

ENGEN PETROLEUM LTD v MULTI WASTE (PTY) LTD AND OTHERS 2012 (5) SA 596 (GSJ)

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Citation	2012 (5) SA 596 (GSJ)
Case No	33410/11
Court	South Gauteng High Court, Johannesburg
Judge	Boruchowitz J
Heard	September 23, 2011
Judgment	October 25, 2011
Counsel	<i>C van der Spuy</i> for the applicant. <i>JP Coetzee SC</i> for the respondents.

Annotations [Link to Case Annotations](#)

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Flynote : Sleutelwoorde

Company — Business rescue — Application — Requirements — Application must be on long form notice of motion — Companies Act 71 of 2008, s 131(1).

Company — Business rescue — Application — Notification of — Applicant must satisfy court that all reasonable steps taken to identify affected persons and their addresses, and to deliver application to them — If delivery is by email or fax, evidence is required of compliance with requirements for cover message or page — Companies Act 71 of 2008, s 131(2)(b), regs 7(1), 7(4) and 124. G

Headnote : Kopnota

This case concerns the type of application in s 131 of the Companies Act 71 of 2008, as well as the notification requirement of s 131(2).

As to the type of application, it must be on the long form notice of motion (Form 2(a) of the First Schedule to the Uniform Rules of Court). (Paragraphs H [14] and [17] at 599G – H and 600B – C.) As to the notification requirement of s 131(2), that section provides that —

'(2) An applicant in terms of subsection (1) must —

. . .

(b) notify each affected person of the application in the prescribed manner.'

And reg 124 of the Companies Regulations, 2011, provides that:

'An applicant in court proceedings who is required, in terms of . . . section . . . 131(2)(b), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant.'

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An applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them in accordance with reg 7. Where compliance proves impossible, an applicant may apply to the high court for an order of substituted service (reg 7(3)). At the least, it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered. Where electronic means — such as a fax machine — is used to give notice, evidence is required of the information

stipulated in reg 7(4). (Paragraph [24] at 602A – C.)

Cases Considered

Annotations:

Case law c

Brack v Front Runner Racks 2000 (Pty) Ltd (GSJ case No 45084/2010): referred to

Breetveldt and Others v Van Zyl and Others[1972 \(1\) SA 304 \(T\)](#): referred to

Ferela (Pty) Ltd v Craigie and Others[1980 \(3\) SA 167 \(W\)](#): referred to

Fullard v Fullard[1979 \(1\) SA 368 \(T\)](#): applied d

Ghomeshi-Bozorg v Yousefi[1998 \(1\) SA 692 \(W\)](#): referred to

Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)[2008 \(4\) SA 145 \(W\)](#): referred to

Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen[1978 \(1\) SA 779 \(T\)](#): referred to. e

Statutes Considered

Statutes

The Companies Act 71 of 2008, ss 131(1) and 131(2)(b), and regs 7(1), 7(4) and 124: see *Juta's Statutes of South Africa 2011/12* vol 2 at 1-346.

Case Information

An urgent application to oppose the grant of an order commencing business rescue proceedings. f
C van der Spuy for the applicant.

JP Coetzee SC for the respondents.

Cur adv vult. g

Postea (October 25).

Judgment

Boruchowitz J:

[1] This is an urgent application brought by an intervening creditor, h *Engen Petroleum Ltd* (*Engen*), to oppose the grant of an order for the placement of two companies under supervision and to commence business rescue proceedings in terms of s 131(1) of the Companies Act 71 of 2008 (the Act).

[2] The relevant facts are largely common cause and can be briefly i stated. The two companies concerned in the rescue proceedings are *Multi Waste (Pty) Ltd* (*Multi Waste*) and *Multi Fleet Logistics (Pty) Ltd* (*Multi Fleet*). The core business of *Multi Waste* is the purchasing of fuel which it supplies to *Multi Fleet* in order to enable it to conduct a cargo- haulage business. The companies are substantially indebted to *Engen* in respect of fuel purchases, their joint indebtedness amounting to approximately R8 million. j

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A [3] To secure its considerable financial exposure, *Engen* procured a cession of the book debts of both companies and a deed of suretyship from *Multi Fleet* in respect of the obligations of *Multi Waste*. In June 2011 the companies executed a written acknowledgment of debt in favour of *Engen* in which they jointly undertook to discharge their outstanding indebtedness by means of instalments, but that undertaking b was breached.

[4] *Engen* proceeded to enforce the cession of book debts and terminated *Multi Fleet's* mandate to

receive any funds from its debtors. An agreement was concluded on 24 June 2011 whereunder Multi Fleet was c mandated to institute legal action on behalf of Engen against certain of its debtors, and undertook to furnish Engen with the contact details of its debtors. It also undertook to inform its debtors that payment was to be made to Engen's attorneys.

[5] Because Engen encountered difficulties in collecting the outstanding-debtors D book, a meeting was held on 15 July 2011, at which Multi Fleet again undertook to provide Engen with details of its current debtors and creditors, and a plan to overcome its cash-flow problems.

[6] On 25 July 2011 it was brought to Engen's attention that a resolution envisaged in s 129 of the Act to voluntarily begin business rescue E proceedings had been passed by the board of directors of each of Multi Waste and Multi Fleet on 21 July 2011. Engen was not forewarned that such resolutions would be taken, and which was in marked contrast to what had been discussed at the meeting on 15 July 2011.

[7] Engen then launched an urgent application to set aside the resolutions on the ground that they had lapsed for want of compliance with F certain procedural requirements laid down in the Act. On 16 August 2011 this court set aside the resolutions by consent, and a written agreement was entered into in terms of which the companies again undertook to provide Engen with all documents and information that were necessary to enforce the cession. Pursuant to that agreement, Engen's attorney took possession of certain documents, which included G the bank statements of Multi Fleet.

[8] The application to commence business rescue proceedings in terms of s 131(1) of the Act was instituted on an ex parte basis on 2 September 2011 by various employees and the sole shareholder and director of the H companies, Mr PJL Moller, in their capacities as affected persons in terms of s 128(1)(a) of the Act.

[9] The present application is said to be urgent for the following reasons: Multi Fleet and Multi Waste are profoundly insolvent and fall to be liquidated rather than placed under supervision. A company, Multi I Crow Logistics (Pty) Ltd (Multi Crow), has effectively taken over the business of Multi Fleet and is in the process of disposing of its assets, including vehicles and collectable debts. Bank statements in Engen's possession indicate that Multi Fleet is in the process of transferring vast sums from its bank account to the accounts of related companies. A creditor, Alondra Trading CC, has also instituted winding-up proceedings J against Multi Fleet.

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[10] Engen also states that it was not given proper notice of the business A rescue application and that it only learnt of the existence thereof when its attorney received an incomplete email copy on 6 September 2011. It also complains that there has not been disclosure, as required in ex parte applications, of Engen's position as a partially secured and affected party, the involvement of Multi Crow and the pending application for liquidation brought by Alondra Trading CC. B

[11] The business rescue application is bristling with procedural irregularities. The most glaring of the irregularities pertains to the use of the short form notice of motion (Form 2 of the First Schedule to the Uniform Rules) and the failure to comply with the service and notice requirements laid down in the Act. c

[12] Section 131 of the Act provides, so far as is relevant, as follows:

'(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business D rescue proceedings.

(2) An applicant in terms of subsection (1) must —

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner. E

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.'

[13] An ex parte application, or an application using the short form notice of motion (Form 2), is

used either because it is not necessary to give notice to the respondent, or the relief claimed is not final in nature ^F (see *Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen* 1978 (1) SA 779 (T) at 783A; *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696D). Rule 6(5)(a) provides that every application other than one brought ex parte shall be brought in accordance with Form 2(a) of the First Schedule to the Uniform Rules. ^G

[14] The following are, in my view, textual indications in the Act that an application under s 131(1) must be brought using the long form notice of motion (Form 2(a)).

[15] Section 131(2) provides that an applicant, in terms of ss (1), must ^H serve a copy of the application on the company and the Commission, and notify each affected person of the application in the prescribed manner. Both the company and the Commission (the Companies and Intellectual Property Commission) have a direct and substantial interest in any order that the court might make and are required to be joined as ^I parties to the business rescue application. The Commission is one of the regulatory agencies established under Ch 8 of the Act. Each affected person has a right to participate in the hearing of an application in terms of s 131(1) (see ss 131(4) and 144 – 146), a right that can only properly be exercised if affected persons are given notice of the application in the manner prescribed in the Act and regulations. ^J

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A [16] The legislature appears to have been cognisant of the distinction between an ex parte application and an application brought using the long form notice of motion. Although in a different context, specific reference is made in s 129(5)(b) to the use of an ex parte application. It is safe to assume that, had an ex parte application been intended in respect of applications brought under s 131(1), the legislature would ^B have said so.

[17] Adopting a purposive approach to the sections mentioned, I am satisfied that the word 'apply', as it appears in s 131(1), contemplates an application brought utilising Form 2(a), and the use by the applicants of ^C the ex parte form (Form 2) constitutes an irregularity.

[18] Section 131(2)(a) requires that an applicant serve a copy of the application on the company and the Commission. Rule 4(1)(a) provides that service of any document initiating application proceedings shall be effected by the sheriff in one or more of the manners therein stipulated. ^D An application to place a company under supervision in terms of s 131(1) is clearly a document that initiates proceedings and is thus required to be served by the sheriff. The companies have purported to waive the requirements of service and notice but the Commission has not. Proof is therefore required that the application was served on the Commission by the sheriff as required in terms of rule 4. A copy of ^E the application appears simply to have been left at the office of the Commission but not served by the sheriff as required under the rules. This also constitutes an irregularity.

[19] Section 131(2)(b) provides that an applicant must 'notify' each affected person of the application 'in the prescribed manner'. The Act ^F and Companies Regulations, 2011, published under GN R351 in GG 34239 of 26 April 2011, specifically provide how notification is to be given to affected persons.

[20] Regulation 124 reads:

'124 Notices to be issued by affected persons concerning court ^G proceedings

An applicant in court proceedings who is required, in terms of either section 130(3)(b) or 131(2)(b), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant.'

^H [21] Regulation 7 provides as follows:

7 Delivery of documents

(1) A notice or document to be delivered for any purpose contemplated in the Act or these Regulations may be delivered in any manner —

^I (a) contemplated in section 6(10) or (11); or

(b) set out in Table CR 3.

(2) A document delivered by a method listed in the second column of Table CR 3 must be regarded as having been delivered to the intended recipient —

(a) on the date and at the time shown opposite that method, in the third column of that table; or

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(b) if the date and time for the delivery of a document referred to in A Table CR 3 to a regulatory agency is outside of the office hours of that regulatory agency, as set out in regulation 165(2), that document will be deemed to have been delivered on the next business day, subject to regulation 165(3).

(3) If, in a particular matter, it proves impossible to deliver a B document in any manner provided for in the Act or these Regulations —

(a) if any person other than the Tribunal is required to deliver the document, the person may apply to either the Tribunal or the High Court for an order of substituted service; or

(b) if the Tribunal is required to deliver the document, the recording officer of the Tribunal concerned may apply to the High Court for an order of substituted service. C

(4) A document that is delivered by fax must include a cover page, and a document that is transmitted by electronic mail must be accompanied by a cover message, in either case setting out —

(a) the name, address, and telephone number of the sender;

(b) either —

(i) the name of the person to whom it is addressed, and the name D of that person's attorney, if applicable; or,

(ii) the name or description of the class of intended recipients, if the document is being delivered generally to all the members of a particular class of persons;

(c) the date of the transmission; and

(d) in the case of a fax transmission — E

(i) the total number of pages sent, including the cover page; and

(ii) the name and telephone number of the person to contact if the transmission is incomplete or otherwise unsuccessful.'

[22] Subsections 6(10) and (11) of the Act stipulate:

'(10) If, in terms of this Act, a notice is required or permitted to be F given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.

(11) If, in terms of this Act, a document, record or statement, other than a notice contemplated in subsection (10), is required — G

(a) to be retained, it is sufficient if an electronic original or reproduction of that document is retained as provided for in section 15 of the Electronic Communications and Transactions Act; or

(b) to be published, provided or delivered, it is sufficient if —

(i) an electronic original or reproduction of that document, record or statement is published, provided or delivered by H electronic communication in a manner and form such that the document, record or statement can conveniently be printed by the recipient within a reasonable time and at a reasonable cost; or

(ii) a notice of the availability of that document, record or I statement, summarising its content and satisfying any prescribed requirements, is delivered to each intended recipient of the document, record or statement, together with instructions for receiving the complete document, record or statement.'

[23] Table CR3 details the various methods of notification and the dates and times of deemed delivery. J

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A [24] An applicant must satisfy the court that all reasonable steps have been taken to notify all

affected persons known to the applicant, by delivering a copy of the court application to them in accordance with reg 7. Where compliance proves impossible, an applicant may apply to the high court for an order of substituted service (see reg 7(3)). At the very least, it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered. Where electronic means, such as a fax machine, is used to give notice, evidence is required of the information stipulated in reg 7(4).

[25] The seventh applicant is the sole shareholder and director of Multi Waste and Multi Fleet. In that capacity he would have had control of and access to the companies' records and was in a position to properly identify the affected persons entitled to notification of the application. He should have provided the court with the information contemplated in reg 7 (including ss 6(10) and (11) of the Act, and Table CR3).

[26] On a proper conspectus of the papers, it cannot be said that there has been compliance, or even substantial compliance, with the notification requirements laid down in the Act and Regulations.

[27] Given the nature and extent of the irregularities involved, the business rescue application falls to be dismissed. On 13 September 2011 the application was postponed sine die. To permit a thoroughly irregular application to remain pending before the court on an indefinite basis is confusing and potentially prejudicial to creditors, affected persons, or persons who in the future choose to deal with the companies. This, in itself, creates an element of urgency.

[28] There are other considerations that render the matter urgent. There is evidence that Multi Fleet, which is profoundly insolvent, is disposing of or transferring its assets to other entities, and moneys received from its book debtors is being paid to entities other than Engen. It is, in my view, essential that a winding-up order be granted so as to enable a liquidator to take control of the affairs of both Multi Fleet and Multi Waste.

[29] There is yet a further reason why the business rescue application cannot succeed. It is settled practice in this division that the liquidation of more than one company cannot be sought in a single application unless there is a complete identity of interests (see *Breetveldt and Others v Van Zyl and Others*[1972 \(1\) SA 304 \(T\)](#)); nor is it advisable that two or more individuals should be joined in an application for their sequestration (*Ferela (Pty) Ltd v Craigie and Others*[1980 \(3\) SA 167 \(W\)](#)); see, also, the unreported judgment of *Brack v Front Runner Racks 2000 (Pty) Ltd* (GSJ case No 45084/2010)). Each of the companies involved in the present application has its own separate share capital, creditors and presumably different affected persons. It would be prejudicial to persons who are only interested in one of the companies to be engaged in business rescue proceedings in respect of the other.

[30] Engen, as an affected person, has a right to participate in the hearing of an application in terms of s 131(1) of the Act. It would not require

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leave of the court to intervene. Such leave may, however, be necessary as a procedural requirement. See, in this regard, *Fullard v Fullard*[1979 \(1\) SA 368 \(T\)](#); and *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)*[2008 \(4\) SA 145 \(W\)](#).

[31] For these reasons I would allow the intervention and dismiss the business rescue application.

[32] The following order is granted:

- (a) The application for leave to intervene is granted.
- (b) The application brought under case No 33410/2011 to place Multi Waste (Pty) Ltd and Multi Fleet Logistics (Pty) Ltd under supervision and to commence business rescue proceedings in terms of s 131(1) of the Act is dismissed with costs.
- (c) No order is granted in respect of prayer 5 of the application to intervene.

Applicant's Attorneys: *Lanham-Love*, Illovo.

Respondents' Attorneys: *Locketts*, Nigel. D
