rescue plan must be published within 25 business days on which the BRP is appointed. It is common cause that in this case the date for publication was 2 June 2021. On the 1 June 2021, the BRP addressed a notice to all creditors seeking an extension of the publication date. It stated that: "*failure to provide us with a signed copy of this letter will be deemed to be consent to this extension*". Nightingale says that s 150(5)(b)[15] requires express consent from creditors for an extension, and that the BRP was not entitled to assume that silence meant consent.

1. The applicant in this matter, Blue Nightingale Trading 709 (Pty) Ltd (Nightingale) is a minority shareholder in the first respondent, Nkwe Platinum South Africa (Pty) Ltd (Nkwe SA). The second respondent, Nkwe Platinum Limited (Nkwe Ltd), is the majority shareholder. On 27 April 2021 Nkwe SA adopted a resolution placing it into business rescue under s 129 of the Companies Act 71 of 2008 (the Act). The third respondent, Mr van der Merwe, was appointed as the business rescue practitioner (the BRP). He has published a business rescue plan. However, on 25 July 2021 Nightingale was granted urgent interim relief. That relief interdicted the proposed meeting of creditors convened by the BRP for purposes of voting on that plan, pending the outcome of the present application before me.

2. In this application, Nightingale seeks the following relief:

2.1. An order declaring that the resolution placing Nkwe SA into business rescue is void (the first prayer).

2.2. Alternatively, an order setting aside the resolution in terms of s130(1)(a) of the Act (the second prayer).

2.3. Further alternatively, an order declaring that the business rescue lapsed on 2 June 2021 (the third prayer).

2.4. An order declaring that Nightingale is entitled to nominate directors to the board of Nkwe SA and that those persons so nominated should hold office from the date of their nomination. Alternatively, ordering Nkwe SA to convene a meeting of shareholders for the purposes of appointing a new board of directors or at least two new directors nominated by the applicant (the fourth prayer).

3. Nkwe SA and Mr van der Merwe oppose the relief sought, as does Nkwe Ltd. No relief is sought against the fourth respondent, the Companies and Intellectual Properties Commission, and, unsurprisingly, it has not engaged in the litigation.

BACKGROUND

4. Nkwe SA was incorporated under the previous **Companies Act, with** its articles of association having been adopted in 2002. It is common cause that as it did not adopt a memorandum of incorporation, under the Act it is bound by its articles, which are deemed to be its memorandum of incorporation (MOI).

5. In May 2006 Nkwe Ltd, Nkwe SA and Nightingale concluded a BEE transaction in terms of which Nightingale would be issued with 30% of the issued share capital in Nkwe SA. The terms of this agreement were recorded in a shareholders' agreement (the SHA). The terms of both the MOI and the SHA are key to certain of the prayers sought in the Notice of Motion. I will deal with these relevant terms in more detail later in this judgment when it is more appropriate to do so.

6. The 2006 transaction took place in a broader context. This involved Nkwe Ltd acquiring a prospecting right in relation to certain property from another South African company, which is not a party to this litigation. The prospecting right asset was subsequently assigned by Nkwe Ltd to Nkwe SA. According to Nkwe Ltd. this was for financial reporting purposes. A loan, equal to the acquisition costs, was created in favour of Nkwe Ltd. The latter entity refers to this loan as the "equity loan". The term is useful as it serves to distinguish this loan from others that were extended by Nkwe Ltd to Nkwe SA. The equity loan was initially recognised in the balance sheet of Nkwe Ltd as a financial liability. In the 2018 annual financial statements it was reclassified as an equity. It was similarly treated in the same way in the 2019 annual financial statements. As will become clearer later, Nightingale takes issue with this reclassification.

In the founding affidavit Nightingale makes a number of assertions aimed at establishing that Nkwe SA was not in financial distress and that the cessation of funding by Nkwe Ltd in April 2021 in reality was simply a scheme to rid Nkwe SA or Nkwe Ltd of the minority shareholder. It has to be said that there is very little evidence in the founding affidavit, if any, to back up the assertions. In the main, Mr Pandor's statements are broadly stated conclusions that he draws from various events that

occurred. So, for example, he refers to the refusal by the board to recognise Nightingale's appointment of two substitute directors as evidencing "*a scheme to bypass*" Nightingale so that Nkwe Ltd "*could simply reap the benefits from the operations of the mine without our participation*". It is highly doubtful whether Nightingale could simply appoint new directors to the board with immediate effect, as it attempted to do. The board's rejection of the attempt to do so is hardly evidence of the scheme asserted to exist by Nightingale.

73. Under s 150(5) of the Act, a business rescue plan must be published within 25 business days on which the BRP is appointed. It is common cause that in this case the date for publication was 2 June 2021. On the 1 June 2021, the BRP addressed a notice to all creditors seeking an extension of the publication date. It stated that: "*failure to provide us with a signed copy of this letter will be deemed to be consent to this extension*". Nightingale says that s 150(5)(b)[15] requires express consent from creditors for an extension, and that the BRP was not entitled to assume that silence meant consent.

74. The BRP in his affidavit attaches letters confirming the express consent of four creditors, representing 96.31% of the voting interests in the business rescue, in favour of the extension. An express approval by Nkwe Ltd for a further extension was given on 25 June 2021. Nkwe Ltd represents 95.93% of the voting interests. Clearly, the requirements of s 150(5)(b) were satisfied in that in each instance, the extension was approved by the holders of a majority of creditors' voting interests. There is no merit in Nightingale's case in this regard, and counsel was well advised to refrain from addressing it in his oral submissions.

75. This was the final attack on the validity of the business rescue process. Its failure means that that process must continue. This being the case, for reasons I stated earlier, it is not necessary to consider the final prayer for relief.

CONCLUSION AND ORDER

76. It follows that there is no merit in any of the bases relied upon by Nightingale to assail the business rescue process.

77. I make the following order:

> "The application is dismissed with costs, such costs to include those of two counsel, one being senior counsel."

NCA Plant Hire CC v Blackfield Group Holdings (Pty) Limited (39508/2019) [2021] ZAGPJHC 741 (26 November 2021)

Concursus creditorum-can be side-stepped if applicant and respondent reaches a settlement agreement

[1] This matter came before me in the Opposed Motion Court on Monday, 22 November 2021, which was the return day of a provisional liquidation order granted at the instance of the applicant ('NCA Plant Hire') against the respondent ('Blackfield Group') by Miltz AJ on 20 May 2021. On that day, this Court in fact issued an order placing Blackfield Group under a provisional winding-up order in the hands of the Master, coupled with a *rule nisi* calling on all interested parties to show cause 'on a date to be arranged with the registrar' why the provisional winding-up order should not be final.

[2] On the return day, which incidentally was arranged by Blackfield Group's Attorneys, NCA Plant Hire applied for the provisional winding-up Order to be made final, whilst Blackfield Group contended that the *rule nisi* should be discharged and the winding application dismissed.

[3] The respondent contends that the provisional order should be discharged on the basis *inter alia* that the dispute between the applicant and the respondent in the winding-up application had become resolved between them in that a written settlement agreement was concluded. The said agreement was constituted by and incorporated into correspondence exchanged between the legal representatives of the parties during August and September 2021. It is the case of the respondent that an agreement between the parties came into existence by virtue of an offer made by respondent's attorneys to the applicant's attorneys on 31 August 2021, which offer was accepted

clearly and unequivocally on 1 September 2021. The acceptance of the offer, which was contained in an email from the applicant's attorneys to the respondent's attorneys, reads as follows:

'Kindly take note that we have received instructions to accept the proposed settlement. Our client further instructed us to proceed to draft a settlement agreement in this regard, as such we are attending to draft same, which you will receive during the course of early next week.'

[4] Having regard to the aforegoing, I have very little doubt that a settlement agreement was concluded between the parties. There was clearly an offer made, which offer was unequivocally accepted – classic offer-and-acceptance, resulting in a binding contract. It was an express term of the said agreement that on the return day, the provisional winding-up order was to be discharged. On the basis of the aforegoing alone, the provisional order stands to be discharged.

[5] The applicant contends, however, that an agreement did not come into existence as it was a condition that the settlement should be incorporated into a written settlement agreement, presumably to be signed by the parties before the agreement would be binding on them. A very superficial reading of the correspondence, especially the extract referred to above, belies this contention. The wording is clear – the proposed settlement was accepted by the respondent.

[6] It is trite that, in interpreting contracts and any other legal instruments, the logical point of departure remains the language of the provision itself. *In casu*, the words used in the exchange of correspondence between the legal representatives lend itself to one interpretation, and one interpretation only, that being that the dispute between the parties has been compromised. The agreement reached by the applicant and the respondent should therefore be given effect to and the provisional winding-up order ought to be discharged.

[7] The applicant also submits that it cannot be accepted that a settlement agreement came into existence because, so the argument goes, an agreement of compromise could only be concluded by the duly appointed provisional liquidators. That is so, according to the applicant, because a *concursus creditorum* had been instituted and the settlement agreement would be to the detriment and prejudice of the general body of creditors. There is no merit in this contention on either a factual or a

legal basis. There is no evidence that there has been a creditors meeting, and therefore it cannot be said that *concursus creditorum* has been instituted. Moreover, the respondent has as yet not been finally liquidated, which is a step which can only be taken at the behest of the applicant. The applicant is *dominus litis* in the liquidation application, not the provisional liquidators. And if the applicant decides to settle the dispute at the heart of the liquidation application, it is within its rights to do so.

[8] In the circumstances, the provisional winding-up order should be discharged.

[9] As contended by Mr Hollander, who appeared on behalf of the respondent, there is another reason why the rule should be discharged. That relates to the fact, so Mr Hollander submitted, that the respondent is not factually insolvent. I agree with this submission. On the uncontested and undisputed evidence before me, it cannot be said that the respondent is factually insolvent

Ex Parte Eckhoff N.O and Another; Ex Parte; Eckhoff N.O and Another (17697/21; 17696/21) [2021] ZAWCHC 233 (17 November 2021):

Provisional Trustees-extension of powers and not s 69(3) of Insolvency Act- section 69 will serve as an adequate alternative. The process does not appear to be logistically viable and neither cost nor time effective.

Provisional Liquidators-extension of powers in form of interdictory relief-granted- s 386 of the 1973 Companies Act

[1] Two ex parte urgent applications came before me on 27 October 2021. In matter under case number 17697/21 the applicants sought the extension of their powers as joint liquidators in the insolvent estate of a provisionally liquidated close corporation known as JCICC Network 100 CC ("the JCICC application"). In matter under case number 17696/21 the joint provisional trustees in the insolvent estate of Mr and Mrs Swartz sought substantially the same relief ("the Swartz application").

[2] In addition, in both matters, the applicants sought an order authorising the South African Police Services or the Sheriff of the High Court to enter and search any premises at which property belonging to the insolvent close corporation and joint estate is found and to take possession of such property.

[3] Although the applications were launched on an ex parte basis both, out of caution, were served on the insolvents, Mr. and Mrs. Swartz. The result of this cautionary approach was that Mr. Sitzer, the Swartz' attorney, and counsel appeared on the hearing date in both applications seeking an opportunity for Messrs Sitzer and Swartz to file opposing papers in both applications. After argument the request was granted and the matters were postponed with directives for the filing of affidavits, if any, by Wednesday 3 November 2021. Messrs Sitzer and Swartz filed affidavits. The applicants replied and both applications were argued on 5 November 2021.

[4] This Court granted orders in respect of both applications individually on Monday 8 November 2021, without reasons, but with the undertaking that reasons will be provided at a later stage. Although the two applications are distinct from each other there is a substantial amount of overlap between the parties involved and the facts that underlie both matters. For that reason, a single judgment is handed down containing the reasons for both orders issued.

[5] Two issues required consideration. Whether the applicants in both applications have made out a case for the extension of their powers as liquidators and provisional trustees. Further, whether the applicants have made out a case for an interdict to search and find property belonging to the insolvent estates.

THE JCICC APPLICATION

[6] Prior to JCICC's provisional liquidation Mr Swartz was its sole member. From the record it appears that a commercial relationship of significant value existed between JCICC and Standard Bank. This relationship was regulated by business loan, instalment sales and commercial property finance agreements. JCICC defaulted on its obligations in terms of these agreements and its conduct resulted in Standard Bank applying for its liquidation based on a claim of R 12 million excluding interest and costs.

[27] In both applications the applicants have established a clear right. The liquidators in terms of s 386 of the 1973 Companies Act while the trustees in terms of s 69(1) of the Insolvency Act. Having established a clear right this Court was

constrained to conclude that there is no further need to enquire whether the right exists**[9]**, in respect of both applications. Both sets of applicants are thus entitled to protection of these rights.

[28] Before an interim interdict may be granted, one of the requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing and must not have taken place already**[10]**. However, if an applicant can establish a clear right an apprehension of irreparable harm need not be established**[11]**.

[29] This Court has already found that the applicants have established a clear right that requires protection. A harm analysis is thus not necessary, but for the avoidance of doubt the suffering of harm is obvious, for all the reasons canvassed in this judgment, since without protection neither the liquidators nor provisional trustees will be able to execute their statutory duties to the benefit of the body of creditors.

[30] Next is the balance of convenience consideration. This Court has already found that the applicants will suffer harm if the interim interdict is not granted. Harm is also an element of the balance of convenience enquiry**[12]**. Since harm is present, the balance of convenience favours the granting of an interdict.

[31] Regarding the requirement that an applicant seeking an interdict should not ask for one if an alternative remedy is available, it was contended in the opposing affidavit that the applicants do have an alternative remedy in terms of s 69(3)**[13]** of the Insolvency Act as it can issue writ of attachments in the magistrate's Court. It is so that the mentioned section allows for a situation where a liquidator or provisional

trustee can approach a magistrate court in the area in which assets of the insolvent estate is situated, to issue a warrant to search for and take possession of the assets.

[32] However, to succeed with an interim interdict and to comply with the requirement that no other alternative remedy is available the legal position**[14]** is that the alternative remedy must: (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.

[33] Considering the facts and circumstances of these applications I cannot agree that to embark on a process as prescribed in s 69(3) will serve as an adequate alternative. The process does not appear to be logistically viable and neither cost nor time effective. Moreover, I am of the view that Mr. Swartz caused the ineffectiveness of s 69(3) as an alternative as the applicants are still in the dark with regards to where all the movable assets are, to which extend they are safe and secure, and to which extend the insolvent estates will not be prejudiced. Neither the liquidators nor provisional trustees have an idea of the true extent, nature, and location of the assets in both insolvent estates. It would be highly impractical and superfluous to follow the steps in s 69(3) of the Insolvency Act. Section 69(3) therefore does not present an adequate alternative remedy.

[34] In both applications the applicants have therefore made out a case for an interim interdict.

END-FOR NOW