IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: **3058/2023**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

(Registration Number: 1962[…])

and

FRANLESE BOERDERY (PTY) LTD First Respondent

(Registration Number: 2018[…])

SUMAIYA KHAMMISSA N.O. Second Respondent

[In her capacity as appointed Business Rescue Practitioner of **Franlese Boerdery (Pty) Ltd**]

ANY AFFECTED PERSONS RELATING TO FRANLESE BOERDERY (PTY) LTD Third Respondent

RUCA BOERDERYE (PTY) LTD Fourth Respondent

CORAM: HEFER AJ

HEARD ON: 8 DECEMBER 2023

<u>DELIVERED ON</u>: 25 JANUARY 2024

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[1] First and Fourth Respondents applied for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of this division, against part of the judgment and order granted by this Court during November 2023.

[2] The Applicant approached the Court to obtain an order in terms of which the business rescue proceedings in respect of the First Respondent, to be converted into liquidation proceedings.

[3] In opposing the application, First Respondent together with one of the creditors of the First Respondent, being Ruca Boerderye (Pty) Ltd (**"Ruca"**), launched a counter-application to the effect that in essence the vote by the Applicant against the adoption of a revised business rescue plan be declared inappropriate and set aside in terms of Section 153(7) of the Companies Act 71 of 2008.

[4] After hearing arguments, an order was indeed granted in terms of which the business rescue proceedings were converted into liquidation proceedings, the counter-application in regards to the inappropriateness of the vote was dismissed and the First Respondent was provisionally liquidated.

[5] In **Matoto v Free State Gambling & Liquor Authority and Others**[1], Daffue J, with reference to Section 17 of the Superior Courts Act 10 of 2013, stated as follows:

> *"[5] There can be doubt that the bar for granted leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now the use of the word 'would' indicates a measure of certainty that another court will differ from the court which judgment is sought to be appealed against. See Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016). The use by the legislator of the word 'only', emphasized supra, is a further indication of a more stringent test."*

[6] In terms of Section 17(1), leave to appeal may only be given where the judge or judges concerned are of the opinion that

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard.

[1] (4629/2015) [2017] ZAFSHC 80 (8 June 2017)

[7] As far as the second ground is concerned, namely whether there is a compelling reason why an appeal should be heard, in **Minister of Justice and Constitutional Development v Southern Africa Litigation Centre**[2], the Supreme Court of Appeal stated:

> *"That is not to say that merely because a High Court determines an issue of public importance it must grant leave to appeal. The merit of the appeal remains vitally important and will often be decisive."*

[8] Mr *Thompson*, appearing on behalf of First and Fourth Respondents, at the initial hearing as well as during the application for leave to appeal, relied to a large extent on the decision of the Supreme Court of Appeal in **Firstrand Bank Ltd v KJ Foods CC**[3]. In this case the main issue was whether Section 153(1)(a)(ii) of the Companies Act 71 of 2008 (**"the Act"**) or Section 153(1)(b)(i)(bb), read with Section 153(7) entailed that the Court must first establish whether the vote was inappropriate before invoking its discretion under Section 153(7) to set it aside.

[9] In terms of a majority judgment, Section 153(1)(a)(ii) and Section 153(1)(b)(i)(bb) were found to be inextricably linked to Section 153(7). On an application to set aside the result of a vote in terms of any of these subsections, the Court was enjoined by Section 153(7) to determine only whether it was reasonable and just to set aside the particular vote, taking into account the

[2] 2016 (3) SA 317 (SCA) at 330 C
[3] 2017 (5) SA 40 (SCA)

factors set out in Section 153(7)(a) to (c) and also all circumstances relevant to the case, including the purpose of business rescue in terms of the Act. Put differently, in an application on the grounds that its result was inappropriate, the vote would be set aside if it were reasonable and just to do so in terms of Section 153(7). This entailed a single enquiry and value judgment.

[10] Mr *Thompson*, *inter alia*, argued that the Court erred in holding that *"… the interest of the party who voted against the proposed business plan is paramount"*.

[11] Although the word "paramount" may have been putting it too strong, it is clear that Section 153(7) confers on a Court a discretion to order that the vote on a business rescue plan be set aside if it is satisfied that it is reasonable and just to do so having regard to the factors listed in Section 7(a) to (c).

> *"The factors referred to apply only in respect of the person or persons who voted against the proposed business rescue plan."*[4]

[12] Those factors are specified in Section 153(7) and in that sense, it is those factors which needs to be considered in respect of a person who voted against the proposed business rescue plan together with all circumstances relevant to the case. These factors were specified in Section 153(7) for a reason, that being a Court must take it into account together with the other factors.

[4] Firstrand Bank v KJ Foods *supra* at p. 57, par. [71]

[13] As is evident from the judgment, all the factors which were considered in the **KJ Foods** matter in which the Court came to a finding in favour of the setting aside of a vote having been inappropriate, have been considered by the Court in the present matter and the Court also fully associated itself with the reasoning of the SCA in coming to its conclusion in regards to inappropriateness of the vote in that matter. That included *inter alia*, the fact that also in the present matter, had the business rescue plan been implemented, the employees of **KJ Foods** would have been able to remain employed as was also considered in the **KJ Foods** matter. However, all the factors and particularly those as contained in Section 153(7)(a) to (c) needs to be considered. That has been set out in particularity in the Court's judgment. Whereas Mr *Thompson* still relies on the **KJ Foods** judgment in support of its application for leave to appeal, the differences between the present matter, and the **KJ Foods** matter needs to be pointed out again.

[14] In the present matter, a settlement agreement was concluded between the Applicant and First Respondent subsequent to which the business rescue process was initiated. That was not the case in **KJ Foods**. In terms of the settlement agreement, Applicant was to receive payment of its outstanding debt in certain instalments at a specified time, being only 90 days from the date of signature thereof.

[15] In **KJ Foods**, the following important facts were also present which are not the case in the present matter, namely:

"As from the date of the launching of the application, the practitioners implemented the business rescue plan. The parties were requested to provide details regarding the implementation of the plan before the hearing of the appeal."[5]

[16] Clearly by implication that is one of the factors the Court took into consideration in coming to its decision. In the present matter, at the time the revised business plan was put to the vote, such plan had not been implemented, because the revised business rescue plan has not yet been approved. It was therefore also not possible for the Court to ask for a report regarding such implementation as suggested by Mr *Thompson*.

[17] In the present matter, a notarial bond was registered over the movable properties, in favour of the Applicant. In the **KJ Foods** matter, that was not the case. The whereabouts of the movable assets and the continued use thereof, resulting in the diminishing value thereof, still remains a matter of concern which was not addressed in the revised business rescue plan.

[18] Mr *Thompson* further, during argument, concentrated on the distinction between the implementation of the business rescue plan and the development thereof. It is indeed common cause that at the time the relevant vote had been taken in regards to which inappropriateness was raised, the plan had not yet been finally developed nor implemented. In respect of the duration, reference

[5] KJ Foods *supra* at p. 54, par. [64]

was indeed made to the **Forty Squares**-matter[6], in the Court's judgment. However, in respect of the present matter, the twelve year period was not in respect of implementation of the business rescue plan, but indeed in the words used by the First and Fourth Respondents themselves, *"It is obvious that 'reverberating' effects of the revised business rescue plan will have a 12 year lifespan in particular in respect of the applicant"*. This was not held in regards to the implementation of the business rescue plan.

[19] Mr *Thompson* further argued that the Court placed undue weight on the apparent extra-curial concession relating to the fees to be charged by the Second Respondent which was not incorporated in the revised business rescue plan. The Respondents however do not even consider the proposition that such lesser fees that should have been included in the revised business rescue plan, would have been to the advantage not only of the Applicant, but all the creditors concerned.

[20] Mr *Thompson* further argued that the Court erred by placing undue weight on the fact that the Second Respondent did not act in terms of Section 132(3) of the Act. However, no explanation whatsoever has been forthcoming in respect of such failure. The Respondents' further submission to the effect that *"failing to consider that despite the business rescue proceedings not having ended within 3 months after the start of those proceedings and further, despite the non-compliance with section 132(3) of the Act, the Applicant continued to participate*

[6] Forty Squares (Pty) Ltd v Norris Fresh Produce Ltd 2023 (5) SA 249 (WCC)

in the business rescue process without objection", do not take into consideration that the actions of the Applicant since the start of the business rescue process up until the meeting where the *"alleged inappropriate vote"* was taken, indeed shows the willingness and *bona fides* of the Applicant to partake in the business rescue proceedings, but up until a certain point. At that point, the business rescue practitioner, Second Respondent, had been "*dragging her feet"* without providing any explanation, the revised business rescue plan which was published shortly before the meeting, still contained certain aspects with which the Applicant was dissatisfied. As stated by Schoeman AJA, the objects of the Act include, *inter alia*, *"the rescue and recovery of financial distressed companies <u>in the manner that balances the rights and interests of all relevant stakeholders</u>"* (own emphasis).

[21] In the consequence, I am not persuaded that another Court would come to a different conclusion and that there is a reasonable prospect of success for the relevant Respondents. This is so even without reliance on the **KJ** : matter , taking into all relevant circumstances.

[22] Furthermore, although it may be desirable that the effects of the non-compliance of Section 132(3) of the Act be considered at some stage, I do not find this as a compelling reason as such for leave to appeal to be granted.

[23] Whereas First and Fourth Respondents did not succeed in the application for leave to appeal, such Respondents are to pay the costs of such application.

Order:

Therefore, I make the following order:

The application for leave to appeal is dismissed with costs.

J J F HEFER, AJ

On behalf of the Appellant: Adv P Zietsman SC

Instructed by: Phatshoane Henney Attorneys
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On behalf of First and Fourth Respondent: Adv C Thompson

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