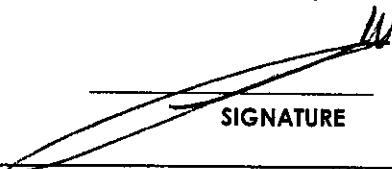


IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>23 / 04 / 2015</u> DATE	
 SIGNATURE	

CASE NUMBER: 75627 / 2013

23/4/2015

In the matter between:

KJ FOODS CC

APPLICANT

(IN BUSINESS RESCUE)

And

FIRST NATIONAL BANK

RESPONDENT

REASONS FOR THE ORDER GRANTED

MAVUNDLA J;

[1] On the 10 October 2014 I granted an order in the following terms:

- (i) setting aside in terms of section 153(7) of the Companies Act No 71 of 2008, the result of a vote by the holders of voting interest at the meeting of affected parties, on 02 December 2013, in the business rescue proceedings of the applicant rejecting the revised business plan, on the grounds that the voting against the plan was inappropriate;
- (ii) that the revised business plan be adopted by the affected parties of the applicant in terms of the Companies Act No 71 of 2008;
- (iii) that that the Respondent is ordered to pay the costs of this application which costs to include the reasonable expenses and disbursements of the joint business rescue practitioners in dealing with this application. I stated that the reasons would be furnished in due course. I therefore proceed to set the reasons for the said order.

[2] It is not disputed that the company "applicant" is producing between 80,000 to 100,000 loaves of bread daily, which bread is distributed to cash and carry wholesalers for distribution in the informal market, to which informal market the company is also distributing. The company employs approximately 220 permanent employees, 50 drivers and 100 assistants. Through the 220 permanent employees the company sustains approximately 792 people.

[3] The applicant, at the best of times, was baking 5 million loaves of bread per month, and at the worst of times, is now producing 2.8 million loaves of bread per month. The company has been banking with the respondent for a period of over 20 years. The company's financial woes which resulted in the dramatic and drastic turnaround of its good business, could be attributed to the fact that SARS slapped the company with an assessment liability of R4 million, which amount was paid in full during the beginning of 2013 and well in advance of the commencement of the business rescue proceedings in July 2013.

- [4] The decline in the production of bread negatively impacted on the financial means of the applicant, compounded by the payment of the liability to SARS in the amount of R4 million. The combination of these two factors placed a stain in the applicant's cash flow. Consequently a dispute between the applicant and one of its suppliers, namely Pioneer Foods, as creditor, threatened the well being of the applicant. This resulted in the applicant commencing with the business rescue plan, against which the respondent subsequently voted against.
- [5] The applicant (in the business rescue), brought an application in terms of s153 (1)(a)(ii) of the Companies Act, Act No. 71 of 2008 to set aside the respondent's vote against the business rescue plan. In order to succeed in a business rescue application, the applicant, as aptly held, with respect, by Binn-Ward in *Koen v Wedgwood Village Golf & Country Estate*¹ "[17] ...must satisfy the court that there is a reasonable prospect that the subject company can be rescued in the relevant sense by being placed under supervision. The information or evidence that will suffice to meet this requirement will depend on the object of the proposed business rescue, viz whether it is to achieve the continued existence of the company on a solvent basis; alternatively, to allow the company's business to be managed for an interim period to allow for a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. Whatever the object of the proposed business rescue, however, in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved. While it is the function of the business rescue practitioner, if appointed, to draw up a business rescue plan to be considered by the 'affected persons', the founding papers in a business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or, at the very least, make out a case for the court to hold that an investigation by a business rescue practitioner to that end, in terms of s 141(1) of the Act, appears to be justified." *Vide also Zoneska Investments v Midnight*

¹ 2012 (2) SA 378.

*Storm Investments*² where the court dealt with ss 128,131 & s153 of the Companies Act 71 of 2008 and held that where there are reasonable prospect of the business being saved, then business rescue should be granted. In my view, the same consideration applies in respect of s153.

[6] Section s153 provides, *inter alia*, that:

(1)(a) If a business rescue plan has been rejected as contemplated in section 152(3)

(a) (c) (ii) (bb) the practitioner may

(i) seek a vote of approval from the holders of voting interest 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.

[7] The jurisdictional facts which must be present, before an application for business rescue may be brought, are that (i) there must be a rejection of the business rescue plan; (ii) there must be grounds that satisfy the court that the rejection by the voting interest holder was inappropriate³.

[8] The issue to be decided in this matter is whether the voting against the business rescue plan by the respondent was inappropriate. S153 (7) provides that 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—

² 2012 (2) ALL SA 590 (WCC) at pars[28]-[36].

³ *Vide DH Brothers v Gribnitz* NO 2014 (1) SA 103 (KZP) at 118 para [35].

- (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 interest of that person or persons; and
- (c) A fair and reasonable estimate of the return to that person or those persons; if the company were to be liquidated."

[9] In deciding the question of inappropriateness, which is a value judgment, the Court must have regard to the general purpose of the Act as encapsulated in s7 of the Act. In the matter of *Nedbank Ltd v Bestvest 153 (Pty) Ltd*⁴; *Essa and another v Bestvest*⁵ *Gamble J*, quite correctly held, with respect, that:

" [19] It is to be noted in particular that specific mention is made in s 7(k) of the necessity for the Act to provide for the efficient rescue and recovery of financially distressed companies while ensuring that the rights and interests of the parties affected thereby are preserved.

[20] It seems to me then that a fresh approach must be adopted when assessing the affairs of 'corporate South Africa'. The legislature has pertinently charged the courts with the duty to interpret the Act in such a way that, firstly, the founding values of the Constitution are respected and advanced, and, secondly, so that the spirit and purpose of the Act are given effect to. Fundamental to the Act is the promotion and stimulation of the country's economy through, inter alia, the use of the company as a vehicle to achieve economic and social wellbeing. This must be done efficiently and in accordance with acceptable levels of corporate stewardship, all the while balancing the rights and obligations of shareholders and directors in the company, its employees and any outside parties with which a company ordinarily interacts in the course of its business.

[21] The general purposes of the Act encapsulated in s 7 must be interpreted in accordance with the interpretative provisions set out in s 5. Firstly, s 5 requires a purposive interpretation of the Act as a whole. Further, it is said that a court

⁴ 2012 (4) ALL SA 103 (WCC) at 107h.

⁵ 2012 (5) SA 497 (WCC) at 502F.

interpreting or applying the Act is entitled to have regard to foreign company law. Neither provision is in and of itself particularly innovative.

- [22] In the constitutional era a purposive approach to legislative interpretation is the method mandated by s 39(2) of the Constitution. As Langa DP observed in the *Hyundai* case:

'This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution.

...

The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values'

- [23]

Interpreting the business rescue provisions of the Act

- [27] The business rescue provisions incorporated in ch 6 of the Act are innovative and, while they resemble in certain respects the judicial management provisions of ch XV of the old Companies Act, 7...

- [36] In a more recent decision in this division, in *Gormley v West City Precinct Properties (Pty) Ltd and Another; Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd*⁶, Traverso DJP commented as follows:

'Business rescue has as its aim proceedings to facilitate the rehabilitation of a financially distressed company by providing for the temporary management of the affairs of the company, a temporary moratorium on the rights of claimants, the implementation of a plan to rescue the company by restructuring its affairs in a manner that maximises the likelihood of a company continuing to function on a solvent basis or if that is not possible, a plan that would achieve a better return for the company's creditors than the payment they would receive if the company were to be immediately liquidated.'

⁶ Ft 14: [2012] ZAWCHC 33 (18 April 2012)

[37] In the *Oakdene Square case supra* CJ Claassen J observed that the focus of the section was on business rather than company rescue:

'This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors' interests to a broader range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employees, may, in the end prove to be a better option for creditors in securing full recovery from the debtor'. "

[10] In my view, what is articulated in the above authorities equally applies in respect of s153 as well. A purposive interpretation which accords and promotes the values, ethos and rights enshrined in the Constitution and the Bill of Rights, requires of the court to do a balancing act between the rights of the role players when dealing with s153. Where, it requires the protection of the rights of employees, in my view, the court must incline towards preserving the rights of the workers rather than allow immediate liquidation of the company, depending on the circumstances of the business rescue proposed. Where the interest of the creditors would still be protected through a business rescue and not be adversely affected, then the court must be slow in countenancing liquidation which would have debilitating consequences to a large number of role players; vide the preceding paragraph; vide also *African Banking Corporation of Botswana Ltd v Kraiba Furniture Manufacturers (Pty) Ltd*.⁷

[11] In the matter of *Koen v Wedgewood Village Golf Estate*⁸ Binns-Ward J held as follows:

".... It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in

⁷ 2013 (4) ALL SA 432 (GNP) at para [23].

⁸ 2012 (2) SA 378 (WCC) at 382H-383A.

cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation." *Vide also DH Brothers Industries v Gribnitz NO.*⁹

[12] In the matter of *Cooper Sunset Trading v Spar Group*¹⁰ Makgoba J held that:

"[32] Creditors should participate in good faith and objectively consider the merits and demerits of a proposed business rescue plan.(Unreported decision by Kollapen J in *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd*¹¹."

[13] According to the applicant, in the event of liquidation the costs of the liquidation for the realisation of the assets will be R11 137 317 calculated on the basis of the assets being sold for R34 775 070 on auction. The creditors can therefore expect the following in liquidation: Secured creditors will receive 100 cents in the Rand for their claim and Concurrent creditors will receive 39 cents in the Rand for their claim.

On the other hand, with the implementation of the business rescue plan the creditors' ability to recover their debt is substantially improved. It is not envisaged that there would be any changes in the number of employees or the terms and conditions of employment if the business rescue plan is adopted. All purchases will be on cash on delivery basis if the plan is adopted and creditors will receive payments directly to their nominated bank accounts. In my view, it would seem that the respondent as a secured creditor in either liquidation or business rescue plan will still receive 100 cents in rand.¹²

[14] The opposing of the business rescue plan by the respondent is that the business plan is unrealistic. In my view, where the respondent stands to benefit the most under liquidation, unlike the unsecured creditors, and whereas under business rescue he

⁹ 2014 (1) SA 103 (KZP) at 108 par[10].

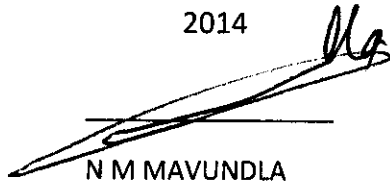
¹⁰ 2014 (6) SA 214 (LP) at 221D-G.

¹¹ (GNP case No 6418/ 2011, 8 May 2012) at para 37.)

¹² Vide paginated pages 542-543.

would still be receiving 100 cents in a rand, the objection against the business rescue is not appropriate but premised on self-interest for a quick solution to the financial woes of the applicant through its statutory burial in the form of liquidation. It is noteworthy that the applicant, besides other financial management problems, its major problem stemmed from the very fact that it paid its liability to SARS promptly, this resulting in liquidity difficulty. Notwithstanding this fact, the applicant managed to stave off the potential job loss which would have resulted through liquidation. It needs to be borne in mind that there is no glass prism to know beforehand whether business rescue, just like any other business, would be successful. Of importance is whether there are reasonable grounds to believe that business rescue is viable and job loss for many can be averted or even delayed. That is a value judgment, the court must make. The very fact that the respondent has managed to pay some of its debts, thus far, is an important consideration that moves this court to conclude that the vote against the business rescue by the respondent was inappropriate and warranted the intervention of this court by setting it aside, as already ordered.

[15] I therefore hand down the reasons for the order delivered on the 10 the October 2014



N M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 23/ 04 /2015

APPLICANT'S ATT : KOSTER ATTORNEYS

APPLICANT'S ADV : ADV L. K. VAN DER MERWE

1ST RESPONDENT'S ATT : RORICH, WOLMARANS & LUDERITZ

RESPONDENT'S ADV : ADV L. MEINTJES