IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 8991/2019P

In the matters between:

ABSA BANK LIMITED	**Applicant**
and	
CROSSMOOR TRANSPORT (PTY) LIMITED	**First Respondent**
SALA 45 786 (PTY) LIMITED t/a SATLOBLOKAS	**Second Respondent/First Intervening Party**
MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LIMITED	**Second Intervening Party**
GREENLEAF REHABILITATION (PTY) LIMITED	**Third Intervening Party**

In the matters between:

CASE NUMBER: 5371/2020P

XMOOR TRANSPORT (PTY) LIMTED	**First Applicant**
CROSSMOOR TRANSPORT (PTY) LIMITED	**Second Applicant**
and	
ANNEKE BARNARD N.O.	**First Respondent**
KGASHANE CHRIPTOPHER MONYELA N.O.	**Second Respondent**
FATHIMA BI CASSIM N.O.	**Third Respondent**

JANETTE EVELYN CARR N.O.	**Fourth Respondent**
MASTER OF THE HIGH COURT, PIETERMARITZBURG	**Sixth Respondent**
GREENLEAF REHABILITATION (PTY) LIMITED	**Intervening Party**

JUDGMENT

VAN ZYL, J.:-

[1] The proceedings under consideration involve a number of applications which, by consent of the parties, were all argued together as opposed motions because they are inter related. To limit confusion, it is as well, at the outset, to identify the various proceedings involved.

[2] Because the various parties to the different applications appear in some instances as applicants and in others as respondents I will instead refer to the different parties by name.

[3] The main application under case number 8991/2019P is an application brought by ABSA Bank Ltd (ABSA) as applicant for the compulsory winding up of Crossmoor Transport (Pty) Limited (Crossmoor) as the respondent. The application for provisional winding up was opposed and was argued as an opposed motion before Moodley, J. who, in a detailed reserved judgment delivered on 30 July 2020, issued a provisional winding up order. The present proceedings related to argument on the extended return date of that order and wherein ABSA seeks an order for the final winding-up of Crossmoor.

[4] Interrelated with the main application were applications to intervene. The first was by Sala 45 786 (Pty) Limited trading as Satlobloks (Satlobloks) with the object of intervening as the second respondent and opposing the winding up of Crossmoor. Satlobloks alleged that it was contracted to as a labour broker providing some 1 758 employees on contract to Crossmoor as drivers, operators and other general workers. It was alleged that Crossmoor, together with its associated company Xmoor Transport (Pty) Limited (Xmoor), were its largest clients and the demise of Crossmoor would probably give rise to the closure of the business of Satlobloks. It was formally joined as second respondent by order granted on 10 December 2019, but thereafter took no further steps until the hearing before Moodley, J on 22 May 2020 when the issue of the provisional order was argued. At that stage counsel belatedly appeared merely to inform the court, without explanation, that Satlobloks did not intend to proceed. Thereafter Satlobloks ceased any further participation in the proceedings. Associated with Satlobloks and referred to in its original joinder application, was the National Transport Movement (NTM), allegedly a union representing a number of employees of Crossmoor. At the hearing on 22 May 2020 NTM sought to join the proceedings in order to oppose the winding up, but then sought and was granted leave to withdraw its application, without an adverse costs order.

[5] The second intervention application, by notice of motion dated 30 January 2020, was brought by Mercedes Benz Financial Services (South Africa) (Pty) Limited (Mercedes) claiming to be a creditor of Crossmoor to the extent of R112 381 206-89 as at 20 January 2020 and arising out of a series of credit agreements concluded with Crossmoor. It alleged that as far back as on 28 October 2019 Crossmoor was R20 287 905-74 in arrears with its repayments due to Mercedes. Consequently it sought to join the proceedings in order to support the winding up of Crossmoor. It seeks an order that the costs of the application be costs in the winding up of Crossmoor.

[6] The third intervention application, by notice of motion dated 8 August 2020, was brought as a matter of alleged urgency by Greenleaf Rehabilitation (Pty) Limited (Greenleaf) on 13 August 2020. The relief sought was to anticipate the return date of the provisional winding up order of Crossmoor, the suspension of those proceedings

and the extension of the provisional order pending the outcome of a business rescue application initiated in the Gauteng South Division, Johannesburg of the High Court under case number 12131/2020, an order precluding the Master during the interim from appointing provisional liquidators to Crossmoor, joining the Master as a respondent in the winding up proceedings and that the costs of the application be costs in the winding up of Crossmoor. The application was opposed by both ABSA and Mercedes and after argument struck from the roll with costs on the attorney and client scale by Bezuidenhout, J. on 14 August 2020.

[7] However, it appeared that the Master, by certificate of appointment dated 12 August 2020 had already appointed Ms A Barnard, Mr K C Monyela, Ms F B Cassim and Ms J E Carr as joint provisional liquidators of Crossmoor (the provisional liquidators) with powers as set out in s386(1) of the Companies Act 61 of 1973, as read with item 9 of Schedule 5 of the Companies Act 71 of 2008.

[8] Under case number 5371/2020P and by notice of motion dated 19 August 2020, an application was then brought as a matter of alleged urgency by Xmoor Transport (Pty) Limited (Xmoor) as first applicant and Crossmoor as second applicant against the provisional liquidators and the Master (as fifth respondent) seeking to interdict the provisional liquidators, firstly from interfering in the conduct by Xmoor of its business from premises at 3 Newton Road, Westmead, Pinetown KZN (the business premises) and secondly from preventing Crossmoor trading and preventing any of its trucks or assets from entering or leaving the business premises. In terms of the relief sought the provisional liquidators would be directed to protect and preserve the assets of Crossmoor to the extent of establishing that they are insured and being permitted to access the live tracking of Crossmoor's vehicles.

[9] The provisional liquidators opposed the application and in the process counter applied for an order interdicting Xmoor and Crossmoor, whilst the latter was under winding up, whether provisionally or final, from conducting the business or using the assets of Crossmoor, interdicting the directors of Xmoor and Crossmoor from causing

or permitting the actions thus interdicted and claiming a punitive costs order against Xmoor and Crossmoor. The fifth respondent (the Master) delivered a report abiding the decision of the court.

[10] By notice of motion dated 6 November 2020 Greenleaf sought to apply, as a matter of urgency, to intervene in the application under case number 5371/2020P in order to interdict the provisional liquidators from preventing Crossmoor from continuing trading and that the costs of the intervention application be paid by the provisional liquidators in their personal capacities. This application is opposed by the liquidators.

[11] The primary issue in dispute is the fate of Crossmoor and whether it should be placed in final liquidation by confirming the provisional winding up order. However, before devoting consideration to that issue it is necessary to deal with and dispose of the other applications because, depending upon the outcomes of at least some of them, these may influence the outcome of the liquidation application.

[12] Greenleaf is involved in the application to join and if successful, then to oppose the final liquidation of Crossmoor. It is also seeking to join in the interdict application. Crossmoor and Greenleaf have in common that both contemplate that the business rescue application (the BRA) pending in Guateng effectively suspended or at least limited the authority of the provisional liquidators to pursue what otherwise would have been their duties as such.

[13] The BRA in relation to Crossmoor was launched by Greenleaf in the Gauteng Local Division, Johannesburg on 26 May 2020 under case number 12131/2020, shortly after the provisional winding up application was argued before Moodley, J in this Division and after judgment had been reserved, was opposed by ABSA and Mercedes and remains pending. The approach taken by both Greenleaf and Crossmoor is that business rescue is preferable to liquidation.

[14] Greenleaf in particular advanced certain legal propositions which require consideration because they are foundational to its application to intervene in the liquidation application under case number 8991/2019P and in the interdict matter under case number 5371/2020P. For present purposes the issue of Greenleaf's *locus standi* is not under consideration and will be considered in due course.

[15] With regard to the consequences of the BRA the propositions advanced were that, upon a proper interpretation of s131(6) of the Companies Act 71 of 2008 and by virtue of the pending BRA, all liquidation proceedings were and remain suspended, including the provisional winding up order issued on 30 July 2020. As a result the liquidators were not empowered to perform what otherwise would have been their functions and duties as such. Instead the powers of the directors of Crossmoor had not ceased, or were revived and Crossmoor was in the position where it was entitled to continue trading without interference. Accordingly the counter application by the liquidators therefore could not succeed.

[16] In *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA) it was held that business rescue proceedings could be instituted both before or after the issue of a final liquidation order in relation to the corporate entity which was the subject of the business rescue application (at par 18). In the event of a successful BRA in respect of a corporate entity under liquidation, the liquidator would then become a creditor (at par 12).

[17] In *Van Staden NNO v Pro-Wiz (Pty) Ltd* 2019 (4) SA 532 (SCA) a close corporation Oljaco was placed under provisional liquidation. The company Pro-Wiz then brought an application to have it placed under business rescue, citing Oljaco's liquidators as respondents. The liquidators opposed the motion. The Court *a* quo, apparently relying upon the decisions in *Richter* (supra) and by Fabricius, J in *Maroos and Others v GCC Engineering (Pty) Ltd and Others* [2017] ZAGPPHC 297 arrived at the conclusion that the effect of s131(6) of the Companies Act 2008 was that when Pro-Wiz made an application for business rescue in relation to Oljaco, that deprived

the liquidators of any power to continue with the administration of the close corporation and revested those powers in its sole member, Mr Smith.

[18] On appeal that proposition was rejected and it was also noted that *Maroos* had been reversed on appeal. At par 10 of *Van Staden* Wallis, JA stated that;

> "*Starting with basic principles, in terms of s 131(2)(a) of the Act an application for business rescue must be served on the company or close corporation. Where it is already being wound up, whether provisionally or finally, that means that the persons on whom it must be served, as representing the company, are its liquidators. That necessarily follows from the fact that, upon the compulsory winding-up of a company, its directors (read members in the case of a close corporation) are deprived of their control of the company, which is then deemed to be in the custody or control of the Master until the appointment of liquidators. Thereafter it is in the custody or control of the liquidators.*"

[19] The appellate decision in *GCC Engineering (Pty) Ltd v Maroos* 2019 (2) SA 379 (SCA), Seriti JA dealt with the issue whether the control and management of a company, already placed in provisional winding-up by a court order, could validly be revested in the directors of that company by virtue of a pending BRA.

[20] Section 131(6) of the Companies Act 2008 reads that:

> *"(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-*
> *(a) the court has adjudicated upon the application; or*
> *(b) the business rescue proceedings end, if the court makes the order applied for."*

[21] In regard thereto it was held in *GCC Engineering* by Seriti, JA in par 17 that:

> "*In terms of s 131(6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to the various creditors. The winding-up order is still in place; and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors.*"

[22] With regard to the functions of a provisional liquidator it was stated that these essentially comprise taking physical control of and to manage the administration of the property and affairs of the company pending the appointment of a liquidator and that s131(6) of the Act did not affect the appointment of provisional liquidators (at par 11).

[23] In response to the argument that control and management of the company already placed in winding-up by a court order could validly be re-vested in the directors of that company by a pending BRA, it was held that upon the granting of the winding-up order the directors of the company ceased to function as directors and the property of the company then fell under the control, initially of the Master and thereafter the appointed liquidators. The directors of the company in liquidation are stripped of their control and management of the company when it is placed in winding-up by the Court. There was no legal provision, either by statute or at common law, that would sanction the re-vesting of control and management of the company in liquidation in the directors of the company (*GCC Engineering* at par 21).

[24] In view of the stated purpose (at par 13.2 of the founding affidavit) of Greenleaf's application to intervene in the interdict application under case number 5371/2020P, namely "*That the First to Fourth Respondents* (the liquidators) *are interdicted from preventing the Second Applicant* (Crossmoor) *from trading.*" the application cannot succeed, irrespective of the outcome of the disputed issues relating to Greenleaf's *locus standi* as an alleged creditor of Crossmoor.

[25] Insofar as the interdict application under case number 5371/2020P relates to relief seeking to interdict the liquidators in the performance of their functions with regard to Crossmoor the application also cannot succeed. What is sought is effectively an order which would sanction Crossmoor's directors retaining or being revested with control and management of Crossmoor, despite it being in provisional liquidation and whilst the BRA remains pending.

[26] It is not in dispute that Xmoor and Crossmoor are entities in the same stable, that they share the same business premises, both conduct similar transport operations and it is overwhelmingly probable that Xmoor has been and is continuing using machinery, vehicles and equipment under the control of Crossmoor for its own business activities. From the so-called settlement offer conveyed in the letter of 13 February 2021 and more fully referred to later in this judgment, it is clear that these two companies have in the past and would, if permitted, likely in the future operate in unison.

[27] Insofar as Crossmoor purports to act as an applicant in the interdict application it is by no means clear that those purporting to represent it has the authority to do so. As already indicated, once a provisional winding-up order was granted its directors were divested of their authority, initially in favour of the Master and then the provisional liquidators, once appointed. However, this issue was not fully argued and in view of the conclusions to which I have come it is unnecessary to devote further attention thereto.

[28] The status of the BRA instituted in the Gauteng High Court was also the subject of extensive debate. ABSA and Mercedes contended that the application was deficient and should be disregarded. Crossmoor, Xmoor and Greanleaf took the attitude that it was valid and as already indicated, that it suspended the winding-up process. In my view the latter submission is not valid in principle. However, there are insufficient facts before me to determine the validity of the BRA, even if it were within my authority to do so. Since I have held that winding-up, as opposed to the liquidation proceedings,

are not suspended by a BRA, there is no further need to consider the alleged validity, or invalidity, of the BRA in Gauteng.

[29] The complaint by Xmoor (as distinct from Crossmoor) and the basis for the interdictory relief it seeks related to an attempt by the liquidators to access the business premises shared by the two companies and to inspect, record and evaluate the assets of Crossmoor which, as indicated, were also being used by Xmoor. The actual incident which gave rise to the allegation of interference by the liquidators with the alleged business operations of Xmoor was an alleged instruction given by an employee of the Sheriff to the guard at the entrance of the shared business premises to disallow entrance to and egress from the premises. That instruction was labeled as unlawful and attributed to the liquidators.

[30] Xmoor appears to have been using, for its own purposes, assets of Crossmoor at their shared business premises. The Sheriff was obliged to record and secure the latter's assets. The instruction complained of suggests an attempt at a control measure to enable the Sheriff to perform his functions. Given the relationship between Xmoor and Crossmoor whereby the latter's assets were used on and out of the shared premises by either or both occupants, the instruction was not necessarily unreasonable or unlawful in the circumstances. The probabilities are it would have been an attempt at temporarily safeguarding the assets of Crossmoor until the position regarding its assets could be clarified. Accordingly, in my view, the instruction was not shown to have been unlawful, as claimed.

[31] However, the Sheriff was not joined in the proceedings as a party. In the answering affidavit on behalf of the liquidators it was pointed out that the Sheriff was performing his statutory duties in terms of s19 of the Insolvency Act 24 of 1936. The averment effectively alleging that the Sheriff or his employee acted as agent for and on the instructions of the liquidators is based upon supposition and inference without any clear factual foundation.

[32] But even assuming that the incident developed as alleged and inferred by Xmoor, then it represented a single incident and no threat of recurrence is either alleged, or shown to exist, so that no clear threat of future harm was established which would justify interdictory relief in favour of Xmoor. If, however, by prohibiting interference with the activities of Xmoor, it was intended to achieve a continuation of its ability to use for its own purposes the assets of Crossmoor, that would not be justified and its claim to interdictory relief cannot succeed.

[33] Insofar as Xmoor in its own right therefore asserted entitlement to an interdict the application, in all the circumstances and in the exercise of my discretion, must fail.

[34] Before turning to consider the issues arising from the main application, namely whether the provisional winding-up of Crossmoor should be confirmed or not, it is necessary to consider the application by Greenleaf to join in those proceedings with regard to the attack upon its *locus standi* as a claimed creditor of Crossmoor.

[35] The founding affidavit on behalf of Greenleaf, in support of its application to join in the liquidation proceedings against Crossmoor, was deposed to by one of its directors Mr B R Mansill. A considerable portion of the affidavit was devoted to the business rescue application (the BRA) initiated by Greenleaf in relation to Crossmoor in the South Gauteng High Court, Johannesburg under case number 12131/2020. This was in support of the contention that the liquidation application should be suspended pending the outcome of the BRA.

[36] In dealing with Greenleaf's *locus standi* in both its applications to intervene in the liquidation proceedings and in the interdict application, it was alleged that Greenleaf did so in its capacity as a creditor of Crossmoor. In this regard it was alleged that a loan agreement was concluded on or about 19 December 2019 in terms of which Greenleaf advanced to Crossmoor the sum of R10 million, so that at the time when the BRA was launched Crossmoor was indebted to it in the sum of R10,4 million. It

was further alleged that since Crossmoor did not dispute its alleged indebtedness to Greenleaf, the latter's status as a creditor could not be disputed. No documents were attached in support of Greenleaf's claim to be a creditor of Crossmoor.

[37] ABSA indeed disputed Greenleaf's status as a creditor of Crossmoor. In its preliminary answering affidavit it put up, as annexure "AB4", a copy of the proof of payment relied upon by Greenleaf in the BRA. That reflected a payment of R10 million on 20 December 2019, the payee as Joxiwiz (Pty) Limited and the beneficiary reference as "*Greenleaf Xmoor*". ABSA accordingly denied that Greenleaf had shown that it was a creditor of Crossmoor. In this it was joined by Mercedes.

[38] In reply Greenleaf sought to disarm the attack upon its claimed status as a creditor of Crossmoor by asserting that payment had been made to the banking account of Joxiwiz (Pty) Ltd in accordance with the terms of the loan agreement and because that account had been nominated by Crossmoor. Insofar as the beneficiary reference reflected "*Greenleaf/Xmoor*" it was claimed in para 27 (at record page 300) that

> "*The reference in the proof of payment is an error and should read Greenleaf/Crossmoor this error was simply made as the Applicant knows Crossmoor colloquially as Xmoor.*"

[39] In further support of the alleged debt by Crossmoor was attached, as annexure ""RA.1", a copy of a document referred to as an Acknowledgement of Debt by Crossmoor in favour of Greenleaf. The document is dated 20 December 2019, records an indebtedness of R10 million which was "*due, owing and payable by us* [Crossmoor] *to the Creditor* [Greenleaf] *as at 20 December 2019.*" In effect the loan made was due and repayable the same day. Clause 3 of the document recorded that the acknowledgement contained the entire agreement of the parties thereto regarding the matters contained therein. It is curious that no mention is made of any interest payable upon the loan amount, which makes it difficult to reconcile with the claim in para 28 of

Greenleaf's founding affidavit that Crossmoor failed to make payment in terms of the loan agreement and was thus indebted to it in the sum of R10,4 million. The additional R400 000-00 remains unexplained.

[40] No detail of the alleged loan agreement was provided. It remains unclear whether it was oral or in writing, what its terms were, or when and how repayment was due to be effected. At the time when the alleged loan agreement was concluded the application to wind up Crossmoor had on 10 December 2019 been adjourned by consent and was thus pending. It would be at least unusual, if not improbable, for a creditor to advance an unsecured loan to a company in the position in which Crossmoor found itself at the time.

[41] The curious features of the alleged loan agreement also extended to the payment being made to Joxiwiz (Pty) Ltd. There was no indication of any relationship between Crossmoor and Joxiwiz (Pty) Ltd, nor any suggestion of a commercial rationale for the payment when the loan had to be repaid by Crossmoor to Greenleaf on the same day.

[42] A further curiosity arose from the explanation for the incorrect beneficiary reference contained in the bank's payment confirmation (annexure AB4 at page 115) to "*Greenleaf Xmoor*" instead of to "*Greenleaf/Crossmoor*". The explanation was that "*the error was simply made as the Applicant knows Crossmoor colloquially as Xmoor*". The explanation was probably based on hearsay because the deponent to the replying affidavit did not suggest that he made the payment and was thus mistaken as to the correct name of the debtor at whose behest the R10 million was advanced. But the implication is that Greenleaf, in making the payment, had not even verified the identity of its debtor.

[43] In both the applications to join in the winding up proceedings and the interdict Greenleaf is the applicant and bears the onus of establishing its status as a creditor of

Crossmoor. That, in turn, required that it showed that it had advanced the R10 million to or at the direction of Crossmoor. A finding on the issue would depend upon the acceptance or rejection of the explanation advanced on behalf of Greenleaf. That explanation was disputed by ABSA and Mercedes who relied *inter alia* upon the lack of persuasive detail, the *prima facie* contradictory documentation sought to be produced by Greenleaf only in reply and the inherent improbabilities attaching to Greenleaf's claim to be a creditor of Crossmoor for R10 million. In the end ABSA in its Further Answering Affidavit suggested at para 41 that the alleged acknowledgement of debt was "*an afterthought and for all intents and purposes a sham document.*"

[44] But irrespective of who bears the onus, there exists a factual dispute as to whether or not Greenleaf advanced the sum of R10 million to or at the behest of Crossmoor. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), Harms DP at para 26 drew attention to the fact that "*Motion proceedings, ... , are all about the resolution of legal issues based on common cause facts*" and are not designed to determine factual disputes. The so-called Plascon-Evans Rule (after the decision in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635D) provided that where disputes of fact arise on the papers, the matter should ordinarily be decided on the respondent's version of the disputed facts, unless its version was so farfetched or clearly untenable that it could be rejected on the papers alone. In this regard it makes no difference that motion proceedings may have been dictated by the legislature, or where the legal or evidential onus may lie.

[45] It is true that ABSA and Mercedes were unable to present positive evidence disproving the alleged advance to Crossmoor. But they could do no more than object to the expanded version of Greenleaf as it emerged only in reply and also point to the paucity of information even upon consideration of the expanded version. But even if the expanded version, belatedly presented, were to be considered, it presents as of doubtful validity. Objectively, on the documentary evidence before court, such advance was not verified and serious misgivings attach to the so-called acknowledgment of debt.

[46] It follows that the versions of ABSA and Mercedes (as respondents in the joinder application) must prevail and that Greenleaf has failed to establish its status as a creditor of Crossmoor. The application to join in the liquidation proceedings must therefore fail. The same considerations apply to the application to intervene in the interdict application.

[47] The opposed hearing of argument on the final winding up of Crossmoor and the joinder applications by Mercedes and Greenleaf was set down for 29 January 2021 but by consent of the parties these matters were postponed to 18 February 2021 so that the applications under case number 5391/2020P could be argued at the same time. In the result these combined matters were argued on 18 and 19 February 2021.

[48] On 17 February 2021 ABSA delivered a so-called supplementary founding affidavit as a result of a letter dated 12 February 2021 addressed to it by Mr Inderan Naicker, a director of Crossmoor and claiming also to be a director of Xmoor, purporting to propose an offer of settlement or compromise on behalf of both Xmoor and Crossmoor. A copy of the letter was attached as annexure "LG.1". In para 2 thereof the belief is expressed that Crossmoor, with the aid of Xmoor could be discharged from provisional liquidation with ABSA being paid in full. The letter also sets out certain payment proposals towards reducing Crossmoor's debt to ABSA with the help of Xmoor and Quidencia, but lacks a time frame for settling the indebtedness, whilst proposing the withdrawal of ABSA's winding up proceedings against both Crossmoor and Xmoor in the meantime.

[49] Although the letter was marked as being "*Without prejudice*", it did not qualify as a protected or privileged communication. In *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA) at par 13 it was held that one of exceptions to the general rule that settlement communications remain confidential was that an offer made, even on a "*without prejudice*" basis, was admissible in evidence where the author concedes insolvency. This was because public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up

proceedings, even if made on a privileged occasion. In the result Mr Harrison, who appeared for Crossmoor, did not object to the letter being received in evidence.

[50] In the course of argument Mr Harrison also conceded that the claimed indebtedness to ABSA was not disputed but that Crossmoor had explained the circumstances which gave rise to its inability to settle such debt. These included the pressure First National Bank brought to bear upon Crossmoor after it became aware of ABSA's claims and the debilitating effects of the Covid-19 pandemic. However, such considerations had been dismissed by Moodley, J. in para 45 of her judgment. Essentially the learned Judge found that Crossmoor had assumed the risk of operating its business by reliance upon significant credit facilities and had only itself to blame if these facilities were withdrawn and it found itself unable to pay its debts and as a result become commercially insolvent. I agree.

[51] Commercial insolvency, again broadly speaking, is the inability of a commercial concern to meet its financial obligations as they fall due. It needs to be able to do so whilst retaining its ability to continue in business. Differently put, if the debtor concern needed to dispose of essential trading or revenue producing assets in order to settle debts becoming due, this would not constitute payment in the ordinary course of business and would be indicative of commercial insolvency.

[52] Section 345(1)(c) of the Companies Act 1973 provides that a company is deemed to be insolvent if it is proved to the satisfaction of the Court that the company is unable to pay its debts and s344(f) that a company may be wound up by the Court if is unable to pay its debts as described in section 345. On considering all the information contained in the voluminous documentation making up the record of proceedings, it is clear that Crossmoor was and remains unable to settle its considerable debts to ABSA, as well as to Mercedes and no doubt its other creditors as well. It has not formally disputed the cancellation, due to the non-performance of its obligations in terms of its credit agreements with them, by ABSA and Mercedes, nor had it paid these creditors the amounts due to them.

[53] The settlement proposals contained in the letter of 12 February 2021, in context, leave no doubt of its inability to do so. It is only primarily with the assistance of Xmoor, itself the subject of a pending liquidation application and in respect of which Crossmoor is liable as surety, that the hope or belief is expressed that, given the opportunity, Xmoor could generate sufficient income also to settle the debts of Crossmoor in full. As already indicated, the letter was admissible in evidence. However, the basis upon which it was proposed ultimately to settle the debts of Crossmoor remained entirely speculative.

[54] In the final analysis it was clear that Crossmoor was both actually as well as commercially insolvent. It follows that a final winding-up was called for and the rule *nisi* should be confirmed. This does not, as already indicated, in principle preclude any successful business rescue proceedings even after the granting of a final winding-up order.

[55] To sum up, the final winding-up of Crossmoor is justified. The joinder in the proceedings by Mercedes is likewise justified. Its claims have not been disputed and it was justified in supporting the application by ABSA and in the absence of success by the latter, then to have itself pursued the winding-up of Crossmoor. The application by Greenleaf to intervene in the winding-up proceedings against Crossmoor fails and stands to be dismissed. For the sake of clarity the application by Sala 45 786 (Pty) Limited trading as Satlobloks and which was apparently abandoned during the course of the proceedings, is also to be dismissed with costs.

[56] The interdict application by Xmoor and Crossmoor against the liquidators cannot succeed and is to be dismissed. The counter application by the liquidators stands, however, on a different footing. Both Xmoor and Crossmoor, as well as those purporting to control their actions, have unjustifiably sought to frustrate the liquidators in the execution of their duties and functions. In my view the relief sought by the

liquidators in the counter applications is justified. On the other hand the joinder application by Greenleaf in the interdict application must fail.

[57] In the result I make an order, as follows:

a. In the application under case number 8991/2019P for the winding-up of the respondent Crossmoor Transport (Pty) Limited:-
    i. The rule *nisi* granted on 30 July 2020 and subsequently extended:-
        1. Is hereby confirmed.
        2. The costs of the application, including the costs consequent upon the employment of senior counsel and any reserved costs, shall be costs in the administration of the respondent.
    ii. The intervention application by the second respondent Sala 45 786 (Pty) Limited trading as Satlobloks, is dismissed with costs, including the costs consequent upon the employment of senior counsel and/or two counsel, where employed and any reserved costs.
    iii. In the intervention application by Mercedes Benz Financial Services (South Africa) (Pty) Limited under notice of motion dated 30 January 2020:-
        1. The applicant is granted leave to intervene as the second applicant in case number 8991/2019P.
        2. The costs of the intervention application, including the costs consequent upon the employment of senior counsel and any reserved costs shall be costs in the administration of the respondent.
    iv. In the intervention application by Greenleaf Rehabilitation (Pty) Limited under notice of motion dated 8 August 2020:-
        1. The application for leave to intervene in case number 8991/2019P is dismissed.

2. The applicant for intervention shall pay the costs occasioned by the intervention application, including the costs consequent upon the employment of senior counsel and/or two counsel, where employed and any reserved costs.

b. In the interdict application under case number 5371/2020P, brought by notice of motion dated 19 August 2020 by Xmoor Transport (Pty) Limited as first applicant and Crossmoor as second applicant against the provisional liquidators (first to fourth Respondents) and the Master (as fifth respondent):-

i. The interdict application;

1. is dismissed.
2. The costs occasioned thereby, including the costs consequent upon the employment of senior counsel and/or two counsel, where employed and any reserved costs shall be paid by the first and second applicants jointly and severally, the one paying the other to be absolved.

ii. The counter application brought by the first to fourth respondents (the provisional liquidators) under notice of motion dated 28 August 2020 succeeds and an order in the following terms is made:-

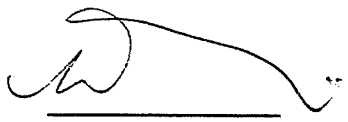
1. Interdicting the applicants, for the period during which the second applicant (Crossmoor) is in liquidation, whether provisional or final, from operating the business of the second applicant, or using any of the assets of the second respondent.
2. Interdicting the directors of the applicants (namely Poonsamy Naicker for the first applicant and Inderan Naicker for the second applicant) from causing or allowing the applicants or any one of them to act in a manner contrary to the interdict contained in sub-paragraph 1 above and to the extent necessary they are joined as respondents to the first to fourth respondents' counter-

application for purposes of the granting and enforcement of the said interdict.

3. The applicants are ordered to pay the respondents' costs and any reserved costs of the counter-application jointly and severally, the one paying the other to be absolved, including the costs of senior Counsel where employed on the scale as between attorney and client.

c. In the application brought by Greenleaf Rehabilitation (Pty) Limited by notice of motion dated 6 November 2020 for leave to intervene in the interdict application under case number 5371/2020P:-

1. The application to intervene is dismissed.
2. The applicant for intervention will pay the costs thereof and any reserved costs, including the costs consequent upon the employment of senior counsel and/or two counsel, where employed.



VAN ZYL, J.

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Judgment reserved: 19 February 2021

Judgement
Delivered on: 27 September 2021