



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

In the matters between

Case Nos: 13269/16 &
14203/16

TYRE CORPORATION CAPE TOWN (PTY) LTD

1st APPLICANT

**TYRE CORPORATION ON SITE SERVICES
DURBAN SALES (PTY) LTD**

2nd APPLICANT

ROYAL FRONT LOGISTICS (PTY) LTD

3rd APPLICANT

and

GT LOGISTICS (PTY) LTD

RESPONDENT

GLEN ESTERHUIZEN

1st INTERVENING PARTY

**MERCEDES-BENZ FINANCIAL SERVICES (PTY)
LTD**

2nd INTERVENING PARTY

Coram: ROGERS J

Heard: 16 SEPTEMBER 2016

Delivered: 21 SEPTEMBER 2016

JUDGMENT

ROGERS J:

Introduction

[1] The applicants, who are trade creditors of the respondent ('GTL'), seek its liquidation. The first intervening party ('Esterhuizen'), who is GTL's managing director and sole shareholder, has responded by applying to have GTL placed in business rescue. Esterhuizen's application is supported by the second intervening party ('MBF'). The applicants were represented by Mr Eloff SC leading Mr Lourens, Esterhuizen by Mr Goodman SC leading Mr Traverso and MBF by Mr Harms.

[2] The first and second applicants are part of the same group. The third applicant is an independent company. The applicants launched their application on 27 July 2016 for hearing on 11 August 2016. GTL filed a notice of opposition on 4 August 2016. Esterhuizen served his business rescue application on 11 August 2016. On the following day Hack AJ suspended the liquidation proceedings and directed that both matters be heard on the semi-urgent roll on 12 September 2016. The matter was crowded out. I heard it on 16 September 2016.

[3] The applicants' alleged claims total R3 381 582. Esterhuizen says that there are 'discrepancies' relating to about 20% of the claims but admits that GTL owes the applicants a substantial amount. The applicants' claims have been outstanding for some months. It is clear on Esterhuizen's own version that GTL is commercially insolvent. Unless the business rescue application succeeds, GTL should be placed in provisional liquidation.

[4] GTL, which began operations in 2010, provides logistical and transport services throughout South Africa. It has offices in Cape Town, Johannesburg, Durban and Port Elizabeth. It has 353 employees. Its customers include substantial companies such as SA Breweries, Compass Glass, DHL, Aveng, Schenker, African Amines, Parmalat and Pioneer/Sasko.

[5] GTL has a substantial fleet of vehicles. The vehicles are financed in terms of instalment sale agreements, financial leases and rental agreements. Most of the current fleet was acquired within the last two to three years. The vehicle financiers are Absa, Toyota, Wesbank, Standard Bank and MBF.

GTL's financial history

[6] GTL's audited financial statements for the year ended 28 February 2015, which contain comparative figures for the preceding year, reflect the following:

- The company's fleet, at cost less accumulated depreciation, increased from R12 225 358 to R54 909 679. (The depreciation policy is to write off the cost of vehicles over five years.)
- Turnover increased from R93 637 284 to R122 112 735 and gross profit from R30 360 981 to R70 821 737.
- Operating expenditure increased from R25 467 384 to R63 595 037. The main sources of this increase were increased consulting expenses, contract expenses (which I take to be outsourcing), depreciation, equipment hire, insurance, vehicle expenses and salaries. Most of these increases would have been occasioned by the substantial increase in the fleet.
- Post-tax profit increased from R3 549 658 to R5 250 414.
- Retained income increased from R4 149 954 to R9 400 368.

[7] Esterhuizen acknowledges that the company is currently experiencing financial distress. He says GTL's audited financial statements for the year ended 28 February 2016 have not been finalised. He has attached to his founding affidavit a balance sheet of the company as at 31 July 2016. I would have expected him to be

able to present draft financial statements for the year ended 28 February 2016 and management accounts for the year to date.

[8] Mr Eloff criticised the draft balance sheet as being uncorroborated. There is merit in this criticism, particularly since the balance sheet seems to be inconsistent with other information contained in the founding papers. Taking the document at face value, the vehicles comprise the bulk of the fixed assets. The only other fixed assets are modest amounts in respect of computer and office equipment, furniture and fittings and workshop equipment and a Cape Town property at R3,357 million (elsewhere Esterhuizen says that this property was bought during the year ended 28 February 2015 for an amount of R3,8 million). The fixed assets total R164 259 563. The figure for vehicles has increased from R63,969 million as at 28 February 2015 to about R160 million, reflecting substantial further acquisitions. Esterhuizen says that the company now has 190 vehicles.

[9] The corresponding long-term liabilities to the vehicle financiers and to the property's mortgagee total R125 210 924, about double the borrowings as at 28 February 2015. Shareholder loan accounts of R2 300 349 take the long-term liabilities to R127 603 952.

[10] The balance sheet records current assets of R27 401 024, comprising modest cash amounts and a 'customer control account' totalling R26 154 023, which I take to be amounts owing by GTL's customers.

[11] The balance sheet records current liabilities of R54 365 061, the main components of which are a 'supplier control account' of R34 437 614, salaries and wages of R8 452 595, a VAT/tax control account of R5 256 910 and R5 628 639 owed to Absa. These headings are not satisfactorily explained. The 'supplier control account' presumably includes trade creditors such as the applicants. It may also include the current component of the vehicle finance contracts (ie the monthly debit orders). From other information in the papers it appears likely that the amount owed to Absa is in respect of an overdraft.

[12] These figures at face value indicate that total assets exceed total liabilities by R9 691 574 (which is the 'retained income' as at 31 July 2016) but that current liabilities exceed current assets by R26 964 037. This is consistent with a picture of factual solvency but commercial insolvency. However, the liabilities reflected in the draft balance sheet appear to be understated, being lower than figures furnished by Esterhuizen in the founding affidavit and in the liquidation scenario discussed later in this judgment. According to the latest information furnished in the replying papers, the amounts owing to Absa, Standard Bank and MBF total R160,25 million. The relatively modest amounts which the liquidation scenario reflects as owing to Wesbank and Toyota increase GTL's liability to the five financiers to R162,61 million. This suggests that GTL is not only commercially but factually insolvent.

[13] The only indications in the balance sheet of the company's recent operational performance are the entries for retained income. The opening figure is R10 817 417, which in context presumably means the retained income for the year ended 28 February 2016. Since retained income for the year ended 28 February 2015 was R9 400 368, this implies that the profit after tax for the year ended 28 February 2016 was R1 417 049. There is then recorded a loss for the year to date (March - July 2016) of R1 125 843, reducing the retained income as at 31 July 2016 to R9 691 574. This indicates a trend of declining profits in the year ended 28 February 2016 turning to losses in the current year.

Actual commercial or factual insolvency a bar to business rescue?

[14] It is convenient here to address an argument raised by the applicants against business rescue. Mr Eloff submitted that the current insolvency of a company is an absolute bar to granting business rescue. He submitted further that GTL was not only commercially but factually insolvent.

[15] For the legal part of this argument, Mr Eloff cited *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd & Another* [2013] ZAGPPHC 109 para 8 where Kgomo J said that it was clear from the definition of 'financially distressed' that a company could not be

placed in business rescue if it was already insolvent.¹ The statement in *Merchant West* is obiter. I respectfully disagree with it. The definition of 'financially distressed' in s 128(1) of the Companies Act 71 of 2008 creates a threshold. Current commercial or factual insolvency is not a prerequisite. This is understandable. But it does not follow that, because the company is already commercially or factually insolvent, and thus obviously financially distressed, it can no longer be the subject of business rescue. Such an interpretation would be inconsistent with s 5(1) read with s 7 of the Act, particularly paras 7(d) and (k), since it would oblige the court to liquidate a company even though there might be a reasonable prospect of rescuing it.

[16] It is clear from *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) Pty Ltd & Others* 2013 (4) SA 539 (SCA) para 7 that Brand JA regarded current commercial insolvency as constituting 'financial distress'. I see no reason why factual insolvency should be treated differently though it would not matter for present purposes whether factual insolvency was outside the scope of the definition because the two legs of the definition are disjunctive – one or other suffices. Naturally the existence and extent of commercial and/or factual insolvency may have an important bearing on the prospect of rescuing a company but they cannot be a bar to a rescue application.

[17] However, and even if the proposition in *Merchant West* were correct, this would not, as Mr Goodman pointed out, be a bar to business rescue since in terms of s 131(4)(a)(iii) the court can grant a business rescue order if it is just and equitable to do so for financial reasons, ie whether or not the company is 'financially distressed'.

[18] As to the factual part of the argument, there was the criticism that the balance sheet as at 31 July 2016 is uncorroborated. That criticism, as I have said, appears to be justified. For the rest, the argument rested on the proposition that ownership in the vehicles was reserved to the financiers and that it was thus wrong to treat them as assets. Since the vehicles were treated as assets in the audited financial

¹ See also *Sulzer Pumps (South Africa) (Pty) Ltd v O&M Engineering CC* [2015] ZAGPPHC 59 para 23; *Gormley v West City Precinct Properties (Pty) Ltd & Another* [2012] ZAWCHC 33 para 11.

statements, I take this to be in accordance with generally accepted accounting practice. Whether it is the correct approach to valuing assets and liabilities for legal purposes is debatable. The accounting approach might be justified on the basis that the company's long-term liability to the financiers is balanced by a right of use and a right to claim delivery in due course. It seems to me to be unrealistic to ignore the value which is created by paying off instalments towards the ultimate acquisition of assets.

[19] If, however, the law requires one to disregard the value of the vehicles, one could not then include the corresponding liabilities. If it were otherwise, many thriving businesses might be found to be factually insolvent. A tenant with a 10-year lease is not factually insolvent because he owes all the rent but does not own the property. One would probably regard the tenant's obligation to pay each month's rent as reciprocal to the landlord's continued obligation to provide occupation. If on this basis one disregarded the value of the vehicles and the corresponding liability to the financiers, GTL would be factually insolvent because its only assets and liabilities for solvency purposes would be the current assets and liabilities, and the latter exceed the former. Even if this is so, for the reasons I have stated it is not a bar to business rescue.

Causes and effects of GTL's financial distress

[20] Esterhuizen attributes the company's current financial distress to the following: (i) growing too fast without sufficient management processes and controls; (ii) poor financial management procedures; (iii) fuel theft; (iv) failure to invoice promptly. He says corrective measures have been implemented. Additional administrative staff have been employed and the accounting system has been upgraded. Outsourcing has been significantly reduced in order to improve GTL's margins. He describes certain measures taken to combat fuel theft.

[21] The applicants' deponent, Mr Patrick Brown ('Brown'), alleges that on Esterhuizen's own version he lacks the ability to manage the company and has been guilty of reckless if not fraudulent conduct. I think Brown's criticisms are overstated. The company has operated profitably for some years. The audited

financial statements as at 28 February 2015 and the balance sheet as at 31 July 2016 show that the company has undergone rapid expansion in the last two years. Even if one disregarded the recent balance sheet, it is not in dispute that there has since February 2015 been a large increase in GTL's fleet. Although Esterhuizen acknowledges that he has not kept a proper grip on the expanded business, he has on his version identified weaknesses and taken corrective measures. I do not think it fair to say that this is a business which he is not capable of managing. At any rate one cannot say that his presence as the company's controller justifies the conclusion that there is no reasonable prospect of rescuing the company.

[22] The result of GTL's currently straitened circumstances is that certain trade creditors who on Esterhuizen's view are not critical to the company's operations have not been paid. The applicants fall into this class. The critical creditors, according to Esterhuizen, are the financier and Avis Fleet, Equestra and Scania. Scania until recently leased vehicles to GTL. The precise role played by Avis Fleet and Equestra is unclear. If GTL defaulted on its obligations to the vehicle financiers, they would repossess the vehicles and GTL's business would grind to a halt. Esterhuizen says that GTL has continued to honour the monthly debit orders in favour of the financiers. It is not in arrears to Equestra or Avis Fleet. The company has also continued to pay its employees.

[23] In his founding affidavit Esterhuizen said that the non-critical creditors, in respect of whom GTL was in arrears, totalled R23 012 190. As noted, the applicants make up R3 381 582 of this amount. Esterhuizen annexed a schedule, "GE5", listing the non-critical creditors under three headings: 'transport suppliers', 'expense suppliers' and 'statutory expenses'. Included in the 'statutory expenses' were SARS (R1 million), provident fund contributions (R1 849 184) and bargaining council contributions (R1 323 424). This suggests that although GTL has continued to pay the amounts due directly to employees, it is not honouring related employment costs.

[24] In his replying affidavit Esterhuizen has provided revised information about the non-critical creditors (annexure "GE20"). He no longer includes the 'statutory expenses' in this category and discloses that GTL owes SARS R7,09 million. The

non-critical creditors (now limited to transport suppliers and expense suppliers) total R17 336 402. The same two classes totalled R16 209 008 in “GE5”.

Three key aspects

[25] There are three key aspects in assessing Esterhuizen’s proposal for rescuing the company. The first is his contention that the non-critical creditors would receive no dividend in a liquidation. The second, which features in the draft plan attached to his founding affidavit, is that the claims of non-critical creditors will be compromised at 40 cents in the rand. The third is his projection of increased revenue and profits in the year ahead. Esterhuizen is supported in his assertions by the proposed business rescue practitioner, Mr Daniel Terblanche (‘Terblanche’). Terblanche is an associate director in Deloitte Restructuring Services. He has considerable experience as a liquidator/trustee and more recently as a business rescue practitioner.

The liquidation scenario

[26] I start with the liquidation scenario. The present case is not one where the person proposing business rescue says that business rescue will provide a better way of realising the business or its assets than liquidation. The proposed business rescue has as its object that the company should continue trading and be restored to solvency. Accordingly, in considering the costs of business rescue as against liquidation, one is not simply concerned with the differing costs of effectively winding up the business but with the costs associated with attempting to save it on the one hand and wind it up on the other.

[27] If he is appointed as GTL’s business rescue practitioner, Terblanche has agreed to a fee of R2000 p/h and a success fee of R500 000. The success fee will become payable once the rescue plan has been adopted and substantially implemented within the agreed time line. Terblanche has not indicated how many hours he expects to spend on the assignment. The process will last until 31 July 2017 when the last payment to the non-critical creditors will be made, a period of approximately ten months. If one assumes a 22-day working month and that he works eight hours p/d over the first six months and four hours p/d over the remaining

four months, the hourly fee would come to R2,816 million. This probably overstates the demands on his time. There would also be the success fee.

[28] Terblanche has prepared a liquidation scenario, “GE8”, which assumes that the vehicles will be realised by the liquidator, with the financiers as secured creditors (see s 84 of the Insolvency Act 24 1936). For each encumbered vehicle asset account, he assumes liquidators’ fees of 10% plus VAT, auctioneering fees of 10% plus VAT and modest amounts for advertising and valuations. In respect of the mortgaged property, the liquidators’ fee is 3%. The fees and costs were not placed in issue in the opposing papers. They would be very much more than the business practitioner’s fees.

[29] The total assumed forced sale proceeds of the vehicles are R114,8 million. This represents a discount of about 28% as against the historic cost less depreciation (about R160 million). Based on GTL’s liability to the financiers as provided to Terblanche by management, each encumbered vehicle asset account reflects a substantial shortfall. The total shortfall in respect of vehicles is R42 520 102. Absa’s vehicle shortfall of R20 575 614 is, however, reduced because it has further security by way of a mortgage bond over the Cape Town property, a cession of debtors and a notarial bond. This reduces Absa’s shortfall to R11 707 994 and the overall shortfall to R33 652 482.

[30] Most of the secured debt is owed to Absa, Standard Bank and MBF. In “GE8” these liabilities, as provided to Terblanche by management, are recorded as being R49 107 114, R30 844 521 and R59 719 513 respectively. In the founding affidavit Esterhuizen, despite confirming the information contained in Terblanche’s liquidation scenario, provided different figures: R51 362 030 (Absa), R37 755 650 (Standard Bank) and R61 661 443 (MBF). According to information provided in Esterhuizen’s replying affidavit and in MBF’s intervention affidavit, the liabilities to Absa and MBF are in fact R55,89 million² and R76,95 million respectively. Esterhuizen says that the liability to Standard Bank is R27,411 million. It is thus apparent that, on the assumed

² The total facility is R59 756 065.

forced sale proceeds of the vehicles, the shortfall will be more than reflected in “GE8”.

[31] Esterhuizen and Terblanche have not explained how they arrived at the forced sale prices. No valuations have been furnished. It is perhaps not unreasonable to assume that in liquidation the forced sale proceeds of the vehicles will be at a discount to market value. Whether it will be as much as (or more than) 28% I do not know. If one recalculated the liquidation scenario assuming a 10% discount, one would have forced sale proceeds of R144 million. After allowing liquidators’ fees and auctioneering fees at 10% each plus VAT and the same valuation and advertising costs as in “GE8”, the net proceeds available to the vehicle financiers would be about R111 million. This would still leave a considerable shortfall. Any surplus from the Cape Town property would go to Absa. (“GE8” appears to assume that there is nothing owing on the Cape Town property so that the full proceeds of the property will be available to reduce Absa’s shortfall in respect of vehicles. This is inconsistent with the balance sheet as at 31 July 2016 which reflects a mortgage liability of R2 450 064. The identification of Absa as the mortgagee is also at odds with Esterhuizen’s statement in the founding affidavit that the mortgagee is First National Bank.³)

[32] Brown criticised the liquidation scenario for assuming that only 65% of the ceded book debts would be recoverable in liquidation. There is force in this criticism, particularly since Esterhuizen says that most of GTL’s customers are blue-chip companies. However this assumption does not have a material effect. The liquidation scenario assumes ceded debtors of R9 870 776. If one assumed full recovery, the net additional amount available after allowance for further liquidators’ fees would only be R3 060 927. This would go to Absa. Even on the basis that all vehicles, including those financed by Absa, achieved 90% rather than 72% of their book value, Absa’s shortfall would be such as to exhaust its additional security in the form of the mortgage bond, the cession of debtors and the notarial bond.

³ Para 67.2

[33] There is another aspect of the liquidation scenario calling for comment. The book debtors ceded to Absa are said to have a face value of R9 870 776. This does not seem to be all debtors. There is evidence that Scania has a cession of some debtors. Furthermore the balance sheet as at 31 July 2016 has a 'customer control account' of R26 154 023 which I take to be trade debtors. If that is so, then, subject to any claim which Scania may have, there ought to be an additional R16 283 247 available in the liquidation scenario. Esterhuizen did not satisfactorily explain this omission in reply. On the assumption that this additional amount were available in liquidation, general liquidation costs and certain preferent creditors such as SARS and Absa under its notarial bond would rank ahead of concurrent creditors (ss 97 – 102 of the Insolvency Act). If anything were left, the other financiers would have a substantial shortfall and would thus rank with the non-critical creditors. On the probabilities the non-critical creditors would recover less than 40 cents in the rand.

The proposed compromise

[34] I turn now to the proposed compromise of non-critical creditors' claims. Esterhuizen's proposed plan is that they will receive 40 cents in the rand which will be paid in quarterly instalments over the period October 2016 to July 2017. These payments will be funded by the company's operations and are thus tied up with Esterhuizen's revenue projections which I shall consider presently. Esterhuizen contends that if GTL gets relief by way of this compromise, it will be able to meet its liabilities to the critical creditors as they fall due and to fund its future operational expenses. Based on the information in the founding papers, the relief would be about R13,8 million (60% of R23 million) together with the cash flow advantage of staggering the interest-free dividends of R9,2 million (40% of R23 million) over a ten-month period

[35] Mr Eloff argued that a business rescue plan may not permissibly incorporate a compromise with creditors. He submitted that a compromise may only be achieved by way of ss 155. I reject this argument. Section 150(2) of the Act requires that the proposals in a business rescue plan must include the extent to which the company is to be released from the payment of its debts. This provision read with s 154 makes it clear that a business plan may incorporate elements of a compromise with

creditors. The business rescue mechanism would be sadly deficient if it were otherwise. And it would be no answer to the deficiency to say that where a company is in business rescue any compromise needed to restore it to solvency should be achieved under s 155 since sub-section one of the latter provision excludes the operation of s 155 in the case of companies in business rescue.

[36] There may, however, be a different deficiency in the business rescue provisions of the Act. In the case of a s 155 compromise, creditors vote according to classes. The compromise must be approved by at least 75% in value of each class. In the case of business rescue, by contrast, the only requirement for approval is that the plan is supported by the holders of more than 75% of the creditors' voting interests actually voted and by at least 50% of the independent creditors' voting interests actually voted (s 152(2)). Section 131 does not confer on the court a power to create classes of creditors or to vary the provisions of the Act relating to the approval of plans. Nobody in the present case suggested that I had such a power. The absence of such a provision is anomalous, particularly since a plan which affects the rights of the holders of any class of the company's securities requires class approval (s 152(3)(c)).

[37] This state of affairs means that similarly placed creditors could be differentially, even unfairly, treated and that a plan which is advantageous to the majority of creditors might be approved even though it is disadvantageous to a minority. I am not concerned with the remedies which minority creditors might enjoy, after the commencement of business rescue, if such a plan were approved. At this stage the company is not yet in business rescue. I am asked to place it in business rescue on the basis that a plan along the lines proposed by Esterhuizen might be adopted and might restore the company to solvency. If the proposed plan is unfair, this would at least be relevant to the exercise of the court's discretion in deciding whether to place the company in business rescue.

[38] To give an extreme example, suppose that all the creditors of a distressed company are concurrent and that the company could be restored to solvency if it were relieved of 20% of the claims. This could be achieved by requiring all creditors to write off 20% of their claims or by a plan in terms whereof named creditors with

claims constituting 20% of the total were required to write off all their claims. I can hardly imagine that a court would allow a plan of the latter kind to go forward just because it would be supported by the majority.

[39] The vehicle financiers, who like the non-critical creditors are independent creditors, will constitute more than 75% of the creditors' voting interests and more than 50% of the independent creditors' voting interests. They will thus be in a position to procure the approval of the proposed plan. It is currently proposed that the non-critical creditors will receive 40 cents in the rand and that the critical creditors will continue to receive payment in full. It would not occasion surprise if the critical creditors were to approve the plan. If the plan successfully restores the company to profitability, they will receive payment in full. If after the implementation of the plan the company were to fold, they would still have the fallback of a liquidation, this time without competition from the non-critical creditors.

[40] In the present case the fact that only the non-critical creditors' claims will be compromised is justified by counsel for Esterhuizen and MBF on three bases: (i) that the treatment is not in truth differential, since all claims in arrears will be compromised; (ii) that the support of the critical creditors is necessary to enable the company to remain viable; (iii) that those critical creditors who are vehicle financiers are secured creditors and would receive all the proceeds from a liquidation. I note that these justifications, if valid, would apply even if after investigating the company's affairs the practitioner were to find that GTL could only be restored to solvency if the dividend to non-critical creditors was reduced to 20 cents or perhaps to nil.

[41] I reject the first justification. The fact that certain creditors' claims are in arrears itself arises from differential treatment. In the past number of months Esterhuizen has chosen to ensure that critical creditors are paid while non-critical creditors are not.

[42] The second consideration likewise does not justify differential treatment. There is no reason why the company's restoration to solvency should be subsidised by creditors whom Esterhuizen regards as non-critical. It is not so much that the

goods and services provided by the non-critical creditors are not critical to GTL's operations but that Esterhuizen probably believes that he can get similar goods and services from other suppliers after starting with a clean slate. Furthermore the amounts which GTL has failed to pay non-critical creditors might be very critical to the survival of those creditors. This is illustrated by the desperate email which Mr Khan, the owner of the third applicant, wrote to SA Breweries on 15 July 2016 regarding GTL's non-payment for transport services provided to GTL in the first three months of the year.⁴

[43] As to the third consideration, it will be apparent from my discussion of the liquidation scenario that in liquidation the vehicle financiers, like the non-critical creditors, will suffer a substantial loss. Their concurrent claims will exceed those of the non-critical creditors. Yet the proposed plan, if it works, will not merely result in the vehicle financiers recovering what they could in any event have recovered in the liquidation; they will receive every cent of their claims on time, including the full profit on their transactions with GTL. The non-critical creditors, by contrast, are expected to accept a 60% reduction in the face value of the claims and to receive the remaining 40% in instalments without interest over ten months, despite the fact that their claims have been due and payable for some months.

[44] I do not see how this can be regarded as fair. It is no answer to say that in terms of the plan the non-critical creditors will get more than on liquidation. The same is true of the financiers. The fact of the matter is that the plan envisages that the vehicle financiers will get 100 cents in the rand on the portion of their claims which would be concurrent in liquidation. Furthermore, the fact that GTL is not currently in arrears to the vehicle financiers and to the other critical creditors must be the consequence of the fact that the critical creditors have been preferred over the non-critical creditors in recent months. In a liquidation the liquidator might be in a position to impeach some of these payments.

[45] It may be, in the light of the liquidation scenario, that a plan which provides for a more equitable distribution of the loss currently to be borne by the non-critical

⁴ Page 95 of the liquidation papers.

creditors could be devised. My rough calculations indicate that the money which Esterhuizen proposes to save for the company by compromising the non-critical creditors at 40 cents in the rand could be saved by an alternative scheme in which all creditors, including the financiers, write off 6% - 8% of their claims. But that is not the plan which Esterhuizen proposes and there is no evidence that he has discussed it with the financiers. There is no evidential basis for saying that such a plan is likely to receive the requisite approval.

[46] Accordingly, and even if the proposed plan would restore the company to solvency, I would be disinclined to place the company in business rescue. Quite apart from this consideration, however, I have considerable difficulty with the projections on which the plan is premised. It is to these that I now turn.

The projections

[47] Annexures “GE6” and “GE7” to Esterhuizen’s founding affidavit contain his projections for the company’s revenue and expenditure over the period August 2016 to February 2017. The revenue is divided into three categories, ‘existing revenue’ (revenue from existing contracts), ‘new contract revenue’ (additional contracts with existing customers), and ‘other income’. The ‘existing revenue’ is projected to grow from R18,8 million in August 2016 to R28 060 750 in February 2017. This is a 49% increase over seven months. The projected ‘existing revenue’ over the seven-month period is R167 380 500. The ‘new contract revenue’ starts at R1 million in September 2016 and jumps to R7,5 million in February 2017. The total ‘new contract revenue’ for the seven-month period is R14,5 million. The ‘other income’ over the seven-month period is R33 million. Revenue from all sources is thus projected to be R214 880 500.

[48] Over the same seven-month period expenses are projected to be R199 883 813. The expenses include the monthly debit orders in favour of the financiers.

[49] On these figures there would be a profit of R14 996 687. It is from this surplus that GTL would pay the dividend to non-critical creditors, though “GE6” assumes a compromise of 30 cents rather than 40 cents.

[50] In his founding papers Esterhuizen provided virtually no evidence in support of these projections. This was pointed out in the opposing affidavit. In his replying affidavit Esterhuizen purported to explain the projections. In regard to ‘existing revenue’, he attached a spreadsheet, “GE21”, comparing revenue by customer for the financial year ended February 2016 and for the six months from March to August 2016. He included a projection for the period September 2016 to February 2017. The projected figures, he said, had been obtained by applying a 6% increase to the average six-monthly revenue for the period September 2015 to February 2016. This is traditionally the busier period for GTL. Historically, Esterhuizen said, the company’s customers have agreed to a ‘standard increase’ of 6%. Since the revenue for the period September 2015 to February 2016 averaged R17 341 873 p/m, he projected R18 382 386 p/m for the period September 2016 to February 2017.

[51] There are several difficulties with Esterhuizen’s explanation (quite apart from the fact that it was contained in his replying affidavit). Since he was purporting to explain his projection for ‘existing revenue’ in the founding affidavit, one would expect a correlation between “GE6” and “GE21”. The annexures are, however, inconsistent with each other. “GE6” projects substantially more ‘existing revenue’ than “GE21”. According to the later annexure, the ‘existing revenue’ over the seven-month period August 2016 to February 2017 would be R125 749 151 (August 2016 actual and September 2016 - February 2017 projected). “GE6”, by contrast, projects ‘existing revenue’ for the same period of R167 380 500. This is a difference of some R41,63 million. Even if the ‘new contract revenue’ and ‘other income’ were accurate, the profit of about R15 million projected in “GE6” would become a loss of R26,63 million. GTL would be unable to pay any dividend to the non-critical creditors and would fall into arrears with its critical creditors.

[52] Then there is the fact that the actual August 2016 ‘existing revenue’ according to “GE21” was R15 454 836. In “GE6”, at a time when Esterhuizen was

still projecting the 'existing revenue' for August 2016, the figure was R18,8 million, indicating a slippage in the very first month of R3,34 million.

[53] I raised these matters with Mr Goodman in argument. He returned to them in reply. I gathered that he had certain instructions which might explain the discrepancies but he said that on the papers all he could point out was that "GE6" listed certain 'existing revenue' customers whose names did not appear on "GE21". This is true. Conversely, though, there are certain 'existing revenue' customers on "GE21" whose names do not appear on "GE6". There are two possibilities. If Esterhuizen was seeking to explain the 'existing revenue' projections made in his founding affidavit (which is what his replying affidavit on a natural reading indicates), the explanation does not come close to justifying the projections in "GE6". If, on the other hand, Esterhuizen was not comparing like with like, there is no explanation at all. And on either approach, the projections in "GE6" cannot be reconciled with a mere 6% increase in average monthly revenue in comparison with the same period in the preceding year. The projections in "GE6", with their massive monthly increases, bear no relation to the pattern of 'existing revenue' income for the period August 2015 – February 2016.

[54] In regard to 'new contract revenue' and 'other income', Esterhuizen in the replying affidavit provided generalised information but did not attach any further schedules explaining how he had arrived at the projections contained in "GE6".

[55] In regard to the projected expenditure ("GE7"), certain line items which appear in the audited financial statements are missing. These include bad debts, contract expenses and depreciation. Bad debts were not very large in the financial year ended 28 February 2015 (R292 879) but with a substantial increase in projected income one would expect at least some bad debt, particularly since Esterhuizen and Terblanche saw fit to assume only 65% recoverability in the liquidation scenario. Esterhuizen's revenue projections assume that all customers pay promptly and in full.

[56] Contract expenses (which I take to be outsourcing expenses) amounted to R7 592 911 in the financial year ended 28 February 2015. Esterhuizen says that he

has taken decisive steps to reduce the amount of outsourcing. He has instructed staff that there is to be no outsourcing without his prior authorisation on a case-by-case basis. He expected outsourcing to cost only R690 000 in July 2016. Even so, it does not appear realistic to make no allowance at all for outsourcing expenditure over the period August 2016 to February 2017. And Esterhuizen's resolve to minimise outsourcing may take strain following the recent termination of GTL's relationship with Scania (more of this below).

[57] Esterhuizen may have disregarded depreciation because it is a non-cash flow item. I nevertheless observe that depreciation is in the nature of a prudent provision for the replacement of equipment with a limited lifespan. Depreciation was R7,12 million during the year ended 28 February 2015. With the more than doubling of the fleet's size since then, the depreciation allowance will increase correspondingly. If it were taken into account, GTL might well be loss-making over the period August 2016 to February 2017 even if one accepted Esterhuizen's revenue projections.

[58] Another concern is that the projections in "GE6" and "GE7" only run to February 2017. To have a 12-month picture, one would need to carry the projections forward to the end of July or August 2017. The period March-August is, according to Esterhuizen, the quiet period, so projected turnover in that period would be lower. While some operational expenditure (eg fuel) might be variable, the debit orders in favour of the financiers, salaries and so forth will still have to be met. Furthermore, the proposed plan envisages that the non-critical creditors will be paid in instalments of R2,3 million in each of April and July 2017. There is no indication that GTL will keep its head above water in this period.

[59] I repeat a point I made earlier, which is that I would have expected Esterhuizen to be able to furnish draft annual financial statements or management accounts for the year ended 28 February 2016 and for the period March - July 2016. The retained income entries in the balance sheet as at 31 July 2016 could not exist without an income statement calculating GTL's post-tax profit/loss for the year ended 28 February 2016 and for the current year to date. Yet all that Esterhuizen has provided, and this in reply, is a spreadsheet with the turnover from some but perhaps not all the important customers. Why is there no proper income statement

including cost of sales and operating expenditure? One cannot help but suspect that trading results for period post-dating February 2015 have been held back because they would have made unpleasant reading and cast serious doubt on the projections.

[60] There is no evidence that if GTL fails to meet the projections it will be able to secure further funding. In the replying papers Esterhuizen says, based on information confirmed by Terblanche, that in business rescue proceedings creditors holding cessions of debtors often allow the company to collect some or all of the debtors to fund operations. That is not the point. Esterhuizen's projections already assume that GTL will, despite the cession of debtors, receive all the projected revenue. The difficulty will arise if expenditure exceeds revenue. I have already indicated why this might well be the case.

[61] Apart from these material problems with the projections of revenue and expenditure, the liabilities of GTL seem to be a moving target. I leave aside for the moment the substantial differences between the liabilities to Absa and MBF contained in the founding and replying papers. The more important figures in that regard are the monthly debit orders, where Esterhuizen's information may well be reliable.

[62] However, I have pointed out the difference between the figures for non-critical creditors in the founding and replying papers. The figures for 'transport suppliers' and 'expense suppliers' have increased from R16 209 008 to R17 336 402. Although the creditors to be compromised have been reduced from R23 021 190 to R17 336 402, this is not because the liabilities of the company have decreased but because the creditors listed under 'statutory expenses' cannot be compromised. Esterhuizen has not said in the replying papers that the company does not still owe the amounts reflected in "GE5" in respect of provident fund and bargaining council contributions. The amount owing to SARS has increased from a projected R1 million to R7 million. This suggests that the 'statutory expenses' exceed R12,8 million (as against R6,6 million in "GE5"). These amounts will have to be paid. Esterhuizen does not say that his projections in the founding papers make provision for payment in full of these liabilities. On the contrary, in the founding papers these expenses (at

the incorrect amount of R6,6 million) formed part of the arrears creditors whose claims were to be compromised. If R12,8 million has to be paid to the statutory creditors during the period of the projection, this will use up almost all of the profit predicted by Esterhuizen in “GE6”.

[63] If the non-critical creditors to be compromised total R17,336 million rather than R23 million, a dividend of 40 cents will now save the company R10,4 million rather than R13,8 million – R3,4 million less than envisaged in the founding papers. The replying papers do not explain whether this reduced saving will be adequate. Given the increased liability in respect of statutory expenses, this is unlikely.

[64] In the plan attached to the founding affidavit Scania is treated as a critical creditor. In the opposing papers Brown set out certain developments regarding Scania. On the day the business rescue application was delivered Scania’s attorneys wrote to GTL stating that the bringing of the business rescue application without seven days’ prior notice to Scania was a breach of the rental agreements between Scania and GTL. An alleged default judgment taken against GTL which had remained un-rescinded for more than ten days was also said to be a breach. Scania elected to cancel the agreements and demanded the return of its vehicles. On the same day Scania’s attorneys wrote to SA Breweries and Africa Amines notifying them that Scania had elected to perfect its cession of book debts and that they should henceforth make payment to Scania.

[65] In his replying affidavit Esterhuizen alleged that Scania was not entitled to cancel the rental agreements because he rather than GTL had brought the business rescue application and because no default judgment had been granted against the company. He also anticipated that if GTL were placed in business rescue Scania would be prepared to permit the company to continue renting the vehicles.

[66] At the commencement of argument Mr Goodman handed up a further affidavit providing updated information regarding the attitude of affected parties. This affidavit had been served late the previous day. Mr Eloff handed up a responding affidavit. In his supplementary affidavit Esterhuizen said nothing about Scania’s position. In Brown’s supplementary answering affidavit he took Esterhuizen to task

for his failure to disclose recent developments regarding Scania. From Brown's affidavit it appears that on 12 September 2016 Scania served an urgent application (issued in the Cape Town Magistrate's Court) for the return of its ten vehicles. An order for the return of the vehicles was issued on 13 September 2016.

[67] Brown attached Scania's application to his supplementary affidavit. From the attached application it appears that Esterhuizen had expressed a desire to continue GTL's relationship with Scania. The latter was willing to do so subject to GTL's providing certain financial information. GTL failed to do so. Scania also alleged that its debit order of 3 September 2016 was returned by GTL's bank. Esterhuizen subsequently claimed to have made payment on 5 September 2016.

[68] Mr Goodman handed up yet a further affidavit with Esterhuizen's explanation for the alleged omission, namely that the omitted material was not relevant. This is unconvincing. Esterhuizen confirms the dishonouring of the debit order but says payment was subsequently made. He confirms that an order for the return of the ten vehicles was made. This was by agreement with each side to bear its own costs.

[69] As far as I can see, the ten Scania vehicles are not listed in the balance sheet as at 31 July 2016, presumably because the rental agreements did not make provision for GTL's ultimate acquisition of ownership. There is no evidence that GTL owes Scania arrear rent, presumably because Esterhuizen has treated Scania as a critical creditor. But until recently the ten vehicles were used by GTL in its operations and, as noted, the business rescue plan treated Scania as a critical creditor. Esterhuizen's projections in "GE7" include monthly rental to Scania. The fact that GTL has now had to return Scania's vehicles must inevitably have some effect on its business. Unless and until GTL can obtain the use of alternative vehicles, its turnover will be reduced or it will need to resort to outsourcing.

[70] All things considered, Esterhuizen has not established reasonable grounds for a belief that the company will achieve the projected turnover and profits on which the rescue plan depends (see *Oakdene* para 27). Something more than a prima facie case or arguable possibility is needed. Naturally projections involve an element of speculation but here they are so divorced from a factual foundation that they do

not provide a basis on which the court can assess this company's return to solvency.

The attitude of affected parties

[71] Esterhuizen's supplementary affidavit evidence provides evidence about the attitude of affected parties. Most employee groupings have indicated their support for business rescue. However UASA, a union representing 102 staff members, has reported difficulty in obtaining member support, listing various grievances, which include outstanding monies not paid over to the provident fund and the bargaining council. They do not support business rescue as they believe they do not have the guarantee that they will receive their wages or that the company will be able to secure the necessary funds. Esterhuizen's reply to UASA in regard to the provident fund grievance is that these amounts are paid on a monthly basis. In regard to the bargaining council, he says that since GTL pays employees when they off sick or on leave, they are not prejudiced. The explanation regarding the provident fund does not seem to be consistent with the treatment of these contributions in "GE5" as part of the arrears or with Esterhuizen's projected expenditure, "GE7", which includes instalments towards arrear provident fund contributions. The explanation regarding the bargaining council is obviously unsatisfactory.

[72] Despite UASA's reservations, I accept that saving the company would be better for employees than its liquidation.

[73] As regards the financiers, MBF has formally endorsed business rescue by intervening to support it. Absa has indicated informally that it does not think that liquidation would be 'ideal'. There is no indication of the attitude of the other financiers. Given the terms of the proposed business rescue plan, it would not surprise me if the financiers were content to go along with it.

[74] As to the non-critical creditors, the applicants, whose claims total R3,38 million out of the revised figure of R17,336 million, oppose business rescue. In the recent affidavit Mr Esterhuizen has furnished information indicating that five creditors, whose claims according to "GE20" total R1 098 364, support business

rescue. The remaining non-critical creditors, who are very numerous but whose claims are mostly modest, have not responded.

[75] Mr Esterhuizen as the company's sole shareholder supports business rescue. It is unfortunate, however, that instead of assessing business rescue in good time he waited until the applicants brought a liquidation application. If they had not done so he might have continued just to fob them off. Instead we have a reactive business rescue application showing all the signs of having been prepared in haste.

Conclusion

[76] Although affected parties are entitled to be heard in relation to a business rescue application, and although their attitude is relevant to the exercise of the court's discretion, the existence of a reasonable prospect of rescuing the company is a factual question, albeit involving a value judgment. If the court concludes that reasonable grounds for believing that the business can be rescued have not been established, the court cannot grant the application, even though many affected parties may support business rescue.

[77] In the present case reasonable grounds for a belief that GTL can be rescued have not been established. Esterhuizen's projections, on which the plan depends, are on the face of it unreliable, contradictory and not based on reasonable grounds. In any event, I think the manner in which only non-critical creditors' claims are to be compromised is fundamentally unfair and objectionable.

[78] For these reasons the application for business rescue must fail and the company must be placed in provisional liquidation. This does not mean that a renewed application for business rescue with better evidence, and taking into account the concerns I have expressed about the fairness of the current plan, cannot be brought: see *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA). Indeed I think it would be very desirable for the financiers, who are the largest creditors and have the necessary in-house expertise, to investigate, with the cooperation of the provisional liquidator and management, the current financial position of the company

with a view to making realistic projections and presenting a more substantiated and equitable case for business rescue.

[79] Mr Goodman and Mr Harms painted a grim picture of what will happen in the event of liquidation – the immediate repossession of all vehicles and the cessation of the company's business. The financiers may well have the right to follow this course. In view, however, of the liquidation scenario presented by Terblanche, I would expect the financiers, behaving rationally, at least to investigate the financial position of GTL more fully before taking such drastic action, either with a view to supporting a renewed business rescue application or at least assessing whether their best interests would not be served by allowing the liquidator to trade and sell the business as a going concern.

[80] The applicants, having obtained copies of GTL's contracts with financiers in terms of rule 35(12), have made the point that, except in the case of Standard Bank, business rescue, like liquidation, is an event entitling the financiers to cancel. An order placing GTL in business rescue would not deprive the financiers of this right (see *Murray NO & Another v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA)). Neither course of action is thus risk-free for GTL.

[81] In regard to costs, MBF's intervention did not add materially to the applicants' costs. I think that MBF should bear its own costs. Esterhuizen must bear the applicants' costs of opposing the business rescue application. Since the opposed proceedings focused on the business rescue application rather than the liquidation application, the applicants' costs of seeking GTL's liquidation should be allowed in the liquidation on an unopposed basis. I indicated to Mr Eloff that if I were to dismiss the business rescue application I might disallow part of the costs of preparing the opposing affidavit on the basis that it was unnecessarily prolix and repetitive and contained inappropriate rhetorical and argumentative matter and exaggerated assertions. Mr Eloff, who came on brief after the opposing papers were filed, left this in my hands.

[82] I make the following order:

- (a) The business rescue application brought by the first intervening party and supported by the second intervening party is dismissed.
- (b) The first intervening party is directed to pay the applicants' costs of opposing the business rescue application, including the costs of two counsel and the wasted costs of 12 June 2016, save that 50% of the costs which would otherwise have been allowed on taxation in connection with the preparation of the applicants' opposing papers will be disallowed.
- (c) The second intervening party shall bear its own costs.
- (d) The respondent is placed in provisional liquidation.
- (e) Interested parties are called upon to show cause, on Thursday 26 October 2016 at 10h00 or as soon thereafter as counsel may be heard:
 - (i) why the respondent should not be placed in final liquidation;
 - (ii) why the applicants' costs should not be costs in the liquidation.
- (f) Service of this order shall be effected:
 - (i) by the sheriff on the respondent, employees, trade unions and the South African Revenue Service;
 - (ii) by publication once in the *Sunday Times* and *Rapport* newspapers.

ROGERS J

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