IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/03/2015

CASE NO: 47327/2014

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED Applicant

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

09/03/15
DATE

SIGNATURE

BERRYPLUM RETAILERS CC First Respondent

MATHEUS JOHANNES SCHLECHTER Second Respondent

VILJOEN VAN ZYL CRAFFERT Third Respondent

BERRYDUST 75 (PTY) LIMITED First Applicant for Intervention

CLOETE MURRAY NO Second Applicant for Intervention

IGNATIUS CLEMENT MIKATEKO SHIRILELE NO Third Applicant for Intervention

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JUDGMENT

Tuchten J:

1 The applicant (Shoprite) carries on business as a central purchase organisation. It buys commodities in bulk and manufactures for the

benefit of the members of the organisation. The first respondent (Berryplum) was a member of this organisation. Berryplum carried on business through two retail outlets in Mpumalanga, at Burgersfort and Dulstroom respectively, and bought product from Shoprite. Berryplum's members, at all relevant times, were the third respondent (WZ Craffert) and LJ de Jager (De Jager).

2 Under a franchise agreement concluded on 27 February 2013, Berryplum, represented by WZ Craffert, became one of Shoprite's franchisees. On the same date Berryplum, similarly represented by WZ Craffert, concluded a credit facility agreement with Shoprite. Both WZ Craffert and De Jager signed unlimited suretyships for Berryplum's indebtedness, as did a corporation related to Berryplum called Berrydust 75 CC (Berrydust).

3 Berryplum gave security for its indebtedness to Shoprite by way of two notarial bonds, both of which were duly registered in the Deeds Office in Pretoria. The first such bond, no. BN105305/09, was registered on 23 June 2009 for the sum of R1,5 million. The second such bond, no. BN000001609/2013, was registered on 22 March 2013 for R3 million. These bonds bound all the movable property as defined in the bonds for the indebtednesses of Berryplum to Shoprite up to the amounts

which I have mentioned together with certain costs and finance charges.

4 On 3 April 2014, pursuant to a resolution under s 129(1) of the Companies Act, 71 of 2008 (the new Companies Act), Berryplum initiated business rescue proceedings. The prescriptions of s 129[1] as to the publication and filing of the resolution were complied with by 7 April 2014. One of these requirements is that such publication be made to all "affected persons". Affected persons are defined in s 128(1)(a) to mean shareholders and creditors of the company, any registered trade union representing employees of the company and, if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

5 Accordingly, it is common cause, the business rescue process commenced on 7 April 2014.[2] The second respondent (the Practitioner) was appointed as Berryplum's business rescue practitioner on 11 April 2014.

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1 All references to statutory material are to the new Companies Act unless otherwise stated.

2 No issue arose in argument whether Berryplum constituted a company as defined in s 1 and thus qualified for business rescue. I shall therefore assume that it did.

6 The resolution stated that Berryplum was "financially distressed', an expression defined in s 128(1)(f). This means in the present context that it appeared to be reasonably unlikely that Berryplum would be able to pay all of its debts as they become due and payable within the immediately ensuing six months or that it appeared to be reasonably likely that Berryplum would become insolvent within the same period. Indeed, the papers demonstrate that Berryplum was, and remains, unable to pay Shoprite what it owes. Shoprite is Berryplum's major creditor. It is common cause that Shoprite holds more than 50% of the creditors' voting interest as defined in s 128(1)(j) and may, depending on how certain issues in this regard are resolved, in fact hold very nearly the whole of the voting interest.

7 At all relevant times before the commencement of the business rescue proceedings, Berryplum operated its two retail stores under Shoprite's brand and as Shoprite's franchisee. Shoprite cancelled the franchise agreement but Berryplum continued while under business rescue to trade through the two outlets. On the date upon which Berryplum was placed under business rescue, it owed Shoprite R2 747 061 for goods sold and delivered and monies loaned and advanced.

8 Under s 150(1) read with s 150(5),[3] the Practitioner was required to prepare a business rescue plan which Berryplum was obliged to publish within 25 business days after the date of the Practitioner's appointment. The Practitioner did not prepare such a plan. Section 150(2) sets out that such a plan must contain

> ... all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan ... .

9 Instead, on 23 May 2014, the last of the 25 days allowed under s 150(5), the Practitioner sent an email to "All Known Creditors and Affected Persons" in which he said that he was unable to publish a business plan at that stage. He asked for an extension to 30 June 2014. He also disclosed that Berryplum was still trading.

10 Shoprite was concerned to hear that Berryplum was trading. One can readily understand why. Berryplum had effectively traded itself into commercial insolvency while it still received the benefits of the credit facility extended to it by Shoprite as well as the Shoprite brand. If Berryplum continued trading, there was a risk that its movable assets,

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3 Section 150(5) provides: "The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by- (a) the court, on application by the company; or (b) the holders of a majority of the creditors' voting interests."

over which Shoprite held notarial bonds, would be diminished or otherwise placed beyond the reach of Shoprite. Shoprite refused the extension requested by the Practitioner.

11 Shoprite took the view, on the authority of *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 1 SA 103 KZP, that once the 25 day period had elapsed without consent of creditors or an extension allowed by the court upon an application as contemplated by s 150(5), the business rescue proceedings lapsed by operation of law. By notice of motion dated 25 June 2014, Shoprite applied to this court, citing Berryplum and the Practitioner as respondents, for orders declaring the business rescue proceedings to be discontinued and terminating such proceedings and for leave to perfect its securities under its notarial bonds. The application was not brought solely on the narrow ground that the proceedings had lapsed by operation of law. Shoprite also contended that it would be just and equitable to terminate the rescue proceedings.[4] All affected persons received notice of Shoprite's application.

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4 Subject to a qualification not presently relevant, an affected person may at any time until the adoption of a business rescue plan in terms of s 152 apply to court under s 130(1)(a)(ii) for an order setting aside the s 129(1) resolution, on the grounds that there is no reasonable prospect for rescuing the company.

12 This case must be seen against the background of the moratorium provided by s 133. This provision drastically restricts the rights of a creditor such as Shoprite to enforce its claims against a company under business rescue. For present purposes, it is enough to say that during business rescue proceedings, no creditor may enforce its claims against the company under business rescue without the written consent of the practitioner or the leave of the court in accordance with such terms as the court may consider suitable.

13 Despite Shoprite's refusal to grant an extension, Berryplum did not apply to court for an extension, then or ever, This is of some importance, in view of what followed.

14 On 6 August 2014, the Practitioner sent a "draft business rescue plan" (the first plan) to Shoprite's attorneys together with a draft sale of business agreement pursuant to which it was envisaged that Berryplum would sell the Burgersfort outlet to Natasha Geldenhuys CC and the Dulstroom outlet to Middle East Holdings (Pty) Ltd. This proposal was unacceptable to Shoprite because, for one thing, it did not preserve claims against sureties. The first plan was however abandoned by the Practitioner.

15 No notice of intention to oppose Shoprite's application was delivered. The application was set down in the unopposed motion court for hearing on 13 August 2014. On 7 August 2014 (the day after the Practitioner submitted the first plan to Shoprite) VVZ Craffert served a notice of application for leave to intervene as third respondent. No affidavit was attached to this notice. However, on 13 August 2014, an order was made, apparently by consent, providing for times within which VVZ Craffert was to file his affidavits in support of his application to intervene in the application and for Shoprite to reply. On 25 August 2014, VVZ Craffert filed a counter-application, seeking the extension of the business rescue proceedings on various grounds.

16 On 30 January 2015, the Practitioner filed what he called an affidavit to abide.[5] Under cover of this document, in which he recorded that the negotiations with Natasha Geldenhuys and Middle East Holdings had failed, the Practitioner put up the essence of a new plan. Under this new plan (the January 2015 plan), circulated to affected persons on 28 January 2015, the Practitioner on behalf of Berryplum concluded sale agreements with Ndlaleni & Sombana Trading CC for the Burgersfort outlet and the Duvonka Family Trust for the Dulstroom outlet. The two sale agreements were conditional upon the approval of the January 2015 plan. On the strength of these agreements,

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5 Consistent with that approach, Berryplum and the Practitioner abide the decision of the present application.

counsel for VVZ Craffert submitted that the business rescue process should be allowed to proceed. I shall analyse the two sale agreements below.

17 The present application was enrolled for hearing before me during the week of 23 February 2015. However, by notice of motion dated 20 February 2015, yet another procedural development occurred. Berrydust and its liquidators (collectively the Berrydust intervening parties) applied for leave to intervene to oppose the main application and, if their opposition were unsuccessful and Berryplum were discharged from business rescue proceedings under the main application, to place Berryplum yet again under business rescue pursuant to s 131(4) or, in the further alternative, to wind Berryplum up.

18 When the case was called, counsel for Shoprite strenuously argued that I should not even consider the Berrydust intervention. After some discussion between bench and bar, counsel reluctantly accepted that the interests of justice overrode counsels' objections to the Berrydust intervening parties' late attempt to enter into the present proceedings and accepted that the Berrydust intervention should be considered together with the other applications before me. Counsel also stated

that Shoprite did not need further time to consider the Berrydust intervention and did not wish to file further affidavits.

19 I accordingly heard argument on behalf of Shoprite, VVZ Craffert and the Berrydust intervening parties. I mention this because although I do not find it necessary to decide the applications for intervention, I have heard the submissions of counsel for those parties who sought leave to intervene. I need not decide the applications for intervention because, as I see it, I can do justice to the issues raised before me on behalf of those parties in the context of the main application.

20 These issues are firstly, whether the failure by the Company to publish a business plan within the requisite 25 business days resulted without more in the ending of the business rescue proceedings; secondly, if those proceedings have not ended, whether it would be just and equitable to order that they now end; thirdly, if termination is ordered, whether a fresh business rescue regime should be imposed; and, fourthly, if a fresh business rescue regime is not imposed, whether a liquidation order should issue.

21 The only reported judicial consideration of the effect of a failure to comply with the provisions of s 150(5) which counsel and I have been able to find is that in *DH Brothers, supra*:

[25] The Act does not anywhere specify the consequence of a failure to publish a plan within the allotted time. This seems to me to constitute yet another drafting *lacuna.* Section 132(2) lists circumstances which bring business rescue proceedings to an end. The failure to timeously publish a plan is not listed. The respondents submitted that this meant that such a failure did not preclude a later publication or vote to extend the allotted time. It is therefore necessary to establish the effect of such a failure. There are a number of pointers which assist in this regard.

[26] Business rescue proceedings place a moratorium on creditors enforcing their claims against the relevant company. This, of course, amounts to a legislative intrusion into a contractual relationship between parties. It is therefore an incursion into existing-law territory. It is a well-worn tenet of our law that the legislature does not intend to alter the existing law more than is necessary, particularly if it takes away existing rights. There is a presumption against any forfeiture of rights. Such a provision or set of provisions must be restrictively interpreted. In the context of business rescue the incursion on rights of creditors has been recognised in the following dictum [in *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 2 SA 378 WCC para 10]:

'There is also the consideration that the mere institution of business rescue proceedings - however dubious might be their prospects of success in a given case - materially affects the rights of third parties to enforce their rights against the subject company.'

[27] The intrusion within the context of business rescue proceedings is done for reasons of policy and within tightly set parameters. Business rescue proceedings are geared at providing a window of opportunity to restore an ailing company to financial health and functionality. This is in case

the company in question may be able to continue to contribute to the flow of the lifeblood of the economy by way of a plan. In the context of business rescue proceedings, the Act requires a number of formal steps to be taken. It is clear that time is of the essence. In *Koen* it was stated to be 'axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition'. Specific and short time limits are set which must be adhered to, inter alia, because of the suspension of the common-law rights of a party to a contract. The window of opportunity does not remain open indefinitely. It follows, therefore, that the legislature will impose and retain such a moratorium only where, in addition to there being a reasonable prospect of rescuing the company, the provisions concerning business rescue proceedings are timeously complied with.

[28] I favour the approach that the failure to publish a plan within the given or extended period results in the termination of the business rescue proceedings. This has the benefit of allowing creditors to enforce their rights against the company as soon as the time lapses. The need for certainty is met and the rights of creditors in particular are trespassed on to the least possible extent. Even if the failure to publish a business rescue plan timeously does not, in and of itself, bring an end to the business rescue proceedings, three possibilities emerge. First, and perhaps most likely, the practitioner can file a notice of termination of the business rescue proceedings in terms of s 132(2)(b). Secondly, an affected person would be entitled to bring an application under s 130(1) on the basis that it would be just and equitable for the resolution to be set aside. Thirdly, since one of the bases listed in s 130(2)(a) for the termination of business rescue proceedings is the setting-aside by the court of a resolution or order, an application may perhaps be brought under that

> subsection. Any of these can be done as soon as the 25-day period elapses without being extended. For the purpose of this application it is not necessary to make a positive finding on this issue. However, what is clear is that the stated need for strict adherence to time limits and the need for certainty have as a necessary corollary that the time to publish a plan cannot be extended after it has elapsed. [footnotes omitted]

22 In my opinion the considerations mentioned in these paragraphs are apposite and weighty. And yet I respectfully cannot agree, if such was the finding of the learned judge, that the effluxion of the 25 business day period without a plan's having been published terminates the business rescue process.

23 Firstly, I would give more weight, at the level of language, to the omission of any reference in s 132 to the position where the 25 day period has passed. Section 132(2) provides in terms for when business rescue proceedings end:

> (2) Business rescue proceedings end when-
> (a) the court-
> (i) sets aside the resolution or order that began those proceedings; or
> (ii) has converted the proceedings to liquidation proceedings;
> (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or

> (c) a business rescue plan has been-
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> (i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or
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> (ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

I can see no reason why, if the intention had been to provide for termination upon the failure timeously to publish a business plan, an express provision to this effect was not included in s 132(2).

24 Secondly: the measure must be interpreted in the light of the purpose of the legislation.[6] Section 7(k) provides that one of the purposes of the new Companies Act is to

> provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

I think that an interpretation which would allow a court, on good cause shown, to extend the 25 day period, even after its expiry, would better promote this purpose. To take an extreme example: if a practitioner

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6 *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16, referring to the cases of *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

were to suffer some personal misfortune and be unable to fulfil or neglect his duties during the critical period, so that the plan was published one day late, the inflexible interpretation could cause a deserving rescue to fail. The flexible interpretation, on the other hand, would promote the balancing of the rights and interests of "relevant stakeholders".

25 Thirdly, and further on this score: the inflexible interpretation would similarly defeat a potentially worthy rescue if instructions for the necessary application to court under s 150(5) were given timeously but, because of misfortune suffered by or negligence on the part of, eg, the company's attorney, the application were only brought (or heard) after the expiry of the period. The flexible interpretation, however, would enable a court to balance competing interests as it does, routinely, in cases where condonation is sought for failure to comply with the Rules.

26 Fourthly, the flexible interpretation would not lead to an absurdity because a creditor, aggrieved by the failure of a practitioner timeously to publish a plan, is not left entirely without a remedy. As I read the measures, a practitioner may of right prepare and the company may of right publish a plan within the 25 day period. If a plan is not so published within that period, it may only thereafter be published with

the consent of creditors or the leave of the court. A business rescue cannot succeed unless there is in the first instance a business rescue plan. It follows, as I see it, that an application to set aside a business rescue where no plan has been published within the prescribed period would generally have to succeed on that ground alone unless the company under business rescue obtained an extension through the consent of creditors or order of court upon a counter-application or other appropriate procedural step.

27 A company that wants to avoid the legitimate commercial consequences of a failure to pay its creditors and has no prospect of being rescued can, pursuant to s 129(1), achieve by a stroke of its own pen the moratorium provided for in s 133. The ease with which this may be done has produced a mischief commonly encountered in this Division. The flexible interpretation would undoubtedly give cynical business persons more scope to duck and to dive, as the expression is. But I do not think that this consideration, weighty as it is, justifies the inflexible interpretation. I agree with the view expressed in *DH Brothers, supra*, para 25 that there is a loophole in the legislation which governs business rescue proceedings. But the reduction of the scope for this mischief is in my view for the Legislature to deal with, if it sees fit. I wish that the Legislature would make it more difficult for such stratagems to succeed. Legislative measures that facilitate the

evasion of obligations do not promote the interests of justice. However, courts must guard against the temptation to use, under the guise of interpretation, their interpretational powers to amend statutory measures of which they do not approve.[7]

28 For these reasons I conclude that the failure by a company under business rescue to publish a proposed business rescue plan within the 25 business day period prescribed by s 150(5) does not of itself put an end to the business rescue process. I find, therefore, that the business rescue process in relation to Berryplum has not yet come to an end.

29 The next question I must consider is whether the current business rescue process should be perpetuated or, if the current process is to come to an end, whether a new such process should be imposed. I deal with these two questions together because to my mind they turn on the same consideration.

30 Section 128(1)(b) defines business rescue as proceedings to facilitate the rehabilitation of a company that is financially distressed. Berryplum is financially distressed. Section 128(1)(b)(iii) requires that provision be made during the business rescue proceedings for

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7 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA para 18

> the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so 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.

31 How the plan contemplated in s 128(a)(b)(iii) must be prepared by the practitioner, published and considered is dealt with in ss 150 and 151. Section 151(1) provides that the plan must be considered at a meeting of "creditors and other holders of a voting interest".

32 "Voting interest" means, as defined in s 128(1)(j), an interest as recognised, appraised and valued in terms of section 145 (4) to (6). Section 145(4) to (6) refers to the interests of creditors. It seems, therefore, that the phrase "and other holders of a voting interest" in s 151(1) is tautologous and that the meeting contemplated in those sections is a meeting of creditors alone.[8] However, under s 152(1)(c),

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8 This conclusion, however, is apparently inconsistent with the provisions of s 146(d) under which each holder of an "issued security" of the company is entitled to vote to approve or reject the plan if the plan would alter the rights associated with the class of securities held by that person. *Securities* means, under s 1, any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company. This difficulty is however of no moment in the context of the present case.

the practitioner is required to provide an opportunity for employees' representatives to address the meeting.

33 After discussion of the plan and subject to certain procedural qualifications, the practitioner must call for a vote for preliminary approval of the plan. A plan will be approved on a preliminary basis only if, amongst other things, it is supported at the meeting by the holders of more than 75% of creditors' voting interests that were voted.[9]

34 If the plan is not approved, a number of options are provided by s 153 for the further conduct of the business rescue. All but two of these options require, directly or indirectly, the approval of creditors. The other two options provide for an application to court by the practitioner[10] or an affected person present at the meeting[11] to set aside the result of the vote on

> ... the grounds that it was inappropriate.

[9] Section 152(2)(a)

[10] Section 153(1)(a)(ii)

[11] Section 153(1)(b)(ii)

35 The term "inappropriate" in its context was debated in argument. Counsel for the Berrydust intervening parties submitted that a vote against the acceptance of a plan by creditors where the vote of each such creditor was cast on the basis that the creditor concerned believed that its interests were better served by a rejection of the plan could in some circumstances nevertheless be inappropriate. In what counsel advanced as the strongest example in support of the submission, counsel pointed to a vote which would result in a substantial number of employees of the company losing their jobs.

36 The loss of jobs weighed with the court in *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another* 2014 6 SA 214 LP para 36. No analysis of the meaning of the term inappropriate was undertaken by the learned judge but it appears that the court found that a vote was inappropriate where the major creditor, which voted against the plan, would be the only beneficiary upon liquidation and that it "sound[ed] reasonable" [para 25] to grant an order setting aside the vote coupled with an order that if the finance necessary for the plan to succeed were not raised within a stated time, the practitioner would be obliged to file a notice of termination of the business rescue proceedings. What the likely dividends would be if the plan were allowed to go ahead, over what period these dividends would be paid, what security the major creditor, which had notarial bonds over some

or all of the applicant's movables, would receive if the plan were approved and finance obtained do not appear from the judgment.[12]

37 I respectfully disagree with this approach. The *Shorter Oxford Dictionary* gives *inappropriate* the meaning of *not appropriate; not suitable to the case; unfitting; improper*. The same work gives as the meaning of *appropriate* apposite to the present enquiry *specially suitable; proper*. The word "inappropriate" is used in the new Companies Act only in two instances, both in the present context.[13] The word is used once in the Companies Act 61 of 1973, (the old Companies Act) with the meaning of *unsuitable* and thus in a context that sheds no light the present interpretational problem.[14]

38 I do not accept that a vote by a creditor which is cast in good faith, in the sense that the creditor genuinely believes that a vote against the proposed plan would advance that creditor's interests, can be inappropriate. I can see nothing *unsuitable*, *unfitting* or *improper* in a vote that honestly reflects a voter's opinion as to his best interests. I can find, against counsel's submission to the contrary, nothing in the

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12 The only other reported judgment touching on the point which I have been able to find is *Advanced Business Technologies & Engineering Co (Pty) Ltd (In Business Rescue) v Aeronautique et Technologies* 2012 JDR 0345 GNP.

13 Sections 153(1)(a)(ii) and 153(1)(b)(i)(bb)

14 Section 297(GA)(b)(ii)

purposes of the new Companies Act and in particular those purposes expressed in s 7(k) which supports counsel's contention. Subject to s 146(d), only creditors vote on the proposal that a plan be approved and the meeting is a meeting of creditors, not affected persons in general. Representatives of employees have no more than a right to be heard at such a meeting before a vote is taken. The purposes of business rescue, broadly stated, are to revive faltering companies or achieve improved dividends for those companies which cannot be revived; in short, to put more money in the pockets of affected persons in general. In this context the interests of creditors, whose own money is at risk, are predominant. Whether either of these results can be achieved in a particular case depends on a forecast, which itself is based on one or more assumptions; in short on an assessment of risk. The business of companies and their creditors, in the present context, is the pursuit of monetary profit. I do not think that the purposes of the new Companies Act will be advanced by vesting in the courts a power to impose upon business people financial risks which they, on honest reflection, judge ill advised.

39 *Henochsberg* on the Companies Act 71 of 2008 (looseleaf ed) in the note to s 153(1)(a) takes the view that it is not clear what is envisaged by the term *inappropriate* in this context and that it is difficult to think of circumstances where the creditors' votes for the rejection of a

business rescue plan would be inappropriate. I agree. The lack of clarity is regrettably compounded by s 153(7) in which provides that in cases including those where the court is approached on the ground that the vote rejecting such a plan is inappropriate, the court may set aside the vote not on the ground that it is inappropriate, but that

> ... it is reasonable and just to do so, having regard to-
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> (a) the interests represented by the person or persons who voted against the proposed business rescue plan;
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> (b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
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> (c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

40 In my view, a court considering an attack on a vote under s 153(7) must first determine whether the vote was inappropriate. Only if it finds that the vote was inappropriate, can the court proceed to consider whether, taking this into account, it would be reasonable and just to set the vote aside.

41 Under s 311 of the old Companies Act, the court had the power to sanction a compromise or arrangement approved by three-fourths of, broadly, creditors and members, voting separately at meetings called

for the purpose of considering such a proposal and thereby render the compromise or arrangement binding on all such creditors and members, including those who had voted against the proposal. Approval was generally granted in such a case when the compromise or arrangement was such as a person of business would generally approve and be fair and reasonable as regards the various classes of creditors and members.[15]

42 Under s 155 of the new Companies Act, compromise proposals by companies other than those under business rescue may be put to any class of creditors of the company. If such a proposal is accepted by a majority in number representing 75% in value of the creditors or class at a meeting called for that purpose, the company has the right[16] to apply to court for an order approving the proposal. The court is then empowered[17] to approve the proposal, if it considers it just and equitable to do so, having regard to the number of creditors who were present at the meeting and voted in favour of the proposal and, in the case of a company being wound up, a report by the Master.

15 *Henochsberg* on the Companies Act 61 of 1973 (looseleaf ed) note to s 311 sv "Sanctioned by the Court".

16 Section 155(7)(a)

17 Section 155(7)(b)

43 It seems to me that the power to assess whether a proposal is just and equitable is wider than a power to determine whether a vote was inappropriate. It will be seen further that no power was or is conferred on the court to override the decisions of creditors where they voted sufficiently *against* a compromise or arrangement. I see no reason why this sound legislative policy should not operate, within the limits I have described, in relation to plans in business rescue proceedings.

44 It appears, moreover, having regard to the factors listed in s 153(7), that the enquiry into inappropriateness should be viewed purely from the perspective of the persons who voted against the plan. It would seem to follow that a consideration such as the loss of jobs by employees is not even one of the factors a court may take into account, at least directly, in the evaluation of an application to set a vote aside on the ground that it is inappropriate.

45 Returning to the facts of the present case: such a meeting was convened for 9 February 2015 but adjourned at the request of Shoprite, pending judgment on the present application, until 9 March 2015. If a vote were to be taken at that meeting, it is commercially certain that Shoprite would vote against the January 2015 plan. The reason why Shoprite will so vote is made clear on the papers: the two

sale agreements, if allowed to proceed, will prejudice Shoprite's position. I shall later say why this is so.

46 Counsel for the Berrydust intervening parties submitted that employees of Berryplum (whom counsel of course did not represent) should not be denied a hearing and suggested that the position of employees at such a meeting was analogous to that of a director at a board meeting. I do not think that the analogy is apt.

47 The Dulstroom outlet was funded by Berrydust, which claims to be a creditor of Berryplum in the sum of R1 538 831. The directors of Berrydust at all relevant times were VVZ Craffert and LJ de Jager. Berrydust itself, also formerly a franchisee of Shoprite, was liquidated on 24 March 2014 pursuant to an urgent application brought by Absa in this court under case no. 72384/13. The Berrydust liquidation application was not opposed. It appears from the papers in the Berrydust liquidation that Berrydust was indebted to Absa in the sum of more than R8 million. Berrydust did not have an overdraft with Absa but succeeded in withdrawing from its bank account with Absa more than R8 million in excess of monies deposited to its credit in that account. Berrydust achieved that, according to the undisputed allegations in the Berrydust liquidation, because VVZ Craffert carried

out a scheme of raising false, fraudulent credits; in short by what is known as kite flying.

48 On the strength of this information, Shoprite makes two points: firstly, that both Berrydust and Berryplum were controlled by the same two people, VVZ Craffert and LJ de Jager; and, secondly, that at least VVZ Craffert is a person with whom carrying on business would carry an unacceptably high moral risk.

49 The financial arrangements embraced under the two sale agreements are the following:

49.1 Shoprite holds in trust the sum of R300 000 which it may appropriate if and when the January plan is carried into effect.

49.2 The proposal would require the consent of Shoprite under s 134(3) because the proposal involves the disposal of property over which Shoprite holds "security or title interest" as contemplated in that subsection. That consent will not be forthcoming.

49.3 The purchase price for the Burgersfort outlet is R2,4 million, while that for the Dulstroom outlet is R1,5 million, in both cases exclusive of stock, for which the purchaser must pay cash within 48 hours of a stock take to be carried out very shortly before the purchaser takes possession of the business.

49.4 In each case the purchase price is to be paid in instalments.[18] No security is contemplated in the agreements in respect of the obligations of the purchasers.

49.5 No information has been provided in respect of the person or persons controlling the proposed purchaser of the Burgersfort outlet except that the person representing the purchaser is described as Joseph Mputana Mohlala.

49.6 No information is provided in respect of the Duvonka Trust, the proposed purchaser of the Dulstroom outlet. However, the trustees of the Duvonka Trust according to the resolution accompanying the Dulstroom outlet agreement are Karin Craffert, Duan van Zyl Craffert and VVZ Craffert.

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18 In the case of the Dulstroom outlet, 24 instalments of R114 000; in the case of the Burgersfort outlet, 22 instalments of R75 000 and a final instalment of R60 000.

49.7 The structure of both transactions is that Berryplum, represented by the Practitioner, will sell the businesses to the respective purchasers, which will thus be liable to Berryplum. Berryplum in turn will, according to the plan, be liable to creditors. But Berryplum will only be obliged to pay over to creditors monies that it actually receives. If one or both of the purchasers default, Shoprite will have lost the security which it presently holds and will, in commercial terms, be remediless. Shoprite's only legal remedy would be to demand that Berryplum take proceedings against the defaulting purchaser.

50 The irresistible conclusion is that creditors are being asked to approve a plan under which the purchase prices for the businesses are to be funded from the conduct of the businesses themselves. These are the very businesses which, even though assisted by the purchasing power of Shoprite and the goodwill that attracts to its brand, became financially distressed. There is nothing to suggest that either of the purchasers has any capital of its own or that either of the businesses is to be recapitalised. No capital is being put into the transaction other than the R300 000 which I mentioned earlier. No security is provided against the risk of default by either of the purchasers. The legal remedy available to Shoprite on default is almost certainly commercially worthless.

51 No reasons are advanced why it is believed that the businesses will fare better under their proposed new owners than they did under Berryplum. There appears to be no reason to believe that the businesses which failed while operated by Berryplum will succeed under the allegedly new regimes to be created pursuant to the sale agreements.

52 And finally and to my mind of the utmost importance: Shoprite is being asked to approve a plan under which it has good reason to believe that at least one of the businesses will continue to be controlled by WZ Craffert and LJ de Jager, the very men responsible for the demise of Berryplum and at least one of whom, if the allegations made on behalf of Absa are correct, has committed very substantial commercial frauds. The moral risk to Shoprite implicit in the plan is intolerable.

53 I would go so far as to say that no reasonable person of business would approve the January 2015 plan. No matter what pleas were to be made to Shoprite at the proposed meeting, the plan will not be approved. On the papers before me, which run to well over 800 pages, there is no reasonable prospect that any court would find that a vote rejecting the plan was inappropriate. But even if a court were minded to declare the vote inappropriate, the refusal of consent by

Shoprite under s 134(3), required because the proposal involves the disposal of property over which Shoprite holds security or "title interest", will not be forthcoming. Shoprite cannot be compelled so to consent. Without such consent, the plan can simply not be implemented, regardless of the views of the court on the appropriateness of the vote.

54 No purpose will therefore be served by allowing the business rescue process to continue. The only plan presently proposed for consideration is doomed to rejection. Section 130(1)(a)(ii) empowers the court on application by an affected person to set aside a s 129(1) resolution if there is no reasonable prospect of rescuing the company. This is so in the present case because there is no reasonable prospect either that pursuant to the January 2015 plan Berryplum would continue on a solvent basis[19] or that a better return would be achieved for creditors under the plan than would be achieved on an immediate liquidation.

55 The Practitioner has during the ten months he has held office proposed two plans, both of which had or have no reasonable project of being accepted. There is no indication in the evidence that a new business rescue process with a different practitioner, as suggested by

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19 Because the plan envisages that Berryplum will be divested of all its potentially revenue generating assets.

the Berrydust intervening parties, would do any better. And indeed, counsel for the Berrydust intervening parties did not argue that a new business rescue process should be instituted.

56 It follows that an order ending the current business rescue process must be made and that no order for a fresh such process should be made. The remaining question is whether, under s 130(5)(c)(ii), an order for the liquidation of Berryplum should issue. A liquidation order was urged by counsel for the Berrydust intervening parties but resisted by counsel for Shoprite.

57 Counsel for Shoprite submitted that Shoprite would be prejudiced by an immediate order for liquidation because a portion of its claim would only become completely secured upon perfection of its bonds before liquidation. However, the portion of Shoprite's security which requires perfection to achieve that end will nevertheless rank above the claims other concurrent creditors in a liquidation. The only respect in which counsel suggested Shoprite might be at risk in this regard is in relation to claims of employees. Having regard to the balancing of interests enjoined by s 7(k), I do not think that this consideration should weigh against an immediate liquidation order.

58 Berryplum is unable to pay its debts and its position can only worsen, to the detriment of creditors and employees generally. In these circumstances, in my view, immediate liquidation is appropriate. Counsel were agreed that no purpose would be served by an order provisionally winding up Berryplum.

59 There remains the question of costs. The arguments of all three parties represented before me have met with substantial success. Counsel for Shoprite have persuaded me to put an end to the business rescue process and not to order a fresh such process. Counsel for VVZ Craffert has persuaded me that the business rescue process did not end by operation of law upon the effluxion of the period allowed for the publication of a business rescue plan. Counsel for the Berrydust intervening parties has persuaded me that a liquidation order should immediately issue. I shall therefore direct that the costs of all those parties be costs in the liquidation.

60 I make the following order:

1 The resolution of the first respondent (Berryplum) adopted on 3 April 2014 to begin business rescue proceedings in terms of s 129(1) of the Companies Act, 71 of 2008 is hereby set aside;

2 The appointment of the second respondent as business practitioner of Berryplum is hereby set aside;

3 A final winding-up order is hereby granted placing Berryplum under liquidation;

4 The costs of the applicant, the third respondent and the first, second and third applicants for intervention will all be costs in the liquidation of Berryplum. In the case of the applicant, such costs are to include those consequent upon the employment of both senior and junior counsel.

NB Tuchten
Judge of the High Court
9 March 2015

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