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Interpretation of 'liquidation proceedings' in terms of section 131(6) of the Companies Act –  
A case analysis of *Richter v ABSA Bank Limited*

by

Angela Rosa E Silva

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SUPERVISOR: Professor Juanita Calitz.

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## 1. Introduction

In this case, the court dealt with the issue of whether an application for business rescue can be made after a final order of liquidation has been handed down.<sup>1</sup> The court dealt with the provisions of section 131 of the Companies Act 71 of 2008 (hereinafter referred to as ‘the Companies Act’), which allows for business rescue by court order. Furthermore the court looked at what constituted ‘liquidation proceedings’ in this context, and as such when such proceedings can be suspended by application for a business rescue application.<sup>2</sup> The court lastly looked at the essence of business rescue proceedings and why, if possible, in certain instances they could be used to suspend liquidation proceedings.<sup>3</sup>

In order to successfully approach the subject matter it will be necessary to outline the process and various relevant aspects relating to business rescue in this instance. A brief look at what is required to bring an application for liquidation will also be investigated and what the effect of a final liquidation order is. After which this case note seeks to investigate the court’s findings, by comparing it to previous judgments, particularly that of the court a quo.<sup>4</sup>

Lastly a brief summation of the issues of bringing an order for business rescue during liquidation proceedings that have yet to be resolved.

## 2. Applicable Law

### 2.1. The Law of Insolvency

#### 2.1.1. Liquidation: A patchwork of legislation and common law.

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<sup>1</sup> *Richter v Absa Bank Limited* (20181/2014)\_ [2015] ZASCA 100 (1 June 2015) 1.

<sup>2</sup> *Richter v Absa Bank Limited* (n1) 9 – 12.

<sup>3</sup> *Richter v Absa Bank Limited* (n1) 13 and 15.

<sup>4</sup> *Richter v Bloempro CC and Others* (69531/2012) [2014] ZAGPPHC 120; 2014 (6) SA 38 (GP) (14 March 2014).

The application of insolvency law to companies has been made fairly complicated by the introduction of the Companies Act; firstly because the Companies Act only makes provision for the winding-up of ‘solvent’ companies,<sup>5</sup> and a proviso that Chapter XIV of the Companies Act 61 of 1973 (hereinafter referred to as the “1973 Act”) applies to ‘insolvent’ companies.<sup>6</sup> Secondly, section 339 of the 1973 Act states “*In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by this Act.*”

### 2.1.2. Instituting liquidation proceedings

A distinction is made between companies which are solvent, and those which are insolvent, which is decided by the commercial solvency of the company.<sup>7</sup> In instances where a company is solvent, it is to be wound up using the Companies Act,<sup>8</sup> and an insolvent company is to be wound up using the 1973 Act.<sup>9</sup> The winding-up of a solvent company is regulated by Part G of the Companies Act, which makes provision for winding-up to be taken voluntarily or by court order. A company is considered to be solvent if it is commercially solvent, which means that the company must be able to pay its debts as they become due and payable.<sup>10</sup> A company may be wound up voluntarily through means of a special resolution taken by the company.<sup>11</sup> This type of winding-up procedure is said to begin when such a resolution is filed.<sup>12</sup> A liquidator in

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<sup>5</sup> S 79(1).

<sup>6</sup> Schedule 5, Item 9.

<sup>7</sup> This concept is explained in more detail below. It should be noted however that factual insolvency is still to be used as an indicator or factor to be taken into account when decided whether or not a company can pay its debts. *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* (936/12[2013] ZASCA 173 (28 November 2013) 23.

<sup>8</sup> S 79.

<sup>9</sup> Schedule 5, Item 9.

<sup>10</sup> *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* (n8) 22. This test is not to be confused by the solvency and liquidity test as per S 4(1), Locke *The meaning of ‘solvent’ for purposes of liquidation in terms of the Companies Act 71 of 2008: Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* (2015) SMLJ 27.

<sup>11</sup> S 80(1).

<sup>12</sup> S 80(6) read with (2).

this instance is said to have the same powers as in the case of an insolvent company; subject to directions given by the parties initiating the winding-up, be they shareholders or creditors.<sup>13</sup> This procedure also limits the continuation of business operations and the directors are divested of their powers subject to the discretion of the party(s) who brought the special resolution (as above it may be the shareholders or the creditors.)<sup>14</sup> Therefore the winding-up may be carried out by the company itself or at the behest of the creditors.<sup>15</sup>

Additionally a solvent company may be wound up by order of court in the following instances, whereby it is just and equitable to do so.<sup>16</sup> The conversion of a voluntary winding-up into that of a court ordered one.<sup>17</sup> In terms of business rescue whereby there is no prospect of the rescue's success<sup>18</sup> or in terms of its termination of same.<sup>19</sup> If the company has reached an impasse in terms of which its management or shareholders have reached a deadlock.<sup>20</sup> In the case of fraud, illegality or misappropriation of company assets shareholders are entitled to apply for winding-up.<sup>21</sup> Finally the court will issue a winding-up order for a company which does not meet the necessary compliance notices.<sup>22</sup> The court mandated winding-up of a solvent company is said to begin once the court has made an order for its winding-up.<sup>23</sup>

The determination of insolvency is based on an investigation into the commercial solvency of a company; if a company cannot pay its debts as they become due and payable it is broadly

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<sup>13</sup> S 80(5).

<sup>14</sup> S 80(8).

<sup>15</sup> Cassim et al *Contemporary Company Law* (2<sup>nd</sup> ed) 915.

<sup>16</sup> S 81(c) and (d).

<sup>17</sup> S 81(1)(a).

<sup>18</sup> S 81(b).

<sup>19</sup> The court will only wind-up the company upon termination of business rescue, whereby a notice of termination has been filed in terms of S 132(2)(b) and it is just and equitable to do so, as per S 81(1)(c).

<sup>20</sup> S 81(1)(d)(i)-(ii).

<sup>21</sup> S 81(1)(e).

<sup>22</sup> S 81(1)(f).

<sup>23</sup> S 81(4)(b). This is subject to some exceptions, whereby the mere application denotes the commencement of winding-up, as per S 81(4)(a) read with S 81(a)-(b) as per Sharrock, van der Linde and Smith *Hockly's Insolvency Law* (9<sup>th</sup> ed) 253.

speaking eligible to be liquidated.<sup>24</sup> There are three instances in which a company is deemed to be unable to pay its debts.<sup>25</sup> Firstly, a company is deemed to be unable to pay its debts if a creditor is owed a minimum amount of one hundred rand, such creditor has demanded payment from the company and the amount has not been paid within three weeks.<sup>26</sup> Secondly whereby the sheriff has issued a *nulla bona* return to a warrant of execution.<sup>27</sup> Lastly, if it has been proved to the satisfaction of the court that the company is unable to pay its debts.<sup>28</sup>

An application for the winding-up of an insolvent company can be brought by the company itself, or by one or more of its creditors, or by one or more of its members.<sup>29</sup>

### 2.1.3. Consequences of liquidation

Upon the issuing of a provisional order for liquidation, a provisional liquidator is appointed by the Master.<sup>30</sup> Such a person will be called upon to provide security to the Master to ensure proper performance of her duties until such time as a final liquidator can be appointed.<sup>31</sup> A final liquidator is also appointed by the Master, but in this instance creditors and members of a company are able to nominate a liquidator at the relevant meetings.<sup>32</sup> In general a liquidator has a duty to collect all assets and property of the company and to realise such to meet the obligations of that company, including; the costs of liquidation, to come as close as possible in

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<sup>24</sup> *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* (n8) 21.

<sup>25</sup> S 345 of the 1973 Act.

<sup>26</sup> S 345(1)(a)(i)-(ii) of the 1973 Act.

<sup>27</sup> S 345(1)(b) of the 1973 Act.

<sup>28</sup> S 345(1)(c) of the 1973 Act.

<sup>29</sup> S 346(1)(a)-(c) of the 1973 Act.

<sup>30</sup> S 368 as read with S 367 of the 1973 Act.

<sup>31</sup> S 368 of the 1973 Act

<sup>32</sup> S 369 of the 1973 Act read with Cassim et al *Contemporary Company Law* (2<sup>nd</sup> ed) 921.

meeting creditor's claims and to distribute the free residue of the estate to the remaining persons legally entitled to payment.<sup>33</sup>

When winding-up commences, the directors of the company are divested of their powers.<sup>34</sup> The company does not however lose its corporate identity nor does it lose the title to its assets.<sup>35</sup> The control of the company and its assets is placed with the liquidator(s), who may choose to continue operations as is necessary to complete the winding-up.<sup>36</sup>

One of the effects of liquidation is the establishment of the *concursum creditorum*, which is the coming together of creditors.<sup>37</sup> With the main purpose of insolvency law being the due distribution of assets among creditors in preference; this means that no action can be taken by a single creditor to the prejudice of the others.<sup>38</sup> It is clear then, that the process of liquidation is still largely creditor-driven, seeking to protect their rights and interests.<sup>39</sup>

The commencement of winding-up has the effect of automatically suspending the company's employment contracts.<sup>40</sup> If the liquidator has neither cancelled the contract nor continued it, it automatically lapses within forty five days after the liquidator's appointment.<sup>41</sup> The liquidator therefore has forty five days in which to engage in consultation with employees or their relevant

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<sup>33</sup> Cassim et al (n16) 922.

<sup>34</sup> S 353(2) of the 1973 Companies Act. It should be noted that directors may retain some power in terms of a voluntary winding-up, subject to the approval of the liquidator or members or creditors.

<sup>35</sup> Sharrock et al (n24) 254.

<sup>36</sup> Sharrock et al (n24) 254.

<sup>37</sup> *Walker v Syfret NO\_1911 AD 141 166*

<sup>38</sup> *Walker v Syfret NO\_1911 AD 141 166*, as laid out in Sharrock et al (n24) 4.

<sup>39</sup> *South African Restructuring And Insolvency Practitioners Association v Minister of Justice And Constitutional Development and Others; InRe: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice And Constitutional Development and Others* (4314/2014, 17327/2014) [2015] ZAWCHC 1; [2015] 1 All SA 589 (WCC); 2015 (2) SA 430 (WCC); 2015 (4) BCLR 447 (WCC); [2015] 4 BLLR 329 (WCC) (13 January 2015) 24, the court did acknowledge that this position is changing, as is seen with the amendments made to the Insolvency Act 24 of 1936, which now provides for notice of sequestration to the employees of the insolvent.

<sup>40</sup> S 38(1).

<sup>41</sup> S 38(9)(a).



representatives to discuss and reach consensus on measures to rescue whole or part of the company's business.<sup>42</sup>

In instances where the business is transferred, the new employer is substituted for that of the old employer.<sup>43</sup> The contract remains in force between employees and their employers, with the proviso that anything done before the transfer is done by the old employer.<sup>44</sup>

Commencement of winding-up means that the employee is no longer required to render services and is thus no longer eligible to receive a salary or employment benefits.<sup>45</sup> The employee is however able to claim or recover any losses as a result of the suspension of employment.<sup>46</sup>

A moratorium is placed over all legal proceedings either against or by the company until such time as a final liquidator has been appointed.<sup>47</sup> Once a liquidator has been appointed, legal proceedings may continue if the liquidator is given due notice of such.<sup>48</sup> One of the powers afforded to the liquidator is the ability to either bring or defend legal proceedings on behalf of the company.<sup>49</sup>



## 2.2. Business Rescue

### 2.2.1. Introduction

The commencement of the Companies Act repealed the previous system of judicial management, and replaced it with business rescue. The Companies Act makes it clear, that in

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<sup>42</sup> S 38(5)-(7) Sharrock et al (n24) 91.

<sup>43</sup> Sharrock et al (n24) 92.

<sup>44</sup> Sharrock et al (n24) 92.

<sup>45</sup> S 38(2)(a).

<sup>46</sup> S 38(10)(a) read with Sharrock et al (n24) 91.

<sup>47</sup> S 359(1)(a) of the 1973 Act.

<sup>48</sup> S 359(2) of the 1973 Act.

<sup>49</sup> Cassim et al (n16) 921.

terms of its purpose clause the Act strives to *inter alia* “...provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders;”<sup>50</sup> This is a process envisioned to rehabilitate a company that is undergoing financial difficulty.<sup>51</sup> The procedure since its inception has been stated to be preferred to that of liquidation.<sup>52</sup> For the sake of brevity this section will merely outline the aspects of business rescue which are pertinent to engage fully with Dambuza J’s decision in of *Richter v Absa Bank Limited*.<sup>53</sup> It must be noted that this case dealt with that of a Close Corporation (hereafter referred to as “CCs”). CC’s are generally governed by the Close Corporations Act 69 of 1984. However there are instances whereby these corporate structures are governed by the Companies Act. Schedule 2 of the Companies Act amended the Close Corporations Act<sup>54</sup> to allow for CC’s to be included for purposes of business rescue.<sup>55</sup>

Chapter 6 ‘Business Rescue and Compromise with Creditors’ of the Companies Act, defines business rescue as a rehabilitative process for financially struggling companies, by allowing for the following; the temporary supervision and management of its affairs, a temporary moratorium over legal proceedings against the company and the development and implementation of a business rescue plan which will either return the company to solvency or in the alternative to provide a better return for creditors than immediate liquidation.<sup>56</sup> An important aspect of business rescue is the way in which a company is viewed; as value is placed

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<sup>50</sup> S 7(k) of the Companies Act, 71 of 2008.

<sup>51</sup> Rushworth “A critical analysis of the business rescue regime of the Companies Act 71 of 2008” *Modern Company law for a Competitive South African Economy 2010 Acta Juridica* 370 375.

<sup>52</sup> *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & another intervening)* [2012] JOL 28893 (WCC) 21. *Panamo Properties (Pty) Ltd and Another v Nel and Others* NNO 2015 (5) SA 63 (SCA) 8.

<sup>53</sup> *Richter v Absa Bank Limited* (n1) 1.

<sup>54</sup> 69 of 1984.

<sup>55</sup> S 66(1A) was inserted into the Close Corporations Act 69 of 1984. As per Bradstreet “*The New Business Rescue: Will Creditors Sink or Swim?*” 2011 SALJ 352 360.

<sup>56</sup> S 128(1)(b)(i)-(iii).

rather on the capacity of a company to continue trading as opposed to the company as an entity by itself.<sup>57</sup>

### 2.2.2. Legal consequences of business rescue

The consequences of business rescue are two-fold, firstly it provides for an automatic moratorium and secondly to place the company under the guidance and supervision of a business rescue practitioner.<sup>58</sup> The moratorium extends over all legal action taken or possibly going to be instituted against the company.<sup>59</sup> This is used to fulfil the policy considerations which underpin business rescue, such as providing a financially distressed company the opportunity of remedying its financial ill-health and possibly restoring it back to functionality.<sup>60</sup> The effect of such a moratorium is that the business rescue practitioner has the opportunity to develop and implement a business rescue plan without the constant threat of creditors attempting to enforce their rights by instituting legal proceedings.<sup>61</sup> Importantly, this moratorium does not just suspend execution proceedings, but it includes all litigation, including liquidation proceedings.<sup>62</sup> In addition to which it allows the company to continue trading, whilst under business rescue.<sup>63</sup>

In order to protect the interests of affected persons, a moratorium extends over property interests of the company. Section 134(2) stipulates that property can only be disposed of in the following ways: if it is in the ordinary course of business, or if it is a *bona fide* transaction taken at arm's length and for fair value, or if the disposal forms part of a business rescue plan. Secured

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<sup>57</sup> Bradstreet (n55) 355.

<sup>58</sup> Cassim et al (n16) 877 - 878

<sup>59</sup> S 133 as interpreted by *Commissioner, South African Revenue Service v Beginsetl NO and Others* 2013 (1) SA 307 (WCC) 15.

<sup>60</sup> *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) 26 – 27. Cassim, 879

<sup>61</sup> Rushworth (n51) 383.

<sup>62</sup> S 133(1).

<sup>63</sup> Cassim et al (n16) 879.

creditors are specifically provided for, as if the secured property is sold it requires the relevant creditor's consent or the proceeds from the sale must be sufficient to pay out the creditor's entire claim, promptly.<sup>64</sup>

### 2.2.3. Initiation of business rescue

Business rescue can be initiated in various ways. The board of directors are able to do so voluntarily by a valid board resolution.<sup>65</sup> However this option is excluded in instances whereby liquidation proceedings have already commenced or have been initiated.<sup>66</sup> Additionally, it can be commenced by application to court by, notwithstanding pending liquidation proceedings, an affected person.<sup>67</sup> An affected person has a fairly broad meaning in terms of business rescue, as it refers to a shareholder, creditor of the company, a registered trade union which represents the company's employees, and any other employees.<sup>68</sup> An employee, who is also a creditor of the company, therefore receives protection as both an employee and a creditor.<sup>69</sup>

In order to grant such an application, the court must be satisfied of the following; that the company is financially distressed, and the company has not been able to pay an outstanding obligation or it is just and equitable to do so.<sup>70</sup> In addition to which there must be a reasonable prospect of rescuing the company.<sup>71</sup> If the court is not satisfied that the applicant has proven the need for business rescue, the court is afforded a discretion to dismiss the application and make any other appropriate order, specifically including an order for liquidation.<sup>72</sup> The Act

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<sup>64</sup> S 134(3)(b).

<sup>65</sup> S 129.

<sup>66</sup> S 129(2)(a)

<sup>67</sup> S 131.

<sup>68</sup> S 128(1)(a)(i)-(iii).

<sup>69</sup> Kunst et al., Meskin, *Insolvency Law and its Operation in Winding-up* (LexisNexis, loose-leaf ed issue 44) 18.3.4 (hereinafter referred to as 'Meskin'). This concept is explained more thoroughly below at 2.2.4.

<sup>70</sup> S 131(4)(a)(i)-(iii).

<sup>71</sup> S 131(4)(a).

<sup>72</sup> S 131(4)(b).

states that an application for business rescue can be made when liquidation proceedings have commenced, but no further detail is given as to the exact time when liquidation proceedings ‘commence’<sup>73</sup> In addition to which a court can make a ruling initiating business rescue proceedings during the course of liquidation proceedings.<sup>74</sup>

#### 2.2.4. Affected persons

As stated above in paragraph 2.2.3, affected persons has a wider meaning, than was previously ascribed to it in terms of the 1973 Act.<sup>75</sup> Of significant importance for this case note would be the effect that business rescue has on its employees, shareholders and creditors

According to Meskin, although a definition is not accorded to ‘creditor’, it is thus submitted to bear its ordinary meaning.<sup>76</sup> However the author goes on to state that creditor has a slightly wider meaning, as it includes employees. This requires some clarification, as employees are then accorded with both the status of employee and creditor.<sup>77</sup>

#### 2.2.5. The favourable position of employees in terms of business rescue proceedings

Business rescue seeks to ensure that employees of a financially distressed company are treated equally, as one of the foundational goals of business.<sup>78</sup> Employees of the company, directly before the commencement of business rescue, continue as such on the same terms and conditions that existed before.<sup>79</sup> There are two exceptions to this rule; firstly whereby changes

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<sup>73</sup> S 131(6).

<sup>74</sup> S 131(7).

<sup>75</sup> 61 of 1973.

<sup>76</sup> Meskin (n69) 18.3.4.

<sup>77</sup> This is discussed in more detail below in paragraph 2.2.5.

<sup>78</sup> Cassim 884.

<sup>79</sup> S 136(1)(a).

to the work force can only happen if it is in the ordinary course of contrition,<sup>80</sup> and secondly where the company and employees agree to other terms and conditions.<sup>81</sup> It should be noted however, that during the course of business rescue proceedings, an employee who claims unfair dismissal may not approach the Labour Court, without express permission from the High Court to do so.<sup>82</sup> This concept fits in with the idea of a legal moratorium placed over a company during business rescue.<sup>83</sup>

Where retrenchments are required for the purposes of business rescue, according to section 136(1)(b), is subject to any employment-related legislation, especially section 189 and 189A of the Labour Relations Act.<sup>84</sup>

In terms of any monies owed to employees during business rescue proceedings, such remuneration owed is considered to be post-commencement finance.<sup>85</sup> Post-commencement finance enables a company to continue trading whilst under business rescue, which provides such financiers with a preferent claim once business rescue proceedings have been completed.<sup>86</sup>

In terms of the ranking of post-commencement finance, employees are in a favourable position, as their claims are ranked just below that of the business rescue and administration costs, but just above that of lenders who provide post-commencement finance.<sup>87</sup>

#### 2.2.6. Business rescue practitioner

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<sup>80</sup> S 136(a)(i).

<sup>81</sup> S 136(a)(ii).

<sup>82</sup> *Burba Integom (Propriety) Limited (JS539/12) [2013] Labour Court Johannesburg*, as per Meskin (n69) 18.9.3.

<sup>83</sup> S 133.

<sup>84</sup> of 1995, as per Meskin (n69) 18.9.3.

<sup>85</sup> S 135(1)(b).

<sup>86</sup> S 135(2)(a).

<sup>87</sup> S 135(1)(b).

A suitable business rescue practitioner (hereafter referred to as ‘practitioner’) is essential to the business rescue process, as they are responsible for the manner in which the plan is implemented and to a large extent its success. In order to do so, a business rescue practitioner is given extensive powers and responsibilities.<sup>88</sup> The practitioner’s core function is to take over full management control of the company to be able to devise and implement the business rescue plan.<sup>89</sup> The practitioner takes control of the company in substitution of the board of directors and current management, but retains the power to delegate any functions to a member of management.<sup>90</sup> The directors of a company are directly answerable to the practitioner.<sup>91</sup> The practitioner is accordingly in a position of responsibility; he is seen as an officer of the court which dictates the manner in which he must and dictates that he must report to the court.<sup>92</sup> In addition to which the practitioner, as he fulfils a management function is also measured against the same standard of directors.<sup>93</sup>

A practitioner is appointed in one of two ways; firstly if business rescue is commenced by board resolution she must be appointed within five days of the resolution being filed with Companies and Intellectual Property Commission.<sup>94</sup> If business rescue is instituted through court process, a person bringing the application may nominate an interim business rescue practitioner, which is subsequently subject to ratification at the first meeting of creditors.<sup>95</sup> In instances whereby the creditors are not willing to confirm this appointment, they are able to apply to court to have the appointment set aside and have a new practitioner appointed.<sup>96</sup>

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<sup>88</sup> Cassim et al (n16) 893.

<sup>89</sup> S 140(1)(a) and (d).

<sup>90</sup> S 140(1)(a)-(b).

<sup>91</sup> S 137(2), as per Meskin-Delport *Henogsberg on the Companies Act 71 of 2008* (2015) 491

<sup>92</sup> S 140(3)(a).

<sup>93</sup> S 140(3)(b).

<sup>94</sup> S 129(3), as per Cassim et al (n16) 889.

<sup>95</sup> Cassim et al (n16) 889.

<sup>96</sup> S 130(6), as per Cassim et al (n16) 889.

### 2.2.7. Termination of business rescue proceedings

Business rescue proceedings can be terminated by the court, whereby the order or resolution commencing proceedings is set aside, or the court converts business rescue proceedings into liquidation proceedings.<sup>97</sup>

### 3. Facts

In 2012 *Richter v Bloempro CC and Others*,<sup>98</sup> dealt with the impending liquidation of Bloempro being headquartered in the Free State.<sup>99</sup> On the 17<sup>th</sup> of September 2012, ABSA Bank Limited (hereinafter referred to as 'ABSA') brought a successful application to have Bloempro CC liquidated, as the close corporation was unable to pay its debts.<sup>100</sup> Mr Richter, in his capacity as a member of Bloempro CC, attempted at this early stage but failed to counter the liquidation by lodging an application for business rescue.<sup>101</sup> Furthermore, the Court in this instance, on the 8<sup>th</sup> of April 2013, refused leave to appeal the final liquidation order.<sup>102</sup> After the final liquidation order was granted and before the leave to appeal was refused, Bloempro CC's main offices were moved to Gauteng.<sup>103</sup>

On the 12<sup>th</sup> of February, Mr Richter, as general manager of Bloempro, brought an application for business rescue in terms of section 131 of the Companies Act, in the Gauteng Division, Pretoria.<sup>104</sup> Bloempro, as the owner of commercial immovable property, leases such property

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<sup>97</sup> S 132(a)(i)-(ii).

<sup>98</sup> *Richter v Bloempro* (n4).

<sup>99</sup> *Richter v Bloempro* (n4) 1.

<sup>100</sup> *Richter v Bloempro* (n4) 1.

<sup>101</sup> *Richter v Bloempro* (n4) 1.

<sup>102</sup> *Richter v Bloempro* (n4) 2.

<sup>103</sup> *Richter v Bloempro* (n4) 2-3.

<sup>104</sup> *Richter v Absa Bank Limited* (n1) 2.



to derive an income.<sup>105</sup> On the 18<sup>th</sup> of March 2013 ABSA applied to intervene and opposed the business rescue proceedings.<sup>106</sup>

Mr Richter decided to oppose ABSA's application to intervene, however on the 12<sup>th</sup> of April he served a notice on ABSA's attorneys withdrawing such opposition.<sup>107</sup> This was interpreted as a withdrawal to both ABSA's application to intervene in and oppose the business rescue proceedings.<sup>108</sup> Based on this interpretation, ABSA pursued an order for default judgment in which it was granted leave to intervene and simultaneously had the business rescue application dismissed.<sup>109</sup> Mr Richter applied for recession of the default judgment in the High Court, specifically heard by Bam J in the Gauteng Provincial Division, Pretoria.<sup>110</sup> Application for recession was dismissed,<sup>111</sup> which lead to this appeal in *Richter v Absa Bank Limited*<sup>112</sup>. The court makes it clear that should the application succeed the matter would be remitted to the *court a quo*. This is a matter whereby the applicant applied for rescission of default judgment being awarded against him and Bloempro, asking the court to dismiss the default judgment and allow for an application for business rescue. Since the matter is taken against default judgment, the court is not required to look at the merits of the case, but rather to decide if it is to be remitted back to the *court a quo* to decide if the applicant's business rescue application stands a *prima facie* chance of success.<sup>113</sup>

#### 4. Decision of the *court a quo*

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<sup>105</sup> *Richter v Absa Bank Limited* (n1) 2.

<sup>106</sup> *Richter v Absa Bank Limited* (n1) 2.

<sup>107</sup> *Richter v Absa Bank Limited* (n1) 3.

<sup>108</sup> *Richter v Absa Bank Limited* (n1) 3.

<sup>109</sup> *Richter v Absa Bank Limited* (n1) 3.

<sup>110</sup> *Richter v Absa Bank Limited* (n1) 5.

<sup>111</sup> *Richter v Absa Bank Limited* (n1) 6.

<sup>112</sup> *Richter v Absa Bank Limited* (n1).

<sup>113</sup> *Caravan & Pleasure Resort v SAHCTU* 2008 ILJ 1008 (LC), read with LAWSA Cumulative Supplement 974.

Bam J made it clear that before hearing the application for rescission, the parties were called to address the following two issues, firstly of *locus standi* for bringing an application for business rescue and, secondly whether such application can be brought after a final order for liquidation has been granted.<sup>114</sup>

Pertaining to the first issue of *locus standi*, the court had to decide if the applicant Mr Richter, as a manager of Bloempro CC at the time of liquidation, was still able to institute liquidation proceedings as an affected person in terms of S128(1)(a).<sup>115</sup> The court confirmed that a provisional or final liquidation successfully suspends employment contracts.<sup>116</sup> Bam J found that even though the applicant's employment contract had been suspended, this does not terminate his right as an affected person; as contracts of employment may be extended by the liquidator, and the status of employees "...will not disappear and cannot be terminated *ex post facto*."<sup>117</sup> Notwithstanding the fact that the applicant's employment was not extended by the liquidators, he retained his capacity as an affected person to bring an application for business rescue.

When assessing the second issue, Bam J had to decide whether or not an application for business rescue could in fact be brought after a final order of liquidation had been handed down. The court found that a final liquidation order and business rescue proceedings are vastly different concepts which cannot co-exist as they are clearly incompatible.<sup>118</sup> A final liquidation order in fact strips a company of its original legal status and requires approval through an order of court, or a Master's ruling or decision of liquidator to operate.<sup>119</sup> This would mean that an interim order of business rescue would suspend a final liquidation order, which in the words of

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<sup>114</sup> *Richter v Bloempro* (n4) 6.

<sup>115</sup> *Richter v Bloempro* (n4) 7 and 9.

<sup>116</sup> *Richter v Bloempro* (n4) 11a, with the court relying on S 38 of the Insolvency Act, 24 of 1936.

<sup>117</sup> *Richter v Bloempro* (n4) 12-13

<sup>118</sup> *Richter v Bloempro* (n4) 17.

<sup>119</sup> *Richter v Bloempro* (n4) 18(ii).

Bam J would be ‘untenable’.<sup>120</sup> Furthermore if the legislator had intended for a conversion of liquidation into business rescue it would have clearly stated so, instead section 132(2)(a)(ii) of the Companies Act only refers to business rescue proceedings being converted into liquidation proceedings.<sup>121</sup> If this had indeed been the legislator’s intention, it would serve to suspend all legal consequences of a final liquidation order, allowing the company to dispose of its property without any reference or permission from the Master or liquidators.<sup>122</sup>

By investigating the definitions of ‘business rescue’ and ‘financially distressed’, Bam J held that the legislature clearly intended that business rescue proceedings be initiated before a liquidation order.<sup>123</sup> In fact, in order to bring an application for business rescue, the final liquidation order would first have to be set aside.<sup>124</sup> The court accordingly dismissed the application for rescission of judgment. Leave of appeal was granted.

## 5. Divergent decisions

The timing of a business rescue application during liquidation proceedings is not a novel concept, it has been asked of the courts on numerous occasions. However this has not led to a uniformity of decisions, with divergent judgments being heard in the various High Courts.

### 5.1. *ABSA Bank Limited v Summer Lodge (Pty) Ltd; ABSA Bank Limited v JVL Beleggings (Pty)Ltd and ABSA Bank Limited v Earthquake Investments (Pty) Ltd*<sup>125</sup>

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<sup>120</sup> *Richter v Bloempro* (n4) 18(ii).

<sup>121</sup> *Richter v Bloempro* (n4) 18(iv).

<sup>122</sup> *Richter v Bloempro* (n4) 18(v).

<sup>123</sup> *Richter v Bloempro* (n4) 17.

<sup>124</sup> *Richter v Bloempro* (n4) 19.

<sup>125</sup> 2014 (3) SA 90 (GP).

In this case Makgoba, J dealt with three applications on their return date, in which the applicant in all of them, ABSA sought an order placing the respondent companies in liquidation. A rule *nisi* was ordered by Van Der Byl J, in which the legal issue in question was whether an application for business rescue automatically or *ex lege* suspends an application for liquidation.<sup>126</sup> The honourable Judge found that liquidation proceedings only commence once an order, be it provisional or final, for liquidation has been handed down.<sup>127</sup> Therefore the mere issuing of a business rescue application would not suspend legal proceedings to obtain a liquidation order, because there is essentially no liquidation or liquidation proceedings.<sup>128</sup>

Makgoa J finally came to the conclusion that "... *“Liquidation proceedings” have to do with the process that is overseen by the liquidation and the Masters in winding-up and not the legal proceedings before a court of law in order to obtain such order.*”<sup>129</sup> This supposition is supported by the use of the word ‘commence’ in section 131(6), which has meaning ascribed to it by section 348 of the 1973 Act, which has a deeming provision that liquidation is deemed to have commenced on the date of application after an order of winding up has been granted.<sup>130</sup> In conclusion the court found that liquidation proceedings in terms of section 131(6) deal with the process of winding-up, which only begins once an order for winding-up has been granted and thereafter the process has begun.<sup>131</sup> This phrase does not include the legal processes and procedure leading up to the granting of a winding-up or liquidation order.<sup>132</sup>

## 5.2. ABSA Bank Ltd v Makuna Farm CC<sup>133</sup>

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<sup>126</sup> ABSA Bank Limited v Summer Lodge (Pty) Ltd (n125) 3.

<sup>127</sup> ABSA Bank Limited v Summer Lodge (Pty) Ltd (n125) 3.

<sup>128</sup> ABSA Bank Limited v Summer Lodge (Pty) Ltd (n125) 3.

<sup>129</sup> ABSA Bank Limited v Summer Lodge (Pty) Ltd (n125) 3.

<sup>130</sup> ABSA Bank Limited v Summer Lodge (Pty) Ltd (n125) 13-14.

<sup>131</sup> ABSA Bank Limited v Summer Lodge (Pty) Ltd (n125) 18.

<sup>132</sup> ABSA Bank Limited v Summer Lodge (Pty) Ltd (n125) 18.

<sup>133</sup> 2014 (3) SA 86 (GJ).

In this instance the court agreed with Makgoba J above in paragraph 5.1. In this instance however, it is important to note that court recognized that due to the facts of this case the company (Makuna Farm) was irrefutably insolvent and as such a provisional liquidation order been granted.<sup>134</sup> The question which Boruchowitz J had to deal with was whether in light of section 131(6), in which liquidation proceedings have been suspended by the application for business rescue, a final order for liquidation could be granted?<sup>135</sup> The court looked at what was meant by ‘liquidation proceedings’ in terms of section 131(6) in order to answer this question. In order to do so, the court had to decide what part of liquidation proceedings section 131(6) applied; was it the substantive provisions in which a creditor applies for a winding-up order or is it the actual process of winding-up a company?<sup>136</sup> Section 131(6) refers to the liquidation proceedings which have been commenced by or against the company at the time of the business rescue application is made.<sup>137</sup> The court held that in terms of this section liquidation proceedings therefore refer to the process once a final liquidation order has been granted, as in terms of section 348 of the 1973 Act, winding up commences retrospectively upon a final order of liquidation.<sup>138</sup>

The court agreed with Van Der Byl J above in paragraph 5.1, in that an application for business rescue proceedings does not in any way change or alter the legal status of a company in liquidation, but merely serves to stay the implementation of a winding-up order.<sup>139</sup> Once a winding-up order has been granted, the launching of business rescue proceedings serve to suspend the implementation of such an order until such time has business rescue proceedings

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<sup>134</sup> *ABSA Bank Ltd v Makuna Farm CC* (n133) 2-3.

<sup>135</sup> *ABSA Bank Ltd v Makuna Farm CC* (n133) 4-5.

<sup>136</sup> *ABSA Bank Ltd v Makuna Farm CC* (n133) 6.

<sup>137</sup> *ABSA Bank Ltd v Makuna Farm CC* (n95) 7.

<sup>138</sup> *ABSA Bank Ltd v Makuna Farm CC* (n95) 7.

<sup>139</sup> *ABSA Bank Ltd v Makuna Farm CC* (n95) 8.

have ended.<sup>140</sup> This does not however alter the legal status of the company as it remains under either provisional or final winding-up.<sup>141</sup>

### 5.3. *Van Staden v Angel Ozone Products CC and Others*<sup>142</sup>

Legodi J, had to decide on an issue similar to that of *Richter v Bloempro CC*,<sup>143</sup> as an application for business rescue was brought after a final liquidation order had been granted. In this instance the judge found that a distinction can be drawn between liquidation proceedings and winding-up proceedings, but that they are not entirely independent of each other. In fact liquidation proceedings are seen as the legal process before a court of law and the winding-up process as overseen by a liquidator and Master would be seen as a continuation of such a process.<sup>144</sup> This is so because you cannot execute upon a liquidation order, the process of winding-up has to be completed with a final liquidation and distribution account being issued and approved, and only that can be executed upon.<sup>145</sup>

Furthermore it was held that in terms of section 131(7) read with section 135(4), a liquidation process could indeed be converted into business rescue, regardless of how far the liquidation or winding-up has progressed.<sup>146</sup> If business rescue proceedings are indeed a better option than liquidation, the court found that there could be no reason to dismiss the business rescue application, regardless of how far along the liquidation and winding-up might be.<sup>147</sup>

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<sup>140</sup> *ABSA Bank Ltd v Makuna Farm CC* (n95) 8.

<sup>141</sup> *ABSA Bank Ltd v Makuna Farm CC* (n95) 8.

<sup>142</sup> (54009/11) [2012] ZAGPPHC 328; 2013 (4) SA 630 (GNP) (12 October 2012).

<sup>143</sup> (n4).

<sup>144</sup> *Van Staden v Angel Ozone Products CC and Others* (n55) 26.

<sup>145</sup> *Van Staden v Angel Ozone Products CC and Others* (n55) 27.

<sup>146</sup> *Van Staden v Angel Ozone Products CC and Others* (n55) 30.

<sup>147</sup> *Van Staden v Angel Ozone Products CC and Others* (n55) 32.

#### 5.4. *First Rand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd*<sup>148</sup>

In this case, one of the creditor's had brought an urgent application for a provisional order for liquidation.<sup>149</sup> The respondent's argued that due to the urgent nature of the application, they were not able to properly file an application for business rescue and would be precluded from doing so once a provisional liquidation order had been handed down.<sup>150</sup> The respondent's argued that once the provisional order had been handed down, the company would be precluded from taking a resolution to initiate business rescue.<sup>151</sup> The applicant argued this away stating that this does not bar an application for business rescue taken by an affected person in terms of section 131(6) and (7).<sup>152</sup> This however prompted the court to look at the distinction between the two ways of initiating business rescue.

The court stated that there is indeed a distinction between the 'inter-relationship of business rescue proceedings and liquidation proceedings', which is dependent upon how the business rescue was initiated or commenced.<sup>153</sup> A company is clearly precluded from adopting a resolution for business rescue, which precludes the company from adopting a resolution voluntarily putting itself in liquidation.<sup>154</sup> Where a company has not adopted a resolution in terms of section 129, an affected person may apply at any time to commence business rescue proceedings in terms of section 131.<sup>155</sup>

The parties argued over the provision of section 131(6), in which liquidation proceedings are suspended until the court had adjudicated the matter<sup>156</sup>, or "...*(b) the business rescue*

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<sup>148</sup> (12910/2011) [2011] ZAKZDHC 65.

<sup>149</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 1, 10(a).

<sup>150</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 10(d), 13.

<sup>151</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 14.

<sup>152</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 15.

<sup>153</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 16. The court held that it is unfortunate that the Act does not clearly define 'initiate' in terms of S 129, but that this has a corresponding meaning to 'commence' in S 131.

<sup>154</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 18.

<sup>155</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 19.

<sup>156</sup> S 131(6)(a).

*proceedings end, if the court makes the order applied for.*” The parties argued over which ‘order’ is referred to in section 131(6)(b) be it the liquidation order or that of the business rescue order<sup>157</sup>. The court clearly decided that it is a reference to an order for business rescue; therefore if the application is denied the liquidation proceedings are no longer suspended, but where the order is granted the suspension continues until the end of business rescue in terms of S132(2).<sup>158</sup>

#### 5.5. *Knipe and Another v Noordman NO and others*<sup>159</sup>

In this instance the court was tasked to deal with an interdict preventing the liquidators from realising the assets in an insolvent estate, with the marked difference that the final liquidation order had been granted because it would be just and equitable and not on the grounds of insolvency.<sup>160</sup> Due to the facts of this matter, the court was forced to look at whether an application for business rescue in terms of section 131(6) can be brought after a final liquidation order, albeit obiter.<sup>161</sup> Mamosebo AJ quoted *Richter v Bloempro CC*<sup>162</sup> with approval.<sup>163</sup> The business rescue application which was pending was still at an early stage, and a business rescue practitioner had not yet been appointed.<sup>164</sup> The Court found that to allow such an application at this stage would unduly impede the entire process, and would ‘hamstring’ the liquidators in fulfilling their duties.<sup>165</sup>

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<sup>157</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 19-20.

<sup>158</sup> *First Rand Ltd v Imperial Crown Trading* (n151) 21.

<sup>159</sup> 2015 (4) SA 348 (NCK).

<sup>160</sup> *Knipe and Another v Noordman NO and others* (n61) 24.

<sup>161</sup> *Knipe and Another v Noordman NO and others* (n61) 19.

<sup>162</sup> (n4).

<sup>163</sup> *Knipe and Another v Noordman NO and others* (n61) 19-20.

<sup>164</sup> *Knipe and Another v Noordman NO and others* (n61) 24.

<sup>165</sup> *Knipe and Another v Noordman NO and others* (n61) 24.



## 5.6. *Molyneux and Another v Patel and Others*<sup>166</sup>

In this case a declaratory order was sought to decide whether or not an application for business rescue would suspend a final order of liquidation and proceedings associated with such an order, and in so doing be called upon to declare a transfer of immovable property taken by the liquidators to be invalid.<sup>167</sup> The court went through a lengthy debate of instances in which you could view the application of section 131(6).<sup>168</sup> However it must be pointed out that the court held the application to be have been procedurally defective from the outset with the proceedings paragraphs seemingly being academic in nature, and therefore *obiter* in nature.<sup>169</sup> The court looked at when this application could be brought, during a pending but unadjudicated matter (referred to as the liquidation or legal process above) or the administration of the liquidation (referred to above as the winding-up process.) The court disagreed with the decision taken above in *ABSA Bank Limited v Summer Lodge (Pty) Ltd*,<sup>170</sup> in which the court held that an application for business rescue could only be brought after a liquidation order. Rogers J took issue with the interpretation of section 131(6), specifically the part which refers to liquidation proceedings commenced ‘by or against the company’, and that the administration of the estate or its winding-up cannot be considered as something by or against the company.<sup>171</sup> Should the application suspend liquidation proceedings, the company would be left ‘rudderless’, until the point at which a business rescue practitioner would be appointed.<sup>172</sup> In this specific instance it would have meant that company would have been without management for 6 months.

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<sup>166</sup> (14618/2014) [2014] ZAWCHC 191 (27 November 2014).

<sup>167</sup> *Molyneux and Another v Patel and Others* (n166) 5 and 14.

<sup>168</sup> *Molyneux and Another v Patel and Others* (n166).

<sup>169</sup> *Molyneux and Another v Patel and Others* (n68) 24.

<sup>170</sup> *ABSA Bank Limited v Summer Lodge (Pty) Ltd* (n125).

<sup>171</sup> *Molyneux and Another v Patel and Others* (n166) 29.

<sup>172</sup> *Molyneux and Another v Patel and Others* (n166) 29-30.

The court submitted that an application for business rescue can be made during the adjudication process of liquidation.<sup>173</sup> This is so because at that stage the directors have not been removed from office and replaced by the liquidators. Therefore by suspending the application during the liquidation's formative stages would be more in line with the policy objectives of business rescue, as management would go from the directors to that of the business rescue practitioner, without there being any uncertainty in the transfer of management.<sup>174</sup> By allowing for a business rescue application after a final liquidation order would prejudice affected persons.<sup>175</sup> Even though the Court posits that the application for business rescue should be heard first, there is nothing preventing both applications being heard at the same time.<sup>176</sup>

Rogers J in this instance believe that the applicant in this instance had brought the application without the necessary *boni mores* and for an ulterior purpose which amounts to an attempt delay the matter.<sup>177</sup> The ulterior motives in this instance could be said to consist of the sale of the immovable property to be declared invalid and the applicant thus able to prevent an eviction order taken against the occupants. This is clearly counter to the purpose of business rescue, as to provide for the efficient rescue and recovery of a business taking into account the interests and rights of all relevant stakeholders.<sup>178</sup>

## 6. Judgment

The decision of *Richter v Bloempro CC*<sup>179</sup> was taken on appeal, and the Supreme Court of Appeal has now clarified the issue surrounding section 131(6). Dambuza AJA took issue with

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<sup>173</sup> *Molyneux and Another v Patel and Others* (n166) 31.

<sup>174</sup> *Molyneux and Another v Patel and Others* (n166) 31.

<sup>175</sup> *Molyneux and Another v Patel and Others* (n166) 33.

<sup>176</sup> *Molyneux and Another v Patel and Others* (n166) 33.

<sup>177</sup> *Molyneux and Another v Patel and Others* (n166) 25-27 read with 15-17.

<sup>178</sup> S 7(g).

<sup>179</sup> *Richter v Bloempro CC* (n4).

Bam J's premise that upon liquidation a company is stripped of its original legal status.<sup>180</sup> The court held this to be incorrect, as a company continues to exist even after a final liquidation order – what occurs at this stage is a change of control over the company; which is transferred to the liquidator.<sup>181</sup> The liquidation procedure begins with the application for liquidation and continues until the company has been finally wound-up and a Master's certificate is published in the Government Gazette, which confirms the dissolution of the company.<sup>182</sup> This is supported by S 82 which states that a company remains in existence until deregistered by Companies and Intellectual Property Commission.

The terms 'liquidation' and 'winding-up' are used interchangeably, both from an historical perspective and in terms of the Companies Act.<sup>183</sup> The court also stated that the use of the words 'liquidation proceedings' in section 131(6) does not change what is meant by liquidation.<sup>184</sup> In fact section 131(1) makes provision for an affected person to apply for business rescue at 'any time'.<sup>185</sup> In addition to which section 131(7) empowers the court to make an order granting business rescue 'at any time' within the course of 'any liquidation proceedings'.<sup>186</sup>

The process of business rescue is one which is meant to last the duration of a company's life span, and for that reason the procedure has to be both flexible and effective.<sup>187</sup> In order to achieve this the right of creditors to bring an application for liquidation, thus looking to terminate the company, must be limited.<sup>188</sup>

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<sup>180</sup> *Richter v Absa Bank Limited* (n1) 10.

<sup>181</sup> *Richter v Absa Bank Limited* (n1) 10.

<sup>182</sup> *Richter v Absa Bank Limited* (n1) 10.

<sup>183</sup> Specifically in the case of winding-up a solvent company in terms of S 79, 80,81 and 81 of the Companies Act.

<sup>184</sup> *Richter v Absa Bank Limited* (n1) 10.

<sup>185</sup> *Richter v Absa Bank Limited* (n1) 9.

<sup>186</sup> *Richter v Absa Bank Limited* (n1) 9.

<sup>187</sup> *Richter v Absa Bank Limited* (n1) 13.

<sup>188</sup> *Richter v Absa Bank Limited* (n1) 13.

When looking at when a company may apply for business rescue, Dambuza AJA felt that it was not necessary to distinguish between circumstances before and after liquidation. The court held that there was no point in ‘drawing the proverbial line in the sand’ between before and after a final liquidation order had been granted.<sup>189</sup> The Companies Act, may during its stage infancy result in some awkward interpretations, but this is not justification for a restrictive interpretation of section 131.<sup>190</sup>

The test to allow for such a company is whether or not it can be restored; if a company is able of being rescued, an application can still be brought after a final order for winding-up had been passed.<sup>191</sup> There are instances, even after a final order of winding-up has been granted, that a company can be rescued; one such example would be the securing of funding for future prospects.<sup>192</sup> If evidence is led during the course of liquidation, that entering business rescue would result in the company’s revival or a better return for creditors, it cannot simply be declined because a final order for liquidation has been granted.<sup>193</sup>

The court recognized that what the court *a quo* had in mind was to protect liquidation proceedings against the disruptive consequences of business rescue application.<sup>194</sup> Dambuza AJA stated the remedy to this lay with the court’s discretion to grant or dismiss an application for business rescue if it is found to be have been brought *mala fides* or does not clearly establish that a successful rescue is achievable.<sup>195</sup>

These include repetitive disruptions and uncertainty that may result from various affected parties making applications for business rescue at different times during the winding up

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<sup>189</sup> *Richter v Absa Bank Limited* (n1) 17.

<sup>190</sup> *Richter v Absa Bank Limited* (n1) 16.

<sup>191</sup> *Richter v Absa Bank Limited* (n1) 17.

<sup>192</sup> *Richter v Absa Bank Limited* (n1) 15.

<sup>193</sup> *Richter v Absa Bank Limited* (n1) 15.

<sup>194</sup> *Richter v Absa Bank Limited* (n1) 16.

<sup>195</sup> *Richter v Absa Bank Limited* (n1) 16.

process, reversion of business control to the same directors who may have been the cause of the financial distress experienced by the company, and the capacity of a company under final liquidation to conduct effective business, including concluding contracts, during the implementation of the rescue plan.

This judgment has already received support by the High Court in *Standard Bank of South Africa Ltd v A-Team Africa Trading CC*.<sup>196</sup> In this instance the court held that liquidation proceedings include both the liquidation application stage and the winding-up stage thereafter.<sup>197</sup> The court held that both of these stages form part of ‘liquidation proceedings’, which is similar to eviction proceedings, whereby the issue of a warrant of eviction forms part of that process.<sup>198</sup>

Not all decisions have been supportive of the SCA decision above.. In *Van der Merwe v Zonnekus*,<sup>199</sup> the High Court of the Western Cape was called to make a declaratory order, after the decision handed down by Dambuza in *Richter v ABSA Bank Limited*.<sup>200</sup> The court held that the interpretation of section 131(6) in *Richter v Bloempro*<sup>201</sup> and that of *Molyneux and Another v Patel and Others*,<sup>202</sup> were to be preferred. However, due to the principle of *stare decicis* the court was bound to the Supreme Court of Appeal’s decision.<sup>203</sup>

It is not just judges who are favouring the approach in *Richter v Bloempro CC*,<sup>204</sup> as Stoop agrees that this is the approach which should be followed. The academic goes further to state

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<sup>196</sup> (7233/15) [2015] ZAKZPHC 51 (17 November 2015).

<sup>197</sup> *Standard Bank of South Africa Ltd v A-Team Africa Trading CC* (n196) 19.

<sup>198</sup> *Standard Bank of South Africa Ltd v A-Team Africa Trading CC* (n196) 20.

<sup>199</sup> (4653/2015) [2015] ZAWCHC 90 (10 June 2015).

<sup>200</sup> *Richter v ABSA Bank Limited* (n1).

<sup>201</sup> (n4).

<sup>202</sup> *Molyneux and Another v Patel and Others* (n166).

<sup>203</sup> *Van Der Merwe v Zonnekus* (n113) 17.

<sup>204</sup> *Richter v Bloempro CC* (n4).

that allowing for business rescue proceedings after a final liquidation order, may lead to an abuse of process.<sup>205</sup>

Another author not in agreement is Delpont,<sup>206</sup> who quoted the decision in *Richter v Bloempro CC*,<sup>207</sup> favouring this decision over the prior decisions, including that of *ABSA Limited v Summer Lodge*.<sup>208</sup>

## 7. Lingering issues

Dambuza AJA may have solved the issue as to whether or not business rescue proceedings can be instituted after liquidation proceedings; but there are some lingering issues which were not dealt with. The problem being that the court was called upon to the decision in terms of the availability of business rescue in terms of liquidation only. The court did not decide on the matter, but merely that the application for business could be launched after a final liquidation order, and was remitted to the court for a final determination of the rescission of default judgment was remitted back to the *court a quo*.<sup>209</sup>

### 7.1. Control of the company before the business rescue application is heard

Where an application for business rescue stays liquidation proceedings, there doesn't seem to be a clear procedure as to what happens to the company. Liquidation proceedings, are stayed upon the launching of an application for business rescue.<sup>210</sup> The problem however, which is

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<sup>205</sup> Stoop "When does an application for business rescue proceedings suspend liquidation proceedings?" 2014 *De Jure* 329, 337.

<sup>206</sup> Meskin-Delpont et al (n91) 478.

<sup>207</sup> *Richter v Bloempro CC* (n4).

<sup>208</sup> *ABSA Bank Limited v Summer Lodge (Pty) Ltd* (n125).

<sup>209</sup> *Richter v Absa Bank Limited* (n1) 6.

<sup>210</sup> *ABSA Bank Ltd v Makuna Farm CC* (n133)

not addressed by Dambuza in *Richter v ABSA*,<sup>211</sup> is what happens to the management of the company during this process.

It would be untenable for the legislature and the courts to allow for the company to become a rudderless ship.<sup>212</sup> An answer to this however can be found in *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others*.<sup>213</sup> In this instance the court was called upon to decide what would happen to the powers of provisional liquidators when an application for business rescue had been launched, as a business rescue practitioner only gains control once she is appointed.<sup>214</sup> The institution of business rescue proceedings does suspend the liquidation process<sup>215</sup> but did not act to suspend the functioning of the provisional liquidators.<sup>216</sup> The court held that the provisional liquidators were not able to dispose of the assets of the company or continue with the winding-up process. However, they were able to continue with the trading of the company, as per section 386(4)(f) of the 1973 Act read with Schedule 2 of the Companies Act.<sup>217</sup>

The reasoning behind the court's decision is that on liquidation directors are divested of their authority to manage the company.<sup>218</sup> The court found that is under the director's care and supervision that the company had to come be in such a sorry state.<sup>219</sup> Particularly in these circumstances whereby the directors and management did not have the companies interests in mind, lest that of the creditors', to entitle them to regain control of the company pending the business rescue application.<sup>220</sup>

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<sup>211</sup> *Richter v Absa Bank Limited* (n1).

<sup>212</sup> *Molyneux and Another v Patel and Others* (n166) 30 and *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212 below) 56.

<sup>213</sup> (46194/13)[2014] ZAGPJHC 40 (4 March 2014).

<sup>214</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 8.

<sup>215</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 7.

<sup>216</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 52.

<sup>217</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 55.

<sup>218</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 49.

<sup>219</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 49.

<sup>220</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 56.

In light of the above, it may be necessary that when an application for business rescue is made, it suspends liquidation proceedings but not the functioning of the liquidators. The liquidators, as the with the provisional liquidators in the *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others*<sup>221</sup> case, are able to continue the running of the business in terms of section 386(4)(f). This should be done until the court has had the opportunity to adjudicate upon the application. This would ensure that once the court had made its decision, the company is still, hopefully salvageable and eligible for business rescue.

## 7.2. The status of employees as ‘affected persons’

Another flaw in the Richter case is the issue of an employee’s *locus standi*, as Bam J in the High Court conceded that Mr Richter had *locus standi* as an affected persons in terms of section 131(1) read with section 128, notwithstanding the fact that his employment contract had not been renewed by the liquidator.<sup>222</sup> The appeal brought by Mr Richter thus dealt with only the provisions of section 131(6) and not the issue of *locus standi*.<sup>223</sup>

However this issue should be looked at, as per paragraph 2.1.3 above, an employee’s contract of employment is suspended upon liquidation and the final liquidator is able to extend the contract’s suspension, or revive the contract or terminate it. If the interpretation of the *court a quo* is to be followed, as the court held that even though an employee who is suspended in terms of section 38 of the Insolvency Act,<sup>224</sup> lose their capacity to act for the company they do

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<sup>221</sup> (n212).

<sup>222</sup> *Richter v Bloempro CC* (n4) read with S 131(1) which allows for ‘affected persons’ to apply for business rescue.

<sup>223</sup> *Richter v Absa Bank Limited* (n1) 6.

<sup>224</sup> 24 of 1936.



not lose their status as an employee.<sup>225</sup> Thus they retain their *locus standi* as an affected person.<sup>226</sup>

There may however arise a problem with the ability of an employee as an affected person to bring an application for business rescue ‘at any time’.<sup>227</sup> During the course of liquidation the liquidator is able, as part of her powers, to terminate employment contracts as part of the winding-up process.<sup>228</sup> This would thus strip employees in their capacity as such, to have *locus standi* to bring an application for business rescue. There is however a saving grace, as employees are able to have ‘double’ *locus standi*, as such they may also qualify as creditors. This would occur in instances whereby any monies owed to them before business rescue and thus liquidation proceedings, they become creditors.

### 7.3. Abuse of process

The business rescue application during liquidation proceedings has been forewarned by various divisions of the High Court to lead to an abuse of court process and a time-delaying tactic.<sup>229</sup> It has occurred, albeit before the *Richter v Absa Bank Limited*,<sup>230</sup> that the party bringing the business rescue application is doing so for purposes of delay. In *Eveleigh v Dowmont Snacks (Pty) Ltd and Others*<sup>231</sup> whereby the applicant, an employee of the company, in trying to have the company under business rescue attempted to rely on a rejected business rescue plan as the basis for their application.<sup>232</sup> Surely by relying on a vague and speculative assertion that the

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<sup>225</sup> *Richter v Bloempro CC* (n4) 13.

<sup>226</sup> S 129(1).

<sup>227</sup> S 131(1).

<sup>228</sup> S 290.

<sup>229</sup> *Van Rensburg N.O and Another v Cardio-Fitness Properties (Pty) Ltd and Others* (n212) 34-35, *Molyneux and Another v Patel and Others* (n166) 27.

<sup>230</sup> (n1).

<sup>231</sup> (11982/2013) [2014] ZAKPHC 1 (22 January 2014)

<sup>232</sup> *Eveleigh v Dowmont Snacks (Pty) Ltd and Others* (n230) 31.

business rescue plan can be amended to suit the creditor's needs is not sufficient to redeem a failed business rescue plan, which is exactly what the court decided.<sup>233</sup> It should be held, but as not yet recognized by the court, that this application was not brought *bona fide*, but rather to serve a time-delaying tactic to prevent control of the company being left with the liquidators.

In *Richter v Absa Bank Limited*<sup>234</sup> the court recognized these concerns, and stated that it would be up to the court on application for business rescue to decide on the merits of the business rescue application.<sup>235</sup> This may be problematic due to the fact that these processes are time-consuming and may not always be in the interests of the company.

## 8. Conclusion

The Dambuza AJA is clearly seen to have settled the burning question of at what stage an application for business rescue can be brought. This application may be brought at any time until the company has been fully wound-up and application has been made for its deregistration. This would seem to be logically sound, as it is at that point that the company would have been entirely divested of its realisable assets and there would no longer be anything left to salvage in terms of business rescue.

Business rescue, as the 'new kid on the block' still requires some fine-tuning. The running of the company during such a process has not been fully resolved as yet. Taking these considerations into account it would be prudent for transitional processes to be put in place to ensure that upon the launching of a business rescue application during liquidation proceedings the liquidators be kept in control of the company but only empowered to continue its trading until the business rescue application is decided. These transitional provisions could be made

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<sup>233</sup> *Eveleigh v Dowmont Snacks (Pty) Ltd and Others* (n230)

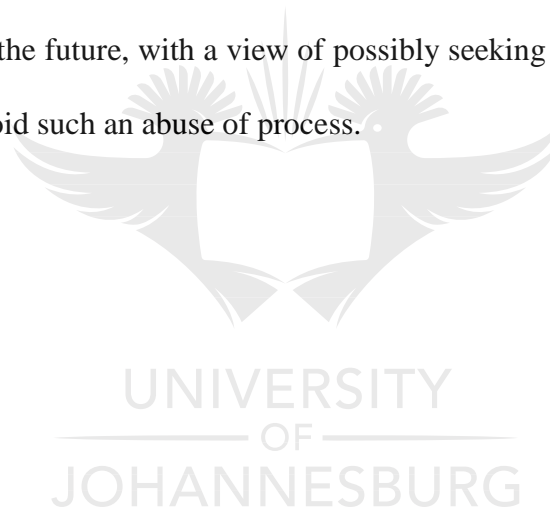
<sup>234</sup> (n1).

<sup>235</sup> *Richter v Absa Bank Limited* (n1) 16.

possible similarly to the way in which the Companies Act has made provisional arrangement for the winding-up of insolvent companies.

The issue of an employee's *locus standi* is one which will need to be addressed in light of a case whereby their contract of employment has been terminated. Taking into account the lengths at which the Companies Act proceeds to ensure that employee's rights are included as affected person, it would seem untenable that they would lose their right institute an application for business rescue if brought at a late stage of the liquidation and winding-up process.

Lastly, it would seem that in some instances the process is being abused by parties wishing to either buy time or find any avenue in which to delay the liquidation proceedings. This may have to be dealt with in the future, with a view of possibly seeking to install preventative and punitive measures to avoid such an abuse of process.



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