IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 8256/2016

In the matter between:

MARK ROY LIFMAN	**Applicant**
and	
THE BUSINESS ZONE 983 CC **Registration Number: 2005/0077685/23** ***(In provisional liquidation)***	**First Respondent**
COMPANIES & INTELLECTUAL PROPERTY COMMISSION	**Second Respondent**
MASTER OF THE HIGH COURT, CAPE TOWN	**Third Respondent**
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**Affected person/Fourth Respondent**

JUDGMENT: 14 NOVEMBER 2016

E STEYN, J

1. Applicant launched an application in terms of s 131(1) of the Companies Act, 71 of 2008, ('the Act') to place the first respondent, known as 'The Business Zone', under supervision to commence business rescue proceedings and for an interim business rescue practitioner to be appointed.

2. The respondents did not oppose the application. The South African Revenue Service, 'SARS', a creditor of first respondent, requested leave to be allowed to intervene in its capacity as an affected person as defined in s 128(1)(a) of the Act. It opposed the relief sought and asked that the application be dismissed, that first respondent be placed in final liquidation and that costs be granted on an attorney and own client scale. According to SARS the outstanding tax liability of The Business Zone, as calculated in April 2016 and as set out in detail by SARS, including interest and penalties, is an amount in excess of R 6.2 million.

3. I was advised that applicant challenges the legality of the opposition of SARS in this matter in view of an argument that the relevant delegation of power by the Commissioner of SARS to an employee to oppose the matter is invalid and that there will be argument on the issue whether it is just and equitable for financial reasons for the court to exercise its discretion in favour of the applicant and place the first respondent under supervision in order that business rescue proceedings commence.

4. The first respondent, a close corporation, has been referred to, ostensibly euphemistically, as a '*gentleman's club*' operating as the Embassy Club in the business centre of Cape Town. The provisions of the Companies Act relating to business rescue proceedings and the winding-up of a company, apply *mutatis mutandis* to a close corporation. The applicant, the sole member of the first respondent, is for purposes of the launching of the application, an 'affected person' as defined in s 128(1)(a) read with s 131(1) of the Act.

5. Section 131 of the Act deals with the circumstances when an affected person may apply to court for an order placing the company under supervision to commence

business rescue proceedings. An affected person has a right to participate in the hearing of an application in terms of this section. The court may, under certain circumstances, order that the company is placed under supervision and commence business rescue proceedings. The court may also dismiss the application and place the company under liquidation. (Section 131 (4) (b) of the Act)

6. Section 129(1) of the Act provides that the board of a company may resolve that the company voluntarily commence business rescue proceedings and place the company under supervision if the board believes that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company. This method of placing the first respondent under business rescue supervision has been exhausted by the applicant in respect of first respondent, as will be demonstrated below.

7. In the September 2015 certain close corporations, including The Business Zone, all represented by applicant, in his capacity as sole member of the first respondent and the other entities, adopted resolutions to voluntarily commence business rescue proceedings. SARS a creditor of the relevant close corporations, launched proceedings in terms of s 130(1)(a) read with s 130(5)(c)(i) of the Act seeking orders setting aside the resolutions and ordering the winding-up of the close corporations, including The Business Zone, the latter under Case no 9673/2015.

8. The Business Zone was placed under provisional liquidation on 7 September 2015 by van Rooyen AJ. The extended return date of the provisional order for the liquidation of first respondent was set down for 18 May 2016. The present application before me was launched on 16 May 2016 and was only set down for hearing on 29 July 2016, on which date the court ordered, by agreement between

the parties, that the application was postponed to 19 September 2016 for hearing on the semi-urgent roll. The applicant was ordered to file its replying affidavit no later than 22 August 2016 and to file its heads of argument no later than 5 September 2016. The replying affidavit was filed a day late and the applicant's heads of argument, dated 5 September 2016, were not filed with the court at all, until such time as the omission was raised, where after the heads were delivered to my Chambers on 13 September 2016. No application for condonation for the late filing of the replying affidavit and heads of argument and accordingly non-compliance with court rules and practice notes was brought. On the day when the matter was argued the advocate for applicant informed the court that she would only address the court on limited aspects related to a point *in limine.*

9. The provisional liquidation order is now suspended by virtue of the institution of the present proceedings brought in terms of s 131(6) of the Act by applicant as an affected person.

10. Section 131(4) of the Act describes the jurisdictional requirements for consideration by the court prior to placing a company under supervision and commencing business rescue proceedings. *Inter alia* the court must be satisfied that it is just and equitable to act as aforesaid for financial reasons and that there is a reasonable prospect of rescuing the company. Under s 131 (5) the court that orders business rescue proceedings may order the appointment of an interim business rescue practitioner.

11. The history and background, questions of law and issues of fact, relating to the financial status of the Business Zone were dealt with in detail by van Rooyen AJ in his judgment of 7 September 2015. He pointed out that SARS obtained civil

judgments against The Business Zone. After warrants of execution against movable property were authorised and executed and after items were attached, the applicant launched urgent applications to set aside the judgments obtained by SARS to prevent them from taking further steps. The applications were dismissed. An application for leave to appeal was later abandoned. Further litigation by applicant, ostensibly with the aim to prevent SARS from taking execution steps, was also unsuccessful. It is abundantly clear from a perusal of the history of the conduct of the applicant in this matter that repeated litigation is aimed at frustrating SARS' attempts to resume the execution process initiated in April 2015 and to prevent any collection by SARS of tax payments which are undisputedly due and payable by The Business Zone.

12. SARS is opposing the present application before me as it contends that the application is an abuse of the process of this court. The factual and legal issues raised in this application are similar to the aspects raised and considered in the setting aside judgment of van Rooyen AJ in September 2015. The business rescue plan, which applicant is currently relying on, is the same as the plan relied upon by applicant in the previous s 129 of the Act applications heard by van Rooyen AJ. The court then considered the business rescue plan in detail and found that there was no reasonable prospect of rescuing The Business Zone and that the business plan in respect of the first respondent was inadequate.

13. Applicant does not at present contend that there have been any changed circumstances or '*gratuitous fortunes*' as SARS referred to it, that may have befallen The Business Zone, which could serve as a basis for this court to come to a different conclusion to that of van Rooyen AJ in the setting aside judgment. He noted that the business rescue resolutions were passed only when SARS obtained

judgments and took execution steps and after the financial distress caused by the SARS claims. The close corporations in question, more specifically The Business Zone, then continued to fail to comply with their tax obligations.

14. Van Rooyen AJ also pointed out that business rescue proceedings are not designed for hopelessly insolvent entities and that he was of the view that in the matters before him business rescue proceedings were abused. Accordingly he found, as noted above, that the resolutions passed to commence business rescue proceedings were set aside and the estate of *inter alia* first respondent was placed under provisional liquidation.

15. The applicant now seeks an order to place the first respondent under business rescue supervision again, relying on the same business rescue plan that was prepared and found inadequate in the previous application relating to The Business Zone. SARS maintains, convincingly, that the application is *res judicata*, was launched in flagrant disregard of the history of the matter and constitutes an abuse of process, in that it was designed to thwart the attempts by SARS to collect payments from first respondent, due to it. SARS argued that The Business Zone is not financially distressed as contemplated by s 131(4)(a)(i) of the Act because The Business Zone is factually insolvent and there are no reasonable prospects of rescuing the first respondent as contemplated by s 131(4)(a) of the Act. It was specifically argued, as contemplated by s 131(4)(a)(iii) of the Act, that it is not otherwise just and equitable, for financial reasons, that first respondent be placed in business rescue.

16. I take note and it appears to be correct, as argued on behalf of SARS, that the applicant is bent on a mission to prevent SARS from executing civil judgments

obtained against the first respondent and related entities in which applicant has an interest. Applicant adopted the said s 129 of the Act resolutions to place the first respondent under business rescue supervision, based on spurious grounds. When the application was not successful, even after an unsuccessful application for leave to appeal, applicant filed the present application, suspending the provisional order of this court, while making no payment of any portion of the tax liability of the first respondent.

17. I agree in the circumstances of the matter, as set out on behalf of SARS in the documentation filed, that there are no reasonable prospects of rescuing the Business Zone and that it is not otherwise just and equitable for financial reasons that The Business Zone be placed in business rescue as contemplated by s 131(4)(a)(iii) of the Act.

18. The only aspect that remains for consideration and the only aspect argued on behalf of the applicant at the hearing of this matter, is the validity of the authority of the deponent to SARS' opposing affidavit and the *locus standi* of SARS to participate in the application as 'an affected person'.

19. The dispute relating to the authority of Mr Keith Hendrickse, ('Hendrickse') the deponent to SARS' opposing affidavit, was only raised in the applicant's replying affidavit, a notice filed in terms of Rule 7 by applicant in August 2016 and in its heads of argument. Applicant is now alleging that Hendrickse is no longer authorised to act on behalf of SARS, indicative of the fact that it is not alleged that Hendrickse lacked authority at the time of the delegation.

20. It is trite that for the purpose of s 11(2) of the Tax Administration Act, 28 of 2011, there is a presumption that Hendrickse is duly authorised to act unless the

contrary is proved. Applicant has not provided any proof that Hendrickse was not duly authorised in that the authority granted to him by the Acting Commissioner has terminated. The presumption is accordingly not displaced.

21. Applicant's new argument that the delegation of authority by the Acting Commissioner is 'potentially invalid', void *ab initio* and unlawful is rejected. I agree with the argument on behalf of SARS that it is impermissible for applicant to rely on a new ground of argument that never formed part of the pleadings in the matter before court. I also agree that it is transparently obvious that this proposed argument is another disingenuous attempt by applicant at being obstructive, by raising manufactured arguments not raised in the founding or replying affidavits and without requesting leave to file further affidavits dealing with this aspect in order to allow SARS to deal therewith. I agree that the challenge to the authority of Hendrickse is without merit and it is rejected.

22. Whether or not SARS is an 'affected person' as claimed and previously accepted by applicant is similarly an aspect where applicant is contriving to raise an argument on spurious grounds in circumstances where no attempts were made in the applicant's founding papers to indicate the basis of its contentions, namely whether The Business Zone owns The Embassy. Applicant again impermissibly seeks to make out a case for the first time in reply, by raising aspects known to applicant when he was deposing to the founding affidavit. Without going into more detail, I agree with the argument set out and argued in detail on behalf of SARS that the 'consequences of the position taken by applicant' on these aspects are dispositive of the application and show the abuse of the court's process by applicant in these proceedings, aimed in my view only to delay the finalisation of the liquidation of the first respondent.

23. It was shown to the court that the Business Zone has exhibited a disregard for its tax obligations over many years; that The Business Zone has repeatedly failed to comply with agreements related to its obligations; that The Business Zone has failed to pay undisputed taxes due; that The Business Zone contrived postponements to delay SARS' execution process; that The Business Zone instituted meritless litigation, without complying with court rules and procedures and then withdrew applications shortly before the date of hearing, preventing the realisation of its assets by SARS to settle its debts.

24. In addition the Business Zone unsuccessfully opposed SARS' application to set aside the business rescue process, initiated by resolution in terms of s 129 of the Act on the same facts and grounds as in this application; The Business Zone unsuccessfully prosecuted an application for leave to appeal against the judgment in favour of SARS in the aforesaid setting aside application and then launched the present application supported by the very same business rescue plan in respect of which this court has already concluded that it is inadequate and that there is no reasonable prospect of rescuing The Business Zone.

25. Van Rooyen AJ, in the setting aside judgment said in para [90], p 33 of the judgment:

> *'... I am of the view that, in these matters, the business rescue process has been abused and it does not entail "a genuine attempt to achieve the aims of the statutory remedy". Those aims are described in s7(k) of the Companies Act as "the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders". It is evident that the sole aim of the resolutions was to frustrate the continuation of the execution steps that commenced, at the instance of SARS, a few days before the resolutions were passed'.*

26. The courts have repeatedly warned that business rescue proceedings, which are in their nature susceptible to abuse, should not be abused and that business rescue applications launched in order to thwart the liquidation of a company, will be dismissed for that reason alone.

27. I was referred to *Sulzer Pumps (South Africa) (Pty) Ltd v O & M Engineering CC*,[1] where Potterill J said, in relation to the abuse of court process in business rescue applications, before finding that the business rescue application before it was launched with the sole purpose to thwart the application to liquidate it:

> *'The introduction of a business rescue in chapter 6 of the Act places a duty on a court to balance the sanctity of entities with the interests of creditors... A court thus has a duty to judicially favour business rescue to liquidation... This being said, no court can allow business rescue proceedings to be utilised as an abuse of the court process. The court also has a duty to ensure that the entry into business rescue was not feigned.'*

28. In *Richter v Absa Bank Limited*[2], the SCA held that a court can dismiss any application for business rescue that is not genuine and *bona fide* or which does not establish that the benefits of a successful rescue will be achieved

29. Applicant persists with the present application for business rescue on the same foundational basis, being the business rescue plan, which formed the subject matter of the setting aside application and in respect of which applicant has the benefits of this court's finding that there is no reasonable prospect of rescuing The Business Zone, based on the business rescue plan presented. There is no indication or basis why the court should now come to a conclusion different to that in the setting aside judgment of van Rooyen AJ.

30. I agree with SARS that the present application was brought with an ulterior purpose, namely to avoid and/or delay the payment by The Business Zone of its tax liabilities by obtaining the benefits of a moratorium on legal proceedings unduly and

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[1] 2015 JDR 0223 (GP) at para [28]
[2] 2015 (5) SA 57 (SCA) para [16]

that accordingly this application constitutes an abuse of the process of this Court.

31. Insufficient facts were placed before this court to support an allegation that there is a reasonable prospect of rescuing The Business Zone or that any of the objectives mentioned in s 128(1)(b) of the Act can be achieved. The proposed business plan is out-dated, has been found to be inadequate and no restructuring of the business of first respondent is contemplated. The business plan is doomed to failure. I find that there is no reasonable prospect of rescuing the first respondent, The Business Zone, as contemplated in s 130(4) of the Act and that it is not otherwise just and equitable to place the first respondent under supervision and commence business rescue proceedings.

32. In its answering affidavit SARS gave notice that it would seek a punitive costs order against the applicant. I am in agreement with the argument on behalf of SARS that the history of the matter, as set out in the documentation before me, is indicative of an attempt by applicant to frustrate the winding-up process of first respondent, in order to avoid or delay the payment of taxes due. In view of the abuse of court process and the blameworthy and vexatious conduct of the applicant in the launching of this application, traversing the same issues on the same spurious grounds that have already been found to be inadequate, as described above, and on the basis of justice and fairness, I believe such a punitive costs order is warranted.

An order is issued as set out in the ORDER annexed marked 'X'.

E STEYN

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

'X'

CAPE TOWN: Monday, 14 November 2016
BEFORE: The Honourable Ms Justice Steyn

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MARK ROY LIFMAN	**Applicant**
and	
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THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**Affected person/Fourth Respondent**

ORDER

Having heard counsel for the parties and having read the papers filed of record, it is ordered that:

[1] The Commissioner for the South African Revenue Service is granted leave to intervene in the application as a respondent;

[2] The application is dismissed;

[3] The applicant is directed to pay the costs of the application of the Commissioner of the South African Revenue Service on an attorney and client scale, such costs to include the costs attendant on the employment of two counsel;

[4] The Rule Nisi in this matter is made final and the first respondent is placed in final liquidation.

BY ORDER OF THE COURT

COURT REGISTRAR