

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2022/2731

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED YES/NO
SIGNATURE _____	
DATE <u>11/04/2024</u>	

In the matter between:

Reiscor Two (Pty) Ltd T/A Bootleggers
(Reg.No.2020/126069/07)
(In Business Rescue)

Applicant

And

Anheuser-Busch Inbev Africa (Pty) Ltd

First Respondent

Coca-Cola Beverages South Africa

Second Respondent

Heineken South Africa (Rf) (Pty) Ltd

Third Respondent

Distell Limited

Fourth Respondent

All Other Affected Parties

Fifth Respondent

**The Companies and Intellectual
Properties Commission**

Sixth Respondent

AND

Case Number: **22/5558**

In the matter between:-

Distell Limited

Applicant

And

**Reiscor Two (Pty) Ltd T/A Bootleggers
(Reg.No.2020/126069/07)**

First Respondent

(In Business Rescue)

John Francis Evans N.O.

Second Respondent

Iain Stockill N.O.

Third Respondent

**The Companies And Intellectual
Properties Commission**

Fourth Respondent

Summary: Application by business rescue practitioners in terms of sections 153(1)(a)(ii) and 153(7) of the Companies Act 71 of 2008 to set aside a vote rejecting the business rescue plan of the applicant on the grounds that it was inappropriate - counter application for liquidation – appropriateness to be viewed objectively – considerations not taken into account at the time of the vote can and should be considered by the court – timing of raising the concern is relevant to bona fides and costs, if at all – commencement of business rescue proceedings does not confer on creditors additional rights regarding access to a companies' confidential information – section 34 of the Insolvency Act does not apply to the disposal of a business by a company which is a trader in terms of an approved business rescue plan

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 11 April 2024

JUDGMENT

Ingrid Opperman J

Introduction

[1] In this matter business rescue practitioners appointed in terms of Chapter 6 of the Companies Act of 2008 (*the New Act*) apply for an order overriding the views of the majority of creditors in the business rescue proceedings. One of those creditors, Distell Limited, applies for the liquidation of the applicant which is presently under the control of the business rescue practitioners. The court is required to decide whether on the business rescue practitioners' application the views of the major creditors should be overridden in terms of section 153 of the New Act and the court is required to decide whether on Distell Limited's application it is required to put the company into liquidation.

[2] Section 153 is part of Chapter 6 of the New Act, which chapter is entitled '*Business Rescue and Compromise with Creditors*'. As will emerge from this

judgement, the question of what the 'compromise with creditors' of the company is, if any, is an important one.

[3] Section 153 has as its subheading '*Failure to adopt business rescue plan*' It reads in material parts:

'153. Failure to adopt business rescue plan

(1)(a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may—

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was **inappropriate**.

(b) If the practitioner does not take any action contemplated in paragraph (a)—

(i) any affected person present at the meeting may—

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

(2) If the practitioner, acting in terms of subsection (1)(a)(ii), or an affected person, acting in terms of subsection (1)(b)(i)(bb), informs the meeting that an application will be made to the court as contemplated in those provisions, the practitioner must adjourn the meeting—

(a) for five business days, unless the contemplated application is made to the court during that time; or

(b) until the court has disposed of the contemplated application.

.....

(7) On an application contemplated in subsection (1)(a)(ii), or (1)(b)(i)(bb), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is **reasonable and just** to do so, having regard to—

- (a) the interests represented by the person or persons who voted against the proposed business rescue plan;
- (b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
- (c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.’ (emphasis provided)

[4] The considerations in both applications are very much intertwined. I commence with the business rescue practitioners’ application to have the decision of the meeting set aside on the grounds that the meeting’s decision on the business rescue plan was ‘inappropriate.’

[5] ‘Business Rescue’, as defined in section 128(1)(b) of the New Act is a legal regime intended to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company and the management of its affairs, business and property by the business rescue practitioners, the temporary moratorium on the rights of creditors against the company or in respect of its property or property in its possession and the development and implementation, if approved, of a plan to rescue the company, or, if it is not possible for the company so to continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company. It is this latter result which the business rescue practitioners intend to achieve with this application as it is common cause that the company cannot continue in existence beyond the implementation of the business rescue plan as its employees have left its employ and as shall be seen, its assets have already been sold.

[6] The issue is thus whether the business rescue plan would obtain a better return for the company’s creditors or shareholders than a liquidation would produce.

[7] The determination of that issue demands a reliable comparison between the liquidation scenario and the business plan scenario. This comparison the business rescue practitioners claim to have provided in their plan as tabled at the meeting and in their founding affidavit. Why then would the majority of those with voting rights who attended the meeting (creditors) oppose the business rescue plan, and why would one of the creditors want it liquidated? All of this will be unpacked in what follows.

Common Cause Facts (or largely undisputed facts)

[8] The applicant's business comprised the trade of liquor, for which it held licences with the Gauteng Liquor Board. The applicant commenced business rescue on 3 May 2021 in accordance with section 129(1) of the New Act. The business rescue practitioners were appointed on 3 May 2021. The first meeting of employees was held on 11 May 2021 and the first meeting of creditors was held on 14 May 2021. On 3 June 2021 the business rescue practitioners requested an extension of time to publish a business rescue plan. The creditors granted the request for the extension until 31 July 2021.

[9] The total value of the applicant's creditors is R39 330 359. The first to fourth respondents are creditors to the applicant as follows: the first respondent - R2 492 083; the second respondent - R2 861 960.96; the third respondent - R 9 488 380.67 and the fourth respondent - R 10 773 092.67.

[10] The first to fourth respondents (collectively *the major creditors*) were consulted by the business rescue practitioners regarding their views during July 2021 and indicated support for selling the company's business as a going concern together with the property owned by the company. On 26 July 2021, a further extension of time to

publish a business rescue plan was sought by the business rescue practitioners from 31 July 2021 to 31 October 2021. The major creditors consented to the extension.

[11] The applicant ceased trading on 2 August 2021 and the major creditors were informed in the status update sent to all creditors on 31 August 2021. On 30 September 2021, the business rescue practitioners provided a report in terms of sections 132(3)(a) and (b) of the New Act.

[12] On 11 October 2021, a sale agreement was concluded with Jay Jay Meat Suppliers CC to sell the fixed assets, the inventory, the liquor license, and the property for R 7 000 000.

[13] On 29 October 2021, the business rescue plan was published and circulated to the affected parties. On 29 October 2021, the notice of a meeting to be held on 12 November 2021 to consider the business rescue plan was sent to the affected parties.

[14] On 10 November 2021, two days before the meeting for the consideration of the business rescue plan, the major creditors' attorney of record requested the permission and co-operation of the business rescue practitioners to consent to a due diligence by a management accountant for a period of 5 to 7 days during November 2021, full access to all documents and records of the applicant and the postponement of the meeting scheduled for 12 November 2021 to early December 2021.

[15] On 10 November 2021, the applicant's attorney denied the request to postpone the meeting in terms of section 151 of the New Act. The business rescue practitioners indicated that they were prepared to discuss potential amendments to the business rescue plan. Certain proposed amendments were formulated to cater for investigations into the applicant's affairs by affected persons submitting complaints to the business

rescue practitioners. They also invited the major creditors to discuss any potential amendments to the business rescue plan.

[16] On 12 November 2021, at the meeting of creditors in terms of sections 151 and 152 of the New Act, the business rescue practitioners invited discussion and questions in relation to the plan. The major creditors were invited to discuss and propose any potential amendments to the business rescue plan but simply confirmed their opposition to it.

[17] The major creditors expressed a view that: (a) an independent auditor was required to investigate as this had not been done; (b) they had no information on which to base an opinion to vote in favour of the plan.

[18] They did not ask any questions and did not propose any amendments to the business rescue plan. The business rescue practitioners emphasized that the proposed business rescue plan did not compromise creditors' claims.

[19] The major creditors, holding 65,36% of the vote, voted against adopting the business rescue plan, and the plan was rejected. The business rescue practitioners advised the meeting that the applicant would apply to set aside the result of the vote because it was inappropriate.

[20] On 24 November 2021, the major creditors demanded an undertaking from the business rescue practitioners to be given by no later than 16h00 on 26 November 2021 that the applicant's assets would not be transferred pending the outcome of an application for the liquidation of the applicant. Despite an invitation to provide reasons for the proposed liquidation application, they failed to do so.

[21] On 28 November 2021, the attorney for the business rescue practitioners responded to the demand and indicated that the major creditors voted twice in favour of

the extension to publish the business rescue plan and had at least since 29 October 2021 been aware of the sale of assets to Jay Jay Meat Suppliers CC.

[22] The first respondent held mortgage bonds over the immovable property of the applicant. On 30 November 2021, and despite a threatened urgent interdict application by the major creditors, the attorneys' confirmed the existence of the mortgage bonds which resulted in there no longer being any urgency to interdict the sale of the property.

[23] Shortly before the hearing of this matter, the business rescue practitioners filed a supplementary affidavit which was received by this court without objection by the major creditors. It recorded that the first respondent was paid an amount of R1 350 000 in terms of the mortgage bonds it held as security over the immovable property that was integral to the sale of the business of the applicant.

Appropriateness

[24] In *First Rand*¹ the SCA held that sections 153(1)(a)(ii) and 153(1)(b)(i)(bb) are inextricably linked to section 153(7). I have quoted these sections above. The SCA held that in an application to set aside the result of a vote in terms of any of these subsections, the court is enjoined by section 153(7) to determine only whether it is reasonable and just to set aside the particular vote, taking into account the factors set out in section 153(7)(a) to (c) and all circumstances relevant to the case, including the purpose of business rescue in terms of the New Act. Put differently, the vote would be set aside on application on the grounds that its result was inappropriate, if it was reasonable and just to do so in terms of section 153 (7). This entails a single enquiry and value judgment.

¹ *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para [80]

[25] In a later case, *Ferrostaal*,² the SCA observed that: ‘*the question before the High Court was whether it was reasonable and just to set aside [the creditor’s] vote on the ground that it was inappropriate*’. This is the question before this court in the practitioners’ application. The reference in *Ferrostaal* to ‘reasonable and just’ is drawn from section 153(7) as discussed by the SCA in *First Rand*.³

[26] As mentioned, in *First Rand* the Supreme Court of Appeal held that a conclusion as to appropriateness is a value judgement which requires a single enquiry taking account of all circumstances⁴. The ‘circumstances’ are all the material facts. I bear in mind that there are two broad purposes to the business rescue chapter in the New Act and in this matter I am dealing only with the second, the attainment of an outcome superior to that which a liquidation would attain.

[27] In the SCA’s discussion in *Ferrostaal*⁵ of its earlier decision in *First Rand*, the court observed that the majority judgment in *First Rand* had stated that the meaning of the word ‘inappropriate’ could be understood as ‘not suitable or proper in the circumstances’. The court was using synonyms to guide its interpretation. Significantly, the SCA held that the interpretation of the term ‘inappropriate’ should take place within the wider context of the objects of business rescue, which includes providing the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all stakeholders. The distinction between rights and interests is noteworthy. Even where rights are not implicated but interests are, this may be sufficient to tilt the conclusion on appropriateness of a business rescue plan.

² *Ferrostaal GmbH and Another v Transnet Soc Ltd t/a Transnet National Ports Authority and Another* 2021 (5) SA 493 (SCA) at [8]

³ *FirstRand* *ibid*

⁴ *FirstRand* *ibid*

⁵ At par. 18 of *Ferrostaal*

[28] Applying the value judgment to which it had come based on the interests of workers, the SCA considered in *First Rand* the fact that the employees of KJ Foods would continue working for the rescued company if the proposed business rescue plan was adopted but would lose their jobs if the company was liquidated. It also considered that, in terms of the proposed plan, FirstRand would have its claim settled in full by the company in a series of payments over a period, and other creditors would also benefit. Interests, not rights alone, were under consideration. It further considered that the concurrent creditors would receive 100 cents in the rand if the proposed plan in *First Rand* was adopted, whereas they would only receive 51 cents in the rand if the company in that case were to be liquidated. Having considered all the facts and circumstances of that case, the SCA had, observed the Court in *Ferrostaal*, held that FirstRand's rejection of the final plan was premised on self-interest which did not take the interests of the workers of the company and other interests sufficiently into account, and was thus *inappropriate*. The discussion that ensued in *Ferrostaal* went on to demonstrate that the facts, and hence the result, of that case were distinguishable from those of *FirstRand*.

The Business Rescue Plan proposed on 12 November 2021, unpacked.

[29] The plan which was rejected records that the applicant ceased trading on 2 August 2021, but that post-business rescue trading allowed the applicant to retain customers and goodwill attaching to the business to attract potential buyers for the business and maximize the selling price thereof. According to the plan, the applicant's financial position disclosed as per the management accounts, shows a positive equity of approximately R5 million compared to a positive equity of approximately R7 million according to draft financial statements.

[30] The plan envisages a winding down of the operations of the applicant and the realization of the applicant's business to maximize the return to creditors when compared to a liquidation scenario.

[31] The following distributions are reflected as what would be received if the applicant were placed in **liquidation**: Employees (preferent) would receive 66.46 cents in the Rand. SARS (preferent) would receive 100 cents in the Rand. Standard Bank (combined secured and unsecured payments) would receive 13.36 cents in the Rand. SAB (combined secured and unsecured payments) would receive 60.91 cents in the Rand. Concurrent creditors would receive 6.52 cents in the Rand.

[32] The following distributions would be received if **the plan was adopted** and implemented: Standard Bank (combined secured and unsecured payments) would receive 23.24 cents in the Rand; SAB (combined secured and unsecured payments) would receive 63.94 cents in the Rand; All other creditors would receive 13.76 cents in the Rand.

[33] Clause 8.1 details the 'Philosophy behind the Plan' as follows:

- '8.1.1.1 keeping employees employed for as long as possible and in the event of retrenchment securing full payment of their respective statutory maximum retrenchment payments;
- 8.1.1.2. maximising the returns from the ongoing ownership and trading of the business of the Company and from the realisation of the working capital assets of the Company;
- 8.1.1.3. realising as much as is possible, within a reasonable time frame, from the sale of the business of the Company and/or its assets;
- 8.1.1.4. maximising the pay-out of distributions to Creditor(s) and where possible, leaving a surplus to be retained in the Company or returned to the Shareholder;
- 8.1.1.5. paying a distribution to the Creditors in excess of what they would receive if the Company was placed in liquidation.
- 8.1.1.6. achieving the above more efficiently than can be done in liquidation.'

[34] The plan also records what factors were taken into account in developing it with the foregoing philosophy in mind, namely:

- '8.1.2.1 the saving of jobs via the sale of the business, or part thereof, as a going concern will reduce the retrenchment costs and improve returns for concurrent Creditors;
- 8.1.2.2. the Company at the Commencement Date had Claims from Creditors of about R 39.73 million (per the company records);
- 8.1.2.3. at the Commencement Date, the Company had not issued notice nor had it commenced consultations in terms of section 189 of the Labour Relations Act;
- 8.1.2.4. ongoing trading, inter alia, enhances the collectability of accounts receivable and the viability of the sale of the business as a going concern;
- 8.1.2.5. trading the business, even on a limited basis, allowed the BRPs to explore the possibility of selling the Company's business as a going concern. There were and are advantages to a sale as a going concern such as the saving of jobs, avoiding retrenchment costs and the value created from a sale of assets in situ as a going concern (as opposed to a break up or auction sale);
- 8.1.2.6. the BRPs received many expressions of interest for the business;
- 8.1.2.7. due to the civil unrest in early July 2021, these buyers retreated and as a result no formal offers were received;
- 8.1.2.8. after careful consideration the employees were offered voluntary separation packages and all employees left the employ of the Company;
- 8.1.2.9. Broll Auctioneers were tasked with finding a buyer through either their network or failing that, through auction;
- 8.1.2.10. the Company entered into an agreement in respect of the sale of business and assets on the following terms ("the Sale of Business"):
Buyer: Jay Meat Suppliers CC
Price: R7,0m (including retail licence, inventory, fixtures and property
Conditions precedent: None'

[35] Ultimately the plan is summarised as follows:

- 8.2.1. Taking all of the above into account, to balance the interests of all Affected

Persons and to successfully rescue the Company, the Company proposes that the BRPs be mandated and authorised to do all things necessary to implement the business rescue plan, including (but not limited to):

- 8.2.1.1. collecting the book debts of the company including via the courts if required;
- 8.2.1.2. implementing the Sale of Business and assets;
- 8.2.1.3. pursuing and collecting all of the accounts receivable including amounts due by Mr MG Reis, including via legal proceedings if required;
- 8.2.1.4. pursuing claims against the Company's insurers in terms of the business interruption insurance policies held by the Company;
- 8.2.1.5. entering into short term contracts of employment to assist with the implementation of the Business Rescue Plan, and
- 8.2.1.6. paying whatever funds remain to the Employees, Creditors and Shareholders of the Company per the payment waterfall and preferences as set out below."

[36] In paragraph 8.4.3 of the plan, the waterfall of payments is set out. Clause 9.5 provides that creditors' claims are *not to be compromised* and that any amounts received under the plan would be on account and in reduction of their claims and not in full and final settlement of such claims. Clause 9.8.1.2 records that creditors retained the right to pursue the unpaid balance of their claims against the applicant, including by applying for liquidation. Clause 9.8.1.3.2 repeats that creditors will be entitled to proceed against *inter alia* the applicant for the balance of their claims. Clause 9.8.1.4 records that the plan in no way novates, waives, nullifies, or prejudices the claims and preserves the rights of sureties, creditors and guarantors.

[37] The only limitation on creditors' rights following business rescue is that they would not take steps to set aside the sale of the business for a period of 7 months after the effective date of the Sale of Business. Also of significance are the following recordals and provisions: (a) It is recorded that the business rescue practitioners had undertaken investigations into the company's affairs pursuant to their statutory

obligations to do so, which had been limited due to the time constraints placed on them by the New Act. It was thus further recorded that there may be issues requiring further additional investigation to enable a final conclusion to be formed, and further, it was noted that if the company were ever liquidated, its liquidators may undertake detailed investigations into the affairs of the company and are not precluded from doing so if the plan is approved; (b) that investigations into the affairs of the company were ongoing; (c) that it is was the intention to pursue certain claims, including claims against the insurer for business interruption and claims against Mr Reis, the company's sole shareholder.

Why Was the Business Rescue Plan Opposed?

[38] In the respondents' answering affidavits they contend that they:

'voiced their opposition to the plan in circumstances where the business rescue practitioners refused to furnish the sale agreement to the creditors, refused an investigation of the company's accounts and had no valuation of the property.'

[39] The business rescue practitioners deny that the respondents voiced the concerns raised and contend that Mr van Nieuwenhuizen, the major creditors' attorney, when pressed at the meeting of the creditors, declined to elaborate on his clients' basis for objecting to the business rescue plan. This latter version accords with the common cause facts as summarised by the parties in their joint practice note at paragraph 11 being that the major creditors '*did not ask any questions and did not propose any amendments to the business rescue plan.*'

[40] In my view, the timing of the raising of the complaint does not have a bearing on whether the decision was appropriate or not but rather on the *bona fides* of the objection and on costs. This is so as the appropriateness of the decision is to be viewed objectively and thus, factors which became known after the date of the meeting

or only considered after the date of the meeting should, if relevant, weigh in on the evaluation of whether the decision to reject the plan was appropriate. All circumstances relevant to the case are to be considered.

[41] The major creditors belatedly and during the hearing of the applications contended that the court, even if it were minded to set aside the vote and thus, in effect, secure the business rescue plan's approval, ought not to do so because *the business rescue plan or its implementation would be contrary to public policy* because the company post business rescue would still be commercially insolvent, lack any assets and should not be permitted to participate in commerce (*the commercial morality point*).

[42] In the supplementary heads of argument filed post the hearing on this point, counsel for the business rescue practitioners argued that the commercial morality point could not have been a consideration for voting against the business rescue plan and cannot be regarded when this court considers the appropriateness of the major creditors' vote. I cannot agree with this latter proposition. The consequence of such an approach would be that if this court were to find that the implementation of the plan would be against public policy based on the commercial morality point, it would be precluded from having regard to that finding because it was not a consideration of the major creditors at the time when the decision to reject the plan was communicated, being 12 November 2021. In my view, this is exactly what this court is not to do as this approach would not be an objective assessment and would incorrectly limit the facts and circumstances the court should consider in making a value judgment as required in terms of the New Act. It should look at all the interests and all the facts as they exist at the time of adjudication by the court. I will thus consider the commercial morality point later in this judgment.

The complaints - paucity of primary facts, uncertainty created by assumptions and the need for further investigation of the company's affairs.

[43] There is a general complaint that the plan makes conclusions without providing the supporting primary facts; that the valuation of the immovable property from which the company business was conducted is inadmissible hearsay and unreliable; that a key assumption of the plan is the recovery of an amount from a debtor of the applicant, which is itself in business rescue, and there is no certainty regarding that recovery; that the sale of the business to a third party has not been fully disclosed but is redacted and that further investigations of the company's affairs was required.

[44] Before dealing with the specific complaints raised in respect of the business rescue plan, I will deal with the stance of the major creditors at the meeting which has a direct bearing on the appropriateness of the decision to vote against the business rescue plan tabled. In what follows, I will deal with the failure by the major creditors to have postponed the meeting and their failure to have suggested amendments to the plan to deal with their concerns, all of which contribute to the conclusion that voting against the implementation of the plan was inappropriate. The concerns could and should have been dealt with by postponing the meeting and by making constructive suggestions to address their concerns.

The approach by the major creditors to the meeting convened on 12 November 2021

[45] The meeting of creditors to consider and adopt the business rescue plan in terms of sections 151 and 152 of the New Act was convened on 12 November 2021 (*the meeting*). During the meeting the business rescue practitioners introduced and summarised the salient points of the business rescue plan and invited discussion and

questions in relation to it. The business rescue practitioners had appointed Broll Auctioneers to manage the sale process that culminated in the applicant entering into a sale of business agreement. The business rescue practitioners communicated that the business and assets of the applicant had been sold and that this transaction was on an arm's length basis and for fair value.

[46] The business rescue practitioners asked the representative of the major creditors if they had any questions or comments on the business rescue plan and whether they wished to discuss and propose any potential amendments to the business rescue plan. They did not ask any questions, did not propose any amendments, and confirmed their opposition to the plan. Reasons included that the business rescue plan did not disclose the details of the assets sold; that an independent management auditor was required to do certain investigations, and this had not been done and that they had no information on which to base an opinion to vote in favour of the plan.

[47] The business rescue practitioners responded that all relevant and required information was disclosed, specifically the assets of the applicant in the business rescue plan and that the sale price of those assets was disclosed; that an independent third party (Broll) was appointed to manage the sale process and secure the highest price; and pertinently, that the transaction was not a proposed sale but had actually been concluded and that the assets had been sold for fair value.

[48] The major creditors refused to engage any further or to elaborate on the reasons put up by them. The business rescue practitioners in response to a question from SARS confirmed that the business rescue plan did not envisage a compromise of the claims of creditors and that the claims would be paid 'on account' and not in 'full and final settlement'.

[49] The business rescue practitioners summarised the discussions and business rescue plan prior to voting as follows: The business and assets of the company had been sold. The next steps in the business rescue process were the collection of the remaining assets, proving of claims and payment of distributions to creditors. The claims of creditors were not compromised and the rights of creditors to pursue recoveries available to them by bringing a liquidation application once the business rescue plan had been substantially implemented were preserved. The business rescue practitioners did not believe that the creditors would suffer any prejudice by adopting the business rescue plan, which facilitated a quicker payment to them from the assets realised and preserved their rights to pursue additional recoveries once the business rescue plan had been substantially implemented.

[50] The meeting was preceded by a request two days prior on 10 November 2021, to postpone the meeting followed by a very detailed response from the attorney for the business rescue practitioners, Mr Lisinski, on the same day setting out why the business rescue practitioners were precluded from postponing the meeting other than provided for in sections 151 and 152 of the New Act. He recorded:

‘4. As you are aware, the business rescue process is governed by chapter 6 of the Companies Act ("the Act"). The rights of affected persons and the processes that govern business rescue are set out therein. In this regard, kindly note the following:

- 4.1 once a business rescue plan is published, the provisions of section 151 of the Act must be complied with. There is no provision which permits the postponement of the meeting unilaterally by business rescue practitioners;
- 4.2 affected persons have an option at the meeting of creditors to:
 - 4.2.1 propose amendments to the proposed business rescue plan in terms of section 152(l) (d) (i) of the Act; and/or
 - 4.2.2 direct the practitioner/s to adjourn the meeting in order to revise the business rescue plan for further consideration in terms of section 152(1)(d) (ii) of the Act.

5. In these circumstances, it is clear that:

5.1 Our clients cannot comply with your clients' request to postpone the section 151 meeting;

5.2 the section 151 meeting may only be postponed to amend the plan.

6. Our clients are prepared to discuss potential amendments of the proposed business rescue plan with you and your clients. The proposed amendment/s could then be put to the meeting of creditors for adoption prior to adoption of the business rescue plan.

7. In this regard, and based on our understanding of your request for further investigation into the affairs of the company, we propose that the business rescue plan be amended by inserting the following clauses:.....'

[51] Section 151 of the New Act provides:

151. Meeting to determine future of company

(1) Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.

(2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out—

(a) the date, time and place of the meeting;

(b) the agenda of the meeting; and

(c) a summary of the rights of affected persons to participate in and vote at the meeting.

(3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153.

[52] Section 152 of the New Act provides:

152. Consideration of business rescue plan

(1) At a meeting convened in terms of section 151, the practitioner must—

(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

- (b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;
 - (c) provide an opportunity for the employees' representatives to address the meeting;
 - (d) invite discussion, and **entertain and conduct a vote, on any motions** to—
 - (i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or
 - (ii) **direct the practitioner to adjourn the meeting** in order to revise the plan for further consideration; and
 - (e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).
- (emphasis provided)

[53] Mr Theron SC representing the major creditors argued that the major creditors had asked for information and had sought a postponement which was refused. Having regard to the fact that the applicant had traded in insolvent circumstances, had provided an almost completely redacted sale agreement, and had no information with which to assess the business rescue plan, their opposition to the plan was entirely appropriate within the meaning of section 153 of the New Act.

[54] Mr Blou SC representing the business rescue practitioners argued, quite correctly in my view, that the business rescue practitioners are shackled to the very tight time constraints in the New Act: Section 150(5) provides that the business rescue plan is to be published by the company within 25 business days after the business rescue practitioners' appointment or within a time as may be allowed by the majority of the creditors holding voting interests, as happened here. Within 10 business days after publishing the plan, the meeting must be convened (section 151(1)). At least 5 days before the meeting a notice of the meeting is to be delivered to all affected persons (section 151(2)). Section 151(3) authorises the adjournment of the meeting.

[55] What is, however, of considerable importance is how a postponement is to be secured and whose decision that is. The process is quite evidently creditor driven and what the major creditors overlooked is that the permission of the business rescue practitioners is not required. The creditors have the absolute right to adjourn the meeting in terms of section 152(1)(d)(ii) of the New Act. If a motion is moved to adjourn the meeting to revise the plan for further consideration the business rescue practitioners are obliged to entertain it and to conduct a vote on it. It follows from the express wording of section 152(1)(d)(ii) that the business rescue practitioners have no 'right of veto' and that they must postpone the meeting if the creditors vote in favour of such an adjournment.

[56] One wonders why the major creditors did not postpone the meeting. The business rescue practitioners suggest that it is because the major creditors had no intention of coming up with solutions that would address their concerns but were intent on putting the company into liquidation to conduct enquiries which would be funded by all proved creditors. It is difficult not to conclude that this is the most plausible reason why this powerful tool, one where a postponement was there for the taking, was not utilised.

[57] This inference is supported by the failure of major creditors to have accepted the tender contained in the replying affidavit relating to the production of the unredacted sale agreement. The high-water mark of the complaint about the sale of business is that the business rescue practitioners provided a heavily redacted copy of the sale agreement. In the replying affidavit, the full document is tendered against confidentiality undertakings, but that invitation has not been accepted. It is not unusual that documents of this nature are kept confidential by practitioners. Most significantly, it is not the major creditors' case that they ever sought the sale agreement either

before or at the meeting to vote on the plan, notwithstanding the reference to it in the plan itself. The whole complaint smacks of an afterthought.

Grounds of opposition to the section 153 application and the complaints raised against the business rescue plan.

Non-joinder of all affected parties

[58] The major creditors contend that all affected persons as defined in the New Act ought to have been joined. In *Absa Bank Ltd v Naude N.O*⁶ it was held that creditors who voted to adopt a business rescue plan have a direct and substantial interest in an application to set it aside. If the plan is set aside, they will not obtain what they anticipated they would receive in terms of the business rescue plan for which they voted, so if they are not joined in the proceedings, it is a fatal procedural flaw that must result in the dismissal of the application.

[59] In *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd*⁷, the Supreme Court of Appeal reaffirmed *Absa v Naude* that if the creditors who voted for the adoption of the business rescue plan are not joined, their position would be prejudicially affected if that business rescue plan were set aside as money that they had anticipated they would receive would not be paid, and the money that they had received would have to be repaid. Thus, the non-joinder of creditors who voted for the adoption of the business plan was fatal to the amended relief sought by the applicant.

[60] These cases are distinguishable. In the current matter, the plan was not approved, so there are no vested rights under the plan that could be affected prejudicially by the relief sought. On the contrary, affected persons will benefit if the

⁶ 2016 (6) SA 540 (SCA)

⁷ [2017] ZASCA 131 (29 September 2017)

relief sought is granted because those who voted in favour of the plan will obtain the rights they wished to have. Only the dissentient creditors were required to be joined, as has been done. I thus conclude that the point of non-joinder is not well taken.

The plan draws conclusions without providing the primary facts.

[61] A business rescue plan is not a pleading or legal document. It is a document prepared by a business rescue practitioner for consideration by businesspeople. The hearsay rule and similar evidentiary rules simply find no application.

[62] As the common cause facts show, the creditors had extensive dealings with the business rescue practitioners and were invited to provide their input and any suggested modifications to the plan. Had the major creditors genuinely entertained concerns about the soundness of the plan, on the basis now alleged, they would have raised these concerns with the business rescue practitioners either before or at the meeting when the plan was presented. The concerns could have been attended to by amending the plan or by voting to adjourn the meeting to prepare a revised plan.

The valuation of the immovable property

[63] On 1 November 2020, an independent valuation of the property was produced by Ace Valuers. This was furnished to the creditors during November 2021 and the major creditors did not object to the accuracy. Chantelle Rademan, the professional valuer who executed the valuation, deposed to an affidavit which was attached to the replying affidavit, confirming the correctness of the valuation.

[64] Having appointed an independent broker to assist with selling the business, the business rescue practitioners concluded a sale of the business, including the property, for R 7 000 000, which price includes the liquor licence, stock, fixtures and the immoveable property. The hearsay objection against the valuation is misguided because the issue is not whether the Court should accept the property valuation now

but rather whether the sale price of the business, which included the property, was at fair market value.

[65] There is no factual basis for the major creditors to suggest it was not, nor is there any evidence that they at any time indicated to the business rescue practitioners that there was a willing and able buyer prepared to pay a higher amount.

Need for further investigation into affairs of the applicant.

[66] The need for further investigation into the affairs of the applicant was first communicated by the major creditors' attorney of record on 10 November 2021. The relevant questions thus are: How did the business rescue practitioners react to the requests for further investigation and, regardless of their reaction, is the contention, that a further investigation is required, sufficient as a rationale for having voted against the plan in the circumstances of this matter?

[67] In my view, there is no obligation on a business rescue to accede to a request by a creditor to enable the creditor to undertake its own investigation. In any event, the refusal of the business rescue practitioners to consent to such a process on the facts of this case, was justified. Having said that, the business rescue practitioners have a statutory obligation to investigate the affairs of the company. There is no evidence in this case that they failed to comply with their obligations. On the contrary, as explicitly stated in the plan, investigations were conducted, but time constraints meant that further investigation to enable a definite conclusion to be drawn could not be conducted. The plan went further to state that because creditors' claims were not compromised and thus creditors would be at liberty (after the seven months grace period provided) to wind up the applicant, this would enable a liquidator to investigate the affairs of the company. An obvious mechanism for such an investigation would be Sections 415, 417 and 418 of the Old Act.

[68] Business rescue proceedings do not afford creditors of a company rights to information which they did not have prior to the company being placed in business rescue. If they have reason to suspect that the business rescue practitioners are not to be trusted their remedy is to remove them not to call for an opportunity to investigate the conduct of the business rescue process by the business rescue practitioners.

[69] The business rescue practitioners in question did not adopt an attitude of obstructiveness or of the rigid application of clearly defined power positions. Appreciating that some co-operation is required for purposes of working together and probably appreciating that a relationship of trust needs to be cultivated, they offered, even before the meeting, to amend the business rescue plan to cater for the concerns raised. Mr Lisinski's letter of 10 November 2021 seeks to reach out to the major creditors and seeks to find a way of dealing with the concerns raised. It records:

'7. In this regard, and based on our understanding of your request for further investigation into the affairs of the company, we propose that the business rescue plan be amended by inserting the following clauses:

"8.2.1.7 The BRPs will conduct further investigations into the affairs of the Company as follows:

8.2.1.7.1 All affected persons are hereby invited to submit to the BRPs on or before 15 December 2021, their concerns regarding the conduct of the business prior to commencement of business rescue, allegations of breaches of the Companies Act by the Company and its directors and all documentation in the creditors possession that are relevant to those concerns and allegations;

8.2.1.7.2 The BRPs will thereafter conduct further investigations into the affairs of the Company and if required take the steps set out in section 141(c)."

8. As I am sure you are aware, our clients are not obliged to provide you, your clients, or their management accountant with *"full access to all documents and records of the company"*. The company's records are confidential and the commencement of business rescue does not confer on your clients any additional rights regarding access to the company's confidential information.

9. In addition, kindly note that:

9.1 our clients, at the first meeting of creditors, invited all creditors who suspected any wrongdoing on the part of the Company or its directors and employees to kindly present all facts and evidence in support of these allegations to us on an urgent basis so that our clients could carry out an investigation;

9.2 our clients have already investigated the affairs of the company but are prepared to conduct further and more detailed investigations should your clients provide our clients with new information relating to alleged breaches of the Act or other matters that require investigation;

9.3 additional information has already been sent to your clients in respect of the sale of business agreement and the salient terms thereof have been included in the published business rescue plan. We are thus unsure as to what further information your clients require. Our clients are nevertheless happy to consider providing additional information regarding the sale in response to a specific request from your clients: the rights of the creditors to put the company into liquidation and hold a formal enquiry are still open to them post substantial implementation.

10. In these circumstances, kindly urgently advise if your clients wish to meet to discuss potential amendments to the business rescue plan that will satisfy your clients.

[70] The major creditors did not respond to this proposal at all. At the meeting on the 12th of November 2021, the business rescue practitioners invited the major creditors to discuss their concerns with the business rescue practitioners and to propose amendments to the plan to address these concerns. The major creditors did not respond to this invitation. They never engaged with the business rescue practitioners at all. They did not come to the meeting and ask for further investigations, they did not suggest an alternative to the 7-month 'grace period', they did not suggest that their legal practitioners be given access to the unredacted version of the sale agreement. They did not take any of the opportunities offered to them to address the concern, which was repeated during argument, being that 'they don't know, what they

don't know'. If they were so anxious to obtain information, one would have thought that the major creditors would have taken every opportunity offered to them. The facts paint a different picture, being that not a single opportunity was utilised.

[71] Many inferences can be drawn from this conduct. One of the inferences to draw is the one suggested by the business rescue practitioners being that the major creditors have a hope (a *spes*) of finding something but that they want this fishing expedition to occur at the expense of all the proved creditors, which is what will occur if the applicant were liquidated as opposed to the major creditors having to investigate and chase down the information if they are simply provided with the information the business rescue practitioners choose to make available to them.

[72] The plan recorded that creditors' claims were not compromised and thus creditors would, after the seven months, when the applicant will be wound up enable a liquidator to investigate the affairs of the applicant utilising sections 415, 417 and 418 of the Old Act.

[73] Conceptually, it can not be the law that a need for investigation of the company affairs into possible mismanagement, unlawfulness or voidable dispositions can validly scupper a plan which is otherwise sound, given the significant time constraints contained in the New Act, which envisages a short term temporary business rescue process unless this was coupled with a compromise of creditors' claims such that after implementation of the plan, they could not proceed to investigate avenues for further recovery. One of the hallmarks of the present plan is that creditors' claims are not compromised. Their rights to pursue liquidations and further avenues of enquiry are accordingly, subject to what is said below in relation to section 34 of the Insolvency Act 24 of 1936 as amended (*the Insolvency Act*), intact.

[74] In any event, other than the broad statement that the applicant traded in insolvent circumstances, allegedly for two years before business rescue, and the need to investigate certain loans, no concrete facts have been put up at any time which would justify a full-blown investigation. The suggestion that the business rescue practitioners are shielding management from such an investigation is without reasonable basis.

Clause 9 of the plan and section 34 of the Insolvency Act

[75] Clause 9.9 of the business rescue plan provides that:

‘Creditors agree that on adoption of the plan they will not take any legal steps or commence proceedings against the company including to wind up the company for a period of 7 months after the effective date of the Sale of Business.’

[76] The question is whether Section 34 of the Insolvency Act applies to the disposal of a business by a company which is a trader in terms of an approved business rescue plan. Section 34 of the Insolvency Act in relevant part provides that:

‘(1) If a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt), and such trader has not published a notice of such intended transfer in the Gazette, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than thirty days and not more than sixty days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period.

(2) As soon as any such notice is published, every liquidated liability of the said trader in connection with the said business, which would become due at some future date, shall fall due forthwith, if the creditor concerned demands payment of such liability...”

[77] Section 34 of the Insolvency Act is not a peremptory provision. On the contrary, it operates to give the trader a choice to either comply or face the consequence provided for in the section itself.

[78] In my view there is nothing sinister or problematic about clause 9 in the context of a business rescue, even assuming section 34 of the Insolvency Act applies. This is because, if section 34 of the Insolvency Act applies, a resort by a creditor or a liquidator to section 34 will nullify any business rescue which depends for its success on the sale of a business by a trading company. It is accordingly not only appropriate but necessary that the plan should protect the business rescue process in this manner. Of course, if creditors are not satisfied with that position, they are at liberty to vote against it, provided their vote is reasonable and appropriate. In my view, it is appropriate to permit creditors the right to contract out of a section 34 claim in the context of a business rescue such as the present.

[79] If I am wrong in finding that creditors can contract out of a section 34 claim I would nonetheless find that as a matter of interpretation⁸, the section cannot apply to a disposal in business rescue because the purpose of the section is to afford protection to a trader's creditors against his dispossessing himself of his property without paying his debts before the disposition or from the proceeds thereof, leaving him insolvent and unable to meet his debts. The idea is that by giving prior notice, creditors can take the necessary steps to protect themselves, and they have the benefit of the acceleration of debts that was not due once publication ensues.

[80] Business rescue became part of our law well after section 34 of the Insolvency Act was enacted and brought about a sea of change as far as substantially distressed

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA); *Novartis SA (Pty)Ltd v Maphil Trading (Pty)Ltd*, 2016 (1) SA 518 (SCA)

companies are concerned. Once a company has been placed in business rescue, various consequences follow: under section 133 of the New Act, creditors may not enforce their claims; the business rescue practitioner is required to formulate a business plan and put it to the vote of creditors; the plan may *inter alia* compromise creditor's claims; and upon the plan being approved, if it so provides, the claims are extinguished in law in terms of section 154 of the New Act.

[81] Section 134 of the New Act empowers the practitioner to dispose of the company's property (which would include its business), *inter alia*, in a transaction that forms part of a business rescue plan. In this context, it would be absurd to suggest that section 34 of the Insolvency Act continues to operate and apply to a company in business rescue because the very persons called upon to vote in terms of the business rescue plan are the persons who would ordinarily receive or require notice in terms of section 34 of the Insolvency Act, and they are thus notified of the proposed disposal and, in fact, vote on it as affected persons.

[82] The section 133 moratorium renders the acceleration of the claims of creditors legally impossible. In the circumstances, creditors receive complete protection through the orderly disposition of a company's business by receiving notice of the disposal and a right to vote on it, but in the meantime, cannot enforce their claims and thus scupper the whole process.

[83] The simultaneous application of section 34 of the Insolvency Act to a company in business rescue would lead to anomalies and absurdities that could not have been intended, and any reasonable and commercial construction leads one to conclude that it does not find operation in the context of a business rescue and business rescue practitioners are not constrained by section 34 of the Insolvency Act.

[84] Section 29 of the Insolvency Act deals with dispositions by an insolvent which are intended to prefer one creditor over another. A disposition lawfully undertaken with the requisite approval of creditors or a court's approval can never be such a disposition. In any event, the essence of this and other Insolvency Act provisions is that disposal before the institution of the *concursum creditorum* precludes the distribution thereafter among all proved creditors of the insolvent's property. This is in accordance with the design of the Insolvency Act to prevent a creditor from obtaining an undue preference over other creditors. But, if the object was not to confer a preference, then there was no intention to prefer. The provisions of section 29 of the Insolvency Act find no application since the sale of the business and the subsequent proceeds will effectively be paid in accordance with the waterfall of payments in terms of the business rescue which gives due expression to the hierarchy of creditors' claims in insolvency. There can be no question of an unlawful preference, rendering any intention to prefer entirely absent.

[85] I thus conclude that section 34 of the Insolvency Act does not pose an obstacle to the acceptance of the plan either because contracting out of the consequences of section 34 is competent where the necessary element of publicity required by section 34 is achieved via notice to affected parties in business rescue, or, because on a proper construction of the applicable legislation, section 34 does not apply to a company in business rescue.

Commercial Morality

[86] The major creditors belatedly contended that the Court, even if it were minded to set aside the vote ought not to do so because the business rescue plan or its implementation would be contrary to public policy. The argument has been labelled as 'novel' and 'scantily motivated' in the applicant's supplementary heads of argument.

[87] The argument is that the company post business rescue will still be commercially insolvent, will lack assets and should thus not be permitted to participate in commerce.

[88] The major creditors argue that our courts have accepted that as a matter of principle, our courts will have regard to commercial morality and the interests of the public at large when considering compromises or rescinding liquidation orders. So, for example, the following principle was distilled as long ago as 1903:

‘Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case.’⁹

[89] Whilst it may not offend commercial morality or the general public interest to allow a company, which is commercially insolvent, to participate in commerce if the board reasonably believes that it will be able to pay its debts as and when it falls due¹⁰, the major creditors argue that it is most certainly against commercial morality to do so when it has lost its substratum; sold all its assets; its sole director and shareholder is under curatorship (more accurately his estate has been sequestrated); it clearly cannot pay its debts whether due or not and it is against the wishes of the majority of its creditors.

⁹ *In re Telescripto Syndicate Limited* (1903) 2 Cah. 174 at 180; *Ex parte Chenille Corporation of SA (Pty) Limited and Another*; *In re : Chenille Industries (Pty) Limited* 1962 (4) SA 459 (T) at 464 H to 465 B; *Mahomed v Kazi's Agencies (Pty) Limited and Others* 1949 (1) SA 1162 (N) at 1171 and *Klass v Contract Interiors CC (in liquidation) and Others* 2010 (5) SA 40 (W) at [57] to [61]

¹⁰ *Ex parte De Villiers and Others NNO*; *In re : Carbon Developments (Pty) Limited (in liquidation)* 1993 (1) SA 493 (A) and *Ozinsky NO v Lloyd and Others* 1995 (2) SA 915 (A)

[90] They contend too that the situation in this case differs completely from the 'white knight' cession and back-ranking or subordination compromise schemes of the late 80s and early 90s dealt with in *Carbon Developments*¹¹ in that, so the argument continues, there is simply no 'white knight' or a prospect of any successful trading in the future. Under such circumstances they argue, the board of the company cannot, going forward, participate in any trade, other than recklessly in circumstances where they simply cannot reasonably believe that they will be able to pay their debts as and when they fall due. In such circumstances they urge this court to conclude that it is against commercial morality and the general public interest to allow this company to continue with the business rescue proceedings in completely insolvent circumstances.

[91] The argument is both factually and legally flawed. It proceeds on the incorrect factual premise being that the purpose of the business rescue plan is to allow the applicant to recommence trading after the business rescue. This is not the outcome envisaged on a plain reading of the business rescue plan. The business rescue plan's purpose retains the creditors' rights to seek to recover the balance of their claims, including through a liquidation process. As a matter of law, the business rescue plan is one precisely as contemplated by the legislative regime governing business rescue proceedings, the second objective being to extract a superior outcome via business rescue rather than via liquidation. It is thus unimpeachable, absent a validity challenge to the statute, which is not made.

[92] On the present facts, that objective is not attained via the company resuming trading, it is just that the sale of the assets of the company via the business rescue attained a superior return for creditors than would a future liquidation. That conclusion has not been displaced by the major creditors.

¹¹ Ibid

[93] It is not lost on this court that the applicant traded under COVID restrictions and through various liquor bans from the end of March 2020 until the date of the commencement of business rescue. In this period, the major creditors continued to supply the applicant. In other words, the major creditors had knowledge of and accepted the risks of supplying the applicant and that they still elected to do. Notably, the major creditors did not raise commercial morality at this point or any point in time during the rescue or at the section 151 meeting to vote on the business rescue plan. Be that as it may, I accept that the morality of the conduct of the major creditors is not under the spotlight.

[94] It is most unlikely on the facts of this matter that the applicant will continue to trade. It has no assets or licence to do so. Thus, the three directors simply cannot trade and the company remains indebted and susceptible to liquidation. There is nothing objectionable in this as a matter of policy. There must be countless companies in this position and the law will take its course to ultimate liquidation, but not in such a way as to displace what has already been achieved by business rescue.

[95] The position under the erstwhile section 311 of the Old Act is not relevant or helpful in this regard. In such a scenario, the court was required to sanction an offer of compromise, which inevitably took the form of a reduced payment (albeit one that was higher than achievable in a liquidation) in full settlement of claims.

[96] Often the compromise offered by a 'white knight' (who would be paying the compromise amount) sought also to acquire all shares in, and the balance of, the claims against the company, generally with a view to continue trading on a "clean" balance sheet (having settled the creditors sufficiently for them to be quieted). Even then, the company often remained insolvent, the acquirer having acquired the claims

of creditors. The courts enjoyed a discretion as to sanction and that there was a reluctance to do so unless the remaining debt was subordinated or converted to equity.

[97] However, in a business rescue context the court is not asked to sanction anything. In business rescue, the creditors are entitled to vote and the requisite majority carries the aspect voted on. However, their right to do so is not unfettered, hence the ability of the business rescue practitioners or affected persons (particularly minority creditors as is the instant case) to seek to have the dissenting vote set aside by a court. And when asked to do so, the court is enjoined to decide the matter on the basis that it has had regard to those factors listed in section 153(7) (a) to (c) of the New Act, which includes specifically the return to creditors under the business rescue plan versus a liquidation.

[98] It is clear from the plan that the business and property of the company have been sold and that it will not be in a position to trade further. Moreover, the fact that it remains commercially insolvent (as it was at all material times before and during the business rescue) is neither here nor there because creditors will enjoy the right to wind up the company (after the expiry of the seven months provided for in clause 9) and investigate whatever they may wish with a view to recovering further monies from the directors or related parties. It is to their benefit, not their detriment, that they do so in circumstances where they have already achieved a better return than would be obtained in liquidation.

[99] The major creditors who oppose the confirmation of the business rescue plan had little but their suspicions of untoward conduct in the business prior to its business rescue to counter this. Their argument based on business morality or the public interest I find to have no substance.

The implications of the Court rejecting the Plan

[100] What would a rejection of the business plan now mean if I were to refuse the practitioners' application to overturn that decision? It would mean that the sale of the company's property and business as a going concern, although perfected, could now be open to attack. It is unnecessary to, as the parties did, explore these risks in any depth. That would threaten to take the progress made in securing a significant liquid benefit for creditors all the way back to the vanishing point of value that a liquidation would imply. This would be a liquidation of a company unable to pay its debts. To allow that to happen at this time seems altogether pointless. The sale to Jay Jay Meat Supplies CC is the cornerstone of the business rescue, it has been perfected, the buyer is running the business and a liquidation with all the deleterious value-destroying effects that necessitated the introduction of the business rescue regime into our company law in the first place, seems to me to be commercially inexcusable. This is particularly so under circumstances where the first respondent who had voted against the implementation of the plan, reaped the benefits of the plan even before the hearing in front of me. The right to chase down miscreant directors and secure relief, such as via section 424 of the Old Act, (enabling officers of companies which have traded recklessly or fraudulently to be pursued to pay the debts of the company) would be unaffected because once the business rescue plan has been implemented it will not change the facts as to how the directors or controlling minds of the company caused the company, if at all, to be unable to pay its debts. The 'shell' of the company will probably go into liquidation after the business rescue plan has been implemented, but it will not be by virtue of the operation of the present liquidation application which will have to be dismissed. All the instruments of the law which shine light where light must be shone have been retained for the creditors in the business rescue plan save for

those instruments / remedies whose time limits had expired before the hearing before me.

[101] During the business rescue the transfer of the company's property has taken place to the buyer, and, as is confirmed in the supplementary replying affidavit, the proceeds of the sale have been paid to the practitioners, a portion has been used to pay the first respondent (who, despite having accepted the fruits of the business practitioners' labours continues to protest that business rescue is inappropriate) and the balance is available for distribution in accordance with the contested business rescue plan. As the practitioners say, they do not guarantee the return proposed in their business rescue plan, but they estimate that the return to creditors will be significantly superior to that obtained on liquidation, that secured and preferent creditors will be paid 100 cents in the rand and that concurrent creditors will receive a higher return via the business rescue plan than via liquidation.

[102] The essence of the remainder of the respondents' concerns regarding the business morality of approving the business rescue plan and thereby overriding the creditors' views, as the court is empowered to do where the refusal is inappropriate as per section 153 of the New Act, is that it would be inappropriate to allow the company to be 'handed back' to its directors and shareholders when it had evidently traded recklessly for two years prior to going into business rescue. The sting of this criticism is significantly diminished by the conduct of the first respondent who accepted the benefit of a cornerstone of the business rescue plan, the sale of the business property and trading licence to Jay Jay Meat Suppliers CC described above.

[103] That this sale was approved by the major creditors counts against their opposition to the business rescue plan. The business rescue practitioners have applied for, and obtained, the sequestration of the sole shareholder of the company,

Mr D Reis. Thus, the return of the business to the directors would not be of much advantage to Mr Reis (who is not a director). To the extent that there is any advantage in giving the directors back control of the company after business rescue has been implemented does not condone their prior misconduct, if there was any, it does not give them anything of value, all value having been extracted for the benefit of creditors by the implementation of the business rescue plan, and it does not offend against the public morals.

[104] It is part of the business rescue plan, once implemented, that the company will indeed be liquidated. The practitioners temporarily kept the business alive, they obtained a valuation on the property, they instructed agents to go out and find buyers, they rejected various offers, they rode out the storm of the July riots which diminished the availability of buyers, the workers of the business were retrenched or left, and the practitioners nonetheless ultimately succeeded in obtaining a buyer for the company's assets at a price well above the market value of the property alone which is valued at R5,800,000, they having acted to keep the trading licence of the business intact by appealing its cancellation.

[105] This latter fact appears from certain of the annexes to the founding affidavit which reflect that the practitioners had written to creditors advising them that the practitioners had had litigated on behalf of the company in business rescue to apply for leave to appeal against the cancellation of the company's liquor license; this to retain value for the creditors and, as the sale of the business as a going concern with its licence reflects, that effort on the part of the practitioners was successful and benefited creditors.

Conclusion on the Application in terms of section 153

[106] It would have seemed churlish of the creditors to reject the benefit of these efforts and the plan which did not constitute a compromise of their rights to 'go after' the allegedly miscreant directors if they wanted to, after the business rescue plan had been implemented.

[107] I find that the business rescue practitioners have made out a case of inappropriateness sufficient to justify the rejection of the major creditors' views, to overturn their rejection of the business plan and to approve it as the court is empowered to do by section 153 of the New Act.

[108] Having regard to all considered herein, I have very little hesitation in concluding that it is reasonable and just that the vote rejecting the plan be set aside on the grounds that it is inappropriate.

Conclusion on the Liquidation Application

[109] Turning to the liquidation, it obviously goes without saying that the liquidation must be refused if the business rescue plan is approved and as I have for the above reasons approved the business rescue plan, nothing further needs to be said about the liquidation.

[110] The business rescue practitioners established on their founding papers that there was a reasonable probability that the return would be superior if the business rescue plan was approved than if the company went into liquidation, they have taken significant steps towards realising that business rescue plan by, *inter alia*, the sequestration of the shareholder, the retaining of the business licence and the sale of the property and business licence for a sum above at least the market value of the property.

Order

[111] In the result, I grant the following orders:

- 111.1. The votes of the first to fourth respondents against the business rescue plan, exercised on 12 November 2021, are set aside.
- 111.2. Costs of the application under case number 2022-2731 are to be paid by the first to fourth respondents jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel where so employed.
- 111.3. The application for liquidation under case number 2022-5558 is dismissed with costs, including the costs of two counsel where so employed.



INGRID OPPERMAN J
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicant (the Business Rescue Practitioners): Adv J Blou SC and Adv C Cremen

Instructed by: Fluxmans Attorneys

Counsel for the respondents (the Major Creditors): Adv EL Theron SC and Adv HP van Nieuwenhuizen

Attorneys for the First Respondent: Schultz Attorneys Incorporated

Attorneys for the Second Respondent: Bowman Gilfillan Inc

Attorneys for the Third and Fourth Respondents: Van Nieuwenhuizen, Kotze & Adam Attorneys

Date of hearing: 17 March 2023

Supplementary heads of argument: 30 March 2023 & 26 April 2023