IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3813/2013

In the matter between:

ABSA BANK LIMITED	Applicant
and	
JOHN FREDERICK KNEALE CAINE N.O.	1st Respondent
CRIR PROPERTIES (CC) Registration Number: 1999/061501/23 (Under business rescue supervision)	2nd Respondent

Case No.: 3915/2013

In the matter between:

ABSA BANK LIMITED	Applicant
and	
JOHN FREDERICK KNEALE CAINE N.O.	1st Respondent
RCIR VALUATIONS (PTY) LTD Registration Number: 2002/021728/07 (Under business rescue supervision)	2nd Respondent

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HEARD ON: 6 FEBRUARY 2014

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 2 April 2014

INTRODUCTION

[1] The dispute to be adjudicated in two interrelated applications, being applications 3813/2013 and 3915/2013, turns around the business rescue proceedings of a close corporation and a private company respectively and a major creditor's claim that their business rescue is void, alternatively terminated and that the two entities should be provisionally wound-up.

THE PARTIES

[2] Absa Bank Ltd ("the bank") is the applicant in both applications. John Frederick Kneale Caine ("the practitioner"), the appointed business rescue practitioner, is cited in his representative capacity as first respondent in both applications. CRIR Properties CC ("Properties") is the second respondent in the first application and RCIR Valuations (Pty) Ltd ("Valuations") is the second respondent in the other application. From time to time I shall refer to Properties and Valuations as "the two entities". The bank is represented by Adv Heymans and the two entities by Adv Hack.

THE RELIEF SOUGHT

[3] The following relief is sought by the bank in both applications:

"1. An order declaring the business rescue of the second respondent void, alternatively that the business rescue is terminated.

2. That the estate of the second respondent be placed under provisional liquidation in the hands of the Master of the High Court…" together with further standard orders.

[4] The applications are opposed by the two entities and they are supported in their opposition by the practitioner. At the hearing of the application the two entities and the practitioner brought formal applications for postponement of the liquidation applications to 10 April 2014. The applications were dated 6 February 2014, the date of the hearing, and served on the bank's attorneys at 08h00 that morning. I considered the applications and arguments on behalf of the parties whereupon I dismissed the applications. I shall briefly refer to certain aspects that were raised in the founding affidavit in support of the applications for postponement *infra.*

[5] The issues to be considered at this stage are the following:

(a) whether the business rescue is void, alternatively terminated;

(b) whether the conditional applications of the two entities in terms of ss 131(7) of the Companies Act, 71 of 2008, ("the ACT") should be granted;

(c) whether the bank has made out a case for provisional winding-up orders against one of or both the two entities.

[6] I intend to deal with both applications in one judgment although separate orders will be made eventually. Insofar as

certain material factual differences exist, these will be dealt with in the factual background provided in the next paragraphs and also considered in my evaluation of the facts and the law thereafter.

FACTUAL MATRIX

The salient facts are set out in chronological order in the subsequent paragraphs.

[7] The members of Properties are Bernard William Davis and his wife Dawn Anne Davis. They are married in community of property and bound themselves as sureties and co-principal debtors for the obligations of Properties to the bank. They are also the directors of Valuations. Properties also bound itself as surety and co-principal debtor for the obligations of Valuations in favour of the bank.

[8] On 31 October 2011 resolutions were passed by Properties and Valuations in terms of s 129(3)(b) of the Act in terms whereof it was resolved that these entities be placed under business rescue with immediate effect.

[9] The notice of the beginning of business rescue proceedings were filed with the Companies and Intellectual Property Commission (CIPC) on 8 November 2011 and on 17 November 2011 a notice of appointment of one Carllo Andreas Gagiano ("Gagiano") as business rescue practitioner was filed with CIPC.

[10] The appointment of Gagiano was not done within the stipulated five business day period provided for in s 129 of the Act. In any event Gagiano failed dismally in discharging his duties and he was eventually removed as business rescue practitioner under case number 4653/2012 by order of court dated 24 January 2013. During this period of business rescue Gagiano failed to

(i) convene a first meeting of creditors in terms of s 147 of the Act which had to be done within ten business days after being appointed;

(ii) prepare and publish a business rescue plan in terms of s 150 of the Act which had to be done within twenty five business days after being appointed;

(iii) convene a meeting in terms of s 151 of the Act to determine the future of the two entities;

(iv) file a report in terms of s 132(3)(a) of the Act, or to apply for an extension of the three month period within which the business rescue had to be finalised.

[11] On 6 February 2013 the practitioner was appointed by the entities as the new business rescue practitioner and a copy of the notice of appointment was filed with the CIPC on 8 February 2013.

[12] The practitioner also failed to comply with the time periods set out in the Act, particularly pertaining to the convening of a first meeting of creditors within ten business days after being appointed and the preparation and publishing of a business rescue plan within twenty five business days after being

appointed. A draft business rescue plan was forwarded to applicant in the Properties matter on 18 April 2013. A meeting was convened by the practitioner, but a major creditor, First National Bank ("FNB"), objected to short notice being given whereupon a meeting was convened for 3 May 2013. Although it was regarded as a first meeting of creditors the bank and FNB made it clear that they would not support the draft plan. Meanwhile the practitioner continued to dispose of immovable properties of Properties without proper authority. A draft plan for Valuations was e-mailed to the bank on 19 April 2013. It was clear from the plan that Valuations was not conducting any business at the time and was wholly dependent on the sale of Properties' immovable properties. At a creditors' meeting of 3 May 2013 the bank made it clear that it would not support the plan in the form submitted.

[13] Hereafter much communication by e-mail followed. It is evident that the bank insisted on a formal procedure in compliance with the prescripts of the Act. However a serious and major dispute arose as the practitioner held the view (which is still the case) that the bank could not use the proceeds of covering mortgage bonds over Properties' immovable properties to settle Valuations' debts, despite the fact that Properties is a surety and co-principal debtor for the debts of Valuations and that the bank is secured by virtue of its covering bonds. This bone of contention remained one, even during argument before me. It must be emphasised

that it was never in dispute that Properties bound itself as such.

[14] On 1 July 2013 meetings were held to put the published business rescue plans to the vote in both the Properties and Valuations matters. This took place months after the twenty five day period referred to in ss 150(5) has lapsed whilst no extension was sought by the practitioner or the two entities and/or granted by either the court or the holders of a majority of the creditors' voting interests. The bank and FNB voted against the plan in the Properties matter and the bank voted against the plan in the Valuations matter. There is a dispute as to what transpired on the meetings, e.g. whether the Properties' meeting was closed hereafter and/or whether any other business was transacted at the meeting. This aspect will be dealt with in the evaluation of the evidence. Contrary to the rejection of the business rescue plan in the Properties' matter, the business rescue plan put forward by the practitioner in the Valuations' matter was adopted by the majority of creditors with a voting interest despite the bank's dissenting vote. The very next day the practitioner reacted in an e-mail suggesting that "section 153 allows the claim of Absa, being the only dissenting vote, to be purchased by way of a binding offer for an amount of R25 064." This is not only a false statement, but was rejected by the bank.

[15] Hereafter the practitioner reported that the plan for Valuations was drafted on the mistaken belief that the business rescue plan for Properties would be supported by

the bank which turned out not to be the case. Therefore the practitioner indicated that he intended to amend the business rescue plan for Valuations which plan had already been adopted. It was conveyed that the bank's claim was to be purchased by the BDL Trust, of which Mr and Mrs Davis are the trustees, for the amount of R2 901.00 which amount was in fact paid into a term loan account in the books of the bank. The bank never agreed to any purchase and the payment was not made with its consent. In fact, it was the bank's viewpoint that the practitioner could not unilaterally amend the approved plan and to allow for purchase of voting rights contrary to the provisions of ss 153(1). It is clear that the adopted plan could not be implemented without the financial support of and the assets of Properties. The bank insisted that the practitioner follow the route of ss 141(2) to have the business rescue proceedings discontinued, but he did not adhere.

[16] On 13 July 2013 the practitioner circulated an email to all affected persons indicating that the members of Properties intended exercising their rights of purchasing the voting interest of the bank and FNB and that the business rescue plan would be revised to reflect the offer. According to the practitioner this was done in accordance with his decision to adjourn the meeting to allow affected persons to consider steps in terms of ss 153(1) as reflected in the minutes of the meeting of 1 July 2013. The bank's case is that the minutes are a total fabrication on the part of the practitioner as this issue was never discussed.

[17] Pertaining to Properties it is the bank's viewpoint that the practitioner was bound by the provisions of s 153(5) of the Act to file a notice of termination of the business rescue proceedings based on the rejection by the bank and FNB of the proposed business rescue plan and no further steps being taken in terms of ss 153(1) at the meeting. It is in the first instance the bank's contention that the business rescue is in any event null and void for non-compliance with procedural aspects, alternatively that it has terminated and that a provisional winding-up order be issued against Properties. Pertaining to Valuations it is the bank's view that the practitioner should have acted in terms of ss 141(2) as there was no reasonable prospect that Valuations could be saved, to seek an order that the business rescue proceedings be discontinued and a further order for Valuations' winding-up. Instead he unilaterally attempted to amend the approved business plan and to allow a third party to acquire the bank's claim in an unlawful manner. Valuations and the practitioner are of the view that the bank does not have a claim anymore and therefore does not have *locus standi* in the proceedings against Valuations.

RELEVANT LEGISLATION AND AUTHORITIES

[18] These two applications will be adjudicated, keeping in mind that the legislature earnestly tried to avoid the problems experienced with judicial management provided for in the Companies Act 61 of 1973. I also accept that the Act must be interpreted and applied in a manner that gives effect to all

those purposes set out in s 7 of the Act, one being relevant in this case, to wit to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of relevant stakeholders. See s 5 read with s 7(k) of the Act.

[19] "Business rescue" is defined in s 128(b) of the Act to mean "proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

i) the temporary supervision of the company, and of the management of its affairs, business and property;

ii) the temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

iii) 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."

[20] S 129 of the Act provides for the procedure to be followed if a company resolves to begin with business rescue proceedings. It reads as follows.

"**129. Company resolution to begin business rescue proceedings.**

(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under

supervision, if the board has reasonable grounds to believe that—

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.

(2) A resolution contemplated in subsection (1)—

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must—

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3) (b), a company must—

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

(5) If a company fails to comply with any provision of subsection (3) or (4)—

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

(b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.

(6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132 (2).

(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1) (f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section."

[21] It is apparent from s 129 that a company resolving to begin with business rescue proceedings is statutory obliged to comply with certain strict time limits pertaining to the publishing of the notice of the resolution and the appointment of the business rescue practitioner. S 129(5) clearly indicates that should a company fail to comply with any of the provisions of ss (3) or (4), its resolution to begin business

rescue proceedings and place the company under supervision lapses and is a nullity.

[22] In **Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique *et* Technologies Embarquees Sas and Others** (GNP) Case No 72522/2011, judgment delivered on 6 June 2012, Fabricius J was asked to consider an application for the extension of the time limits stated in ss 129(3) and (4) after these had expired. It related to the appointment of a business rescue practitioner who did not have a licence to practise at the stage when she was appointed. He found at para [25] that the sub-sections "must be judged on its own wording in the light of the actual request for such extension" and "(W)ere it otherwise, the time periods contained in s 129(3) and 129(4) would become meaningless and their purpose would be subverted." He concluded as follows at para [27]:

> "It is clear from the relevant sections contained in Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings. The purpose of section 129(5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out and no question of any condonation or argument pertaining to "substantial compliance". The requirements contained in the relevant sub-sections were either complied with or they were not. In this case they were not for the reasons stated herein above."

[23] S 130 deals with objections to company resolutions and reads as follows:

"**130. Objections to company resolution.**

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

(a) setting aside the resolution, on the grounds that—

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 129;

(b) setting aside the appointment of the practitioner, on the grounds that the practitioner—

(i) does not satisfy the requirements of section 138;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

(c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.

(2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of—

(a) subsection (1) (a) to set aside that resolution; or

(b) subsection (1) (b) to set aside the appointment of the practitioner appointed by the company,

unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.

(3) An applicant in terms of subsection (1) must—

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(4) Each affected person has a right to participate in the hearing of an application in terms of this section.

(5) When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may—

(a) set aside the resolution—

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;

(b) afford the practitioner sufficient time to form an opinion whether or not—

(i) the company appears to be financially distressed; or

(ii) there is a reasonable prospect of rescuing the company,

and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and

(c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including—

(i) an order placing the company under liquidation; or

(ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76 (4) and (5).

(6) If, after considering an application in terms of subsection (1) (b), the court makes an order setting aside the appointment of a practitioner—

(a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and

(b) the provisions of subsection (5) (b), if relevant, apply to the practitioner appointed in terms of paragraph (a)."

[24] What is apparent from s 130 is that an affected person may at any time between adoption of the resolution in terms of s 129 and adoption of the business rescue plan in terms of s 152 apply to the court for setting aside the resolution taken by the company as well as the appointment of the business

rescue practitioner on the grounds set out in ss (1)(a) and (1)(b) respectively. It appears from ss (5) that the court may set aside the company's resolution on any of the grounds set out in ss (1) or, having regard to all the evidence, if the court considers that it is otherwise just and equitable to do so. The court may, when setting aside a company's resolution, make any further necessary and appropriate order, including winding-up the company.

[25] There appears to be an anomaly if ss 129(5)(a), which provides for an immediate lapsing and a nullity of the resolution in the event of non-compliance, and s 130(5) which provides for the setting aside of the company's resolution in certain circumstances are considered. Surely, there is no reason to provide a court with a discretion to set aside a resolution which had automatically lapsed or which is a nullity. This is just one of several anomalies found in the Act and I refer in this regard to the discussion in **Henochsberg on the Companies Act 71 of 2008**, Vol 1, p 450-461. Fabricius J did not at all consider the effect of ss 130(5) read with ss 130(1)(a)(iii) in **Advanced Technologies** *supra* as he preferred to rely on the plain and unambiguous wording of ss 129(3) and (4).

[26] A further anomaly is that ss 130(1)(a) provides an affected person seeking to approach the court to set aside a resolution only three grounds on which to base the application, but in contrast, ss 130 (5)(a) empowers the court hearing an application to set aside the resolution not only on

one of those three grounds, but to rely on an additional ground, to wit if it is considered just and equitable. Clearly, *ex facie* ss 130(1)(a) an applicant is not entitled to base his application on the just and equitable ground, but contrary thereto, the court may invoke this ground to set aside the resolution. This might be a drafting error. In my view an applicant should be entitled to rely on the just and equitable principle as an additional ground to the three grounds listed in ss 130(1)(a). The legislature should make an appropriate amendment to avoid uncertainty.

[27] A court may order business rescue proceedings to begin and in this regard s 131 of the Act reads as follows:

> "**131. Court order to begin business rescue proceedings.**
>
> (1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.
>
> (2) An applicant in terms of subsection (1) must—
>
> (a) serve a copy of the application on the company and the Commission; and
>
> (b) notify each affected person of the application in the prescribed manner.
>
> (3) Each affected person has a right to participate in the hearing of an application in terms of this section.
>
> (4) After considering an application in terms of subsection (1), the court may—

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

(5) If the court makes an order in terms of subsection (4) (a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until—

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.

(7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any

time during the course of any liquidation proceedings or proceedings to enforce any security against the company.

(8) A company that has been placed under supervision in terms of this section—

(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132 (2); and

(b) must notify each affected person of the order within five business days after the date of the order."

[28] Ss 131(7) authorises a court, at any time during liquidation proceedings, to make an order placing the company under supervision and commencing business rescue proceedings and to appoint an *interim* business rescue practitioner. This is what the two entities have in mind with the backing of the practitioner in the event of the court finding that their business rescue is void or has terminated. The relief sought in terms of the conditional applications is firstly, to be placed under business rescue and secondly, for the appointment of the practitioner as their business rescue practitioner.

[29] The idea with the introduction of business rescue proceedings is surely to facilitate the rehabilitation of a financially distressed company within a relatively short space of time as it cannot be in the interest of affected persons to drag out the procedure over a year or even several years. Therefore s 132 of the Act makes specific provision for the duration of business rescue proceedings as follows:

"**132. Duration of business rescue proceedings.**

(1) Business rescue proceedings begin when—

(a) the company—

(i) files a resolution to place itself under supervision in terms of section 129 (3); or

(ii) applies to the court for consent to file a resolution in terms of section 129 (5) (b);

(b) an affected person applies to the court for an order placing the company under supervision in terms of section 131 (1); or

(c) a court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 131 (7).

(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—

(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

(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

(3) If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must—

(a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and

(b) deliver the report and each update in the prescribed manner to each affected person, and to the—

(i) court, if the proceedings have been the subject of a court order; or

(ii) Commission, in any other case."

[30] In **<u>DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others</u>** 2014 (1) SA 103 (KZP) Gorven J emphasised that the Act nowhere specifies the consequences of a failure to publish a business rescue plan within the allotted time and he regarded this as a drafting lacuna. S 132(2) lists circumstances which bring business rescue proceedings to an end, but the failure to timeously publish a plan is not listed. The respondents in that matter submitted that this meant that a failure did not preclude a latter publication or vote to extend the allotted time. The learned judge referred to the fact that business rescue proceedings place a moratorium on creditors enforcing their claims which is a legislative intrusion into a contractual relationship between parties and finally concluded that the failure to publish the business rescue plan within the given or extended period,

results in the termination of the business rescue proceedings. Such an approach has the benefit of allowing creditors to enforce their rights against the company as soon as the time lapses. He concluded as follows at para [28] p 116C:

> "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."

[31] Gorven J continued and found in para [32] of his judgment in **DH Brothers Industries** as follows:

> "It is my view, on a conspectus of the structure of business rescue proceedings, that a meeting must be convened and a vote taken in order for it to be said that a majority of creditors 'allowed' an extension of time. This was not done. No extension was therefore allowed by creditors as envisaged in s 150(5)*(b)*. This means that the business rescue proceedings came to an end after the 25-day period elapsed. If this is not the case, this application can and should bring them to an end by setting aside the resolution on the just-and-equitable ground."

[32] Insofar as the alleged enforcement of a surety by a company in favour of a third person may not be undertaken against a company except with the leave of the court, it is apposite to quote s 133 dealing with the general moratorium on legal

proceedings against a company. The section reads as follows:

> "**133. General moratorium on legal proceedings against company.**
>
> (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
>
> (a) with the written consent of the practitioner;
>
> (b) with the leave of the court and in accordance with any terms the court considers suitable;
>
> (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;
>
> (d) criminal proceedings against the company or any of its directors or officers;
>
> (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
>
> (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.
>
> (2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
>
> (3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the

measurement of that time must be suspended during the company's business rescue proceedings"

[33] A number of arguments have been raised in respect of the consideration of the business rescue plans put forward *in casu* and the approval or rejection of these plans and consequently I deem it apposite to quote s 152 and s 153 dealing with the consideration of the business rescue plan and failure to adopt the business rescue plan respectively:

"**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).

(2) In a vote called in terms of subsection (1) (e), the proposed business rescue plan will be approved on a preliminary basis if—

(a) it was supported by the holders of more than 75% of the creditors’ voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors’ voting interests, if any, that were voted.

(3) If a proposed business rescue plan—

(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153;

(b) does not alter the rights of the holders of any class of the company’s securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or

(c) does alter the rights of any class of holders of the company’s securities—

(i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities who rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and

(ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised—

(aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or

(bb) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153.

(4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—

(a) was present at the meeting;

(b) voted in favour of adoption of the plan; or

(c) in the case of creditors, had proven their claims against the company.

(5) The company, under the direction of the practitioner, must take all necessary steps to—

(a) attempt to satisfy any conditions on which the business rescue plan is contingent; and

(b) implement the plan as adopted.

(6) To the extent necessary to implement an adopted business rescue plan—

(a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 40 to the contrary; and

(b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3) (c), the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms of the business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.

(7) Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as contemplated in section 39, does not apply with respect to an issue of shares by the company in terms of the business rescue plan.

(8) When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.

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.

(3) If, on the request of the practitioner in terms of subsection (1) (a) (i), or a call by an affected person in terms of subsection (1) (b) (i) (aa), the meeting directs the practitioner to prepare and publish a revised business rescue plan—

(a) the practitioner must—

(i) conclude the meeting after that vote; and

(ii) prepare and publish a new or revised business rescue plan within 10 business days; and

(b) the provisions of this Part apply afresh to the publishing and consideration of that new or revised plan.

(4) If an affected person makes an offer contemplated in subsection (1) (b) (ii), the practitioner must—

(a) adjourn the meeting for no more than five business days, as necessary to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer; and

(b) set a date for resumption of the meeting, without further notice, at which the provisions of section 152 and this section will apply afresh.

(5) If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings.

(6) A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1) (b) (ii).

(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."

[34] It is of particular importance to note that ss 153(1) read with ss 152(3)(a) or (c) deals with the rejection of a business rescue plan only and the consequences set out in ss

153(1)(a) apply only in the case of rejection of the plan and not the adoption thereof.

[35] It is also emphasised at this stage that in the event of the rejection of a business plan and the practitioner failing to take any action contemplated in ss 153(1)(a), any affected person or combinations of affected persons may make a binding offer to purchase the voting interest 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 of that person or those persons if the company were to be liquidated.

[36] If no person takes any action contemplated in ss 153(1) the business rescue practitioner must promptly file a notice of termination of the business rescue proceedings as is apparent from the provisions of ss 153(5). It is uncertain whether the business rescue proceedings lapse automatically if the practitioner fails to take the required action, but it has to be considered whether an affected person has *locus standi* to approach the court in such case to obtain a declaratory order that the proceedings have terminated. Although the Act is silent in this respect logic dictates that a court may grant appropriate relief if approached by an affected person in circumstances where the business rescue practitioner fails to comply with his statutory duties. If there is no further hope that the business rescue may succeed, affected persons should be allowed as

soon as reasonably possible to pursue their common law and/or contractual rights against the company.

[37] Gorven J in **<u>DH Brothers Industries</u>**, *supra*, also considered the judgment in **<u>African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others</u>** 2013 (6) SA 471 (GNP) pertaining to "binding offers" envisaged in section 153(1)(b)(ii) of the Act. I respectfully agree with his criticism of the judgment in **<u>Kariba Furniture</u>** *loc cit* for the reasons advanced by him. I also accept the correctness of Dr A. Loubser's formulation in her doctoral thesis: **Some Comparative Aspects of Corporate Rescue in South African Company Law**, LLD Thesis, University of South Africa, February 2010 at 138, referred to with approval by Gorven J, where she says:

> "The word 'binding' means to imply that the offer, once made cannot be retracted or changed, although it is far from clear why this should be the case. An explanatory memorandum or report by the drafters to explain the reason behind the condition would, once again, have been of invaluable help."

She then discussed the curious condition pertaining to payment offered to purchase the voting interests and continued as follows:

> "This inexplicable condition now raises the fear that the words 'binding offer' referred to above do not apply to the offeror only, but in fact also bind the offeree to the offer. The right of the offeree to apply to court for a review of the valuation would be

> explained by this interpretation, as he would otherwise simply refuse the offer. It is to be hoped that this is not the intended result of the provision, since the possibilities for abuse and exploitation are endless, but it is almost impossible to say with any certainty what this provision is supposed to achieve."

In my view the reference to "binding offer" should be regarded as an offer binding on the offeror and not the offeree who should be entitled to either accept or reject the offer at his will. However it is apparent that there is uncertainty and therefore the legislature is urged to consider the issue afresh and make the necessary amendments. *In casu* the practitioner believed that a valid binding offer, which also bound the bank, was made. However it is not necessary to discuss the issue further as the offer relied upon was made after the business rescue plan had been adopted and the provisions of ss 153(1) did not even come into play.

[38] It is necessary to return to what is meant by "financially distressed" in ss 128(1)(f) of the Act. This is the case if "it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months or it appears to be reasonable likely that the company will become insolvent within the immediately ensuing six months." *In casu* it is common cause that the two entities were indeed financially distressed at the time the initial applications were brought.

[39] Business rescue proceedings are much better suited to provide solutions for financially distressed companies as was the situation with judicial management under the Companies Act 61 of 1973. One of the prerequisites in ss 427(1)(b) of that Act was a reasonable probability that if the company is placed under judicial management it would be enabled to pay its debts or meet its obligations and become successful. Judicial management suffered a slow death in the light of such strict requirement and *dicta* such as the following in **Millman NO v Swartland Huis Meubileerders Bpk** 1972 (1) SA 741 (C) at 745A:

> "… even though it might be more advantageous to dispose of the business of the company as one under judicial management rather than one in liquidation, this is not a factor that should influence the Court to grant an order of judicial management in respect of a company which will in all probability never be able to discharge more than a percentage of its liabilities."

[40] Business rescue proceedings are much more flexible and financially distressed company friendly than judicial management. The potential business rescue plan provided for in ss 128(1)(b)(iii) has two objects in mind, the primary object being to facilitate the continued existence of the company in a state of solvency and secondly and in the alternative, in the event that the primary objective cannot be achieved or appears not to be viable, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. Consequently the Supreme Court of Appeal found in **Oakdene Square**

Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) at para [26] as follows:

> "It follows, as I see it, that the achievement of any one of the two goals referred to in section 128(1)(b) would qualify as "business rescue" in terms of section 131(4)."

As further stated by the Supreme Court of Appeal in para [27]:

> "… business rescue proceedings are not limited to the return of the company to solvency…"

[41] In **Oakdene Square Properties**, *supra*, the court remarked as follows in para [33]:

> "My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, ouside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution……. *A fortiori*, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve."

[42] Insofar as major creditors may be opposed to any business rescue plan put on the table by the business rescue

practitioner, it is apposite to quote the following *dicta* contained in paras [37] and [38] of **Oakdene Square Properties**, *supra*:

> "[37] In these circumstances I do not believe Nedbank and Imperial can be branded unreasonable in their declared intent to oppose any business plan in line with either of the two options proposed by the appellants. The court a quo regarded this declared intent by the two major creditors – and the holders of 60% of the shareholding in the company – as one of the reasons why business rescue was doomed to fail (see paragraph [47]). In argument before us the court a quo was criticised for doing so. Authority for this criticism was sought in the following statement from *Nedbank Ltd v Bestvest* 153 (Pty) Ltd; *Essa v Bestvest* 153 (Pty) Ltd 2012 (5) SA 497 (WCC) [also reported at [2012] 4 All SA 103 (WCC) – Ed] at paragraph [55]:
>
> 'In the answering affidavit both [the major creditors] make it clear that they are not in favour of any BRP plan, and that they will vote against it at any meeting to be convened by the business rescue practitioner in terms of ss 132(2)(c) and 152 of the Act. They accordingly urged the court not to sanction an exercise in futility, and to rather make an order of winding-up. Such an approach appears, at first blush, to be a stratagem to advance the argument for winding-up: one would have expected a responsible creditor to be open to any proposal that may ultimately redound to its benefit. Such an approach certainly does not accord with the overall purpose of BRP which, as I have demonstrated above, are aimed at saving rather than destroying a business, and in which consultation and consensus-seeking would be the point of departure.'
>
> [38] If the statement is intended to convey that the declared intent to oppose by the majority creditors should in

> principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of section 132(2)(c)(i) read with section 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the Court in terms of section 153. But that, of course, will take time and attract further costs. Moreover, the Court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In these circumstances I do not believe that the court a quo can be criticised for having regard to the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants."

[43] One of the declared purposes of the Act is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of relevant stakeholders. See s 7(k).

[44] In **Commissioner, South African Revenue Service v Beginsel NO and Others** 2013 (1) SA 307 (WCC) the Commissioner challenged the validity of a decision taken at a meeting of creditors to adopt a business plan and sought a conversion of the business rescue into winding-up proceedings. The court found that the implementation of the

business plan was far advanced, there was already planning for the sale of some of the respondent's operations and the business rescue plan was supported by 87% of the value of creditors present at the meeting of creditors whilst only SARS took an opposite view. Consequently the court found that nothing would be achieved if the business rescue proceedings would be converted into liquidation, bearing in mind the extra costs to be incurred. The court was also satisfied that the continuation of the business rescue proceedings would result in a better return for the company's creditors as a whole than would result from the reintroduction of the liquidation process. *In casu* matters are much more intricate. There has been non-compliance with the Act in several respects and it cannot avail the two entities and the practitioner to argue that all these should be disregarded and business rescue be allowed to proceed. In **Beginsel NO** the implementation of the business rescue plan was far advanced, but *in casu* it cannot be implemented.

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[45] Neither Mr Heymans, nor Mr Hack referred to any case law dealing specifically with the issue of costs in business rescue, sequestration and liquidation applications. In terms of s 97(3) of the Insolvency Act, 24 of 1936, the costs of opposition in sequestration proceedings are not included in the costs of sequestration, unless the court directs that they be included. Such orders have been granted in the past on the sole ground that the debtor's opposition was *bona fide*

and reasonable. See **Hugo, NO v Lipkie** 1961 (3) SA 66 (O) at 73A and the further case law referred to by **Mars: The Law of Insolvency in South Africa**, 9th ed, para 5.40 at 150. However it appears as if such costs should as a general rule be refused unless special circumstances exist and the debtor had real and substantial grounds for opposing, or because his opposition assisted the court in coming to a decision. See **Slabbert, Verster & Malherbe (Vrede) (Edms) Bpk v Bothma** 1975 (1) SA 232 (O) at 236A and **Lotzof v Raubenheimer** 1959 (1) SA 90 (O) at 94G.

[46] Section 97(3) of the Insolvency Act applies to a winding-up by virtue of s 342(1) of the Companies Act, 61 of 1973. Notwithstanding the 2008 Companies Act, Chapter 14 of the 1973 Act is still applicable in certain instances. In the case of insolvent companies the costs of an unsuccessful opposition to a winding-up application form part of the costs of liquidation only if the court so orders (s 97(3) of the Insolvency Act). To conclude, the effect of s 97(2)(c) and (3) of the Insolvency Act, read with s 342(1) of the 1973 Companies Act is that the costs incurred by the applicant for the winding-up order are automatically "the taxed costs of liquidation" (unless the court otherwise orders) and the costs of unsuccessful opposition to the grant of the order are costs in the liquidation only if the court so directs. Contrary to an earlier approach that the court should so direct only if the opposition was *bona fide* and reasonable - see for example **Premier Industries Ltd v African Dried Fruit Co (1950) Ltd and Others** 1953 (3) SA 510 (C) at 513 – 514 - more

recent authorities are to the effect that the court should so direct only where special circumstances exist. See **Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others** 1976 (2) SA 856 (W) at 868. See also **Absa Bank Ltd v Rheboksskloof (Pty) Ltd and Others** 1993 (4) SA 436 (C) at 450 – 451 where the court refused so to direct where it was satisfied that at no relevant time had there been any reasonable prospect of the opposition proving successful.

EVALUATION OF THE FACTS, THE SUBMISSIONS OF COUNSEL AND THE AUTHORITIES

[47] I am a proponent of supervision and business rescue proceedings and am a firm believer that if the spirit and purpose of the Act is given effect to success will be achieved and the proceedings will not become redundant as was the case with judicial management under the 1973 Companies Act. If a purposive approach to interpretation of the Act is undertaken as one should do, there can be little doubt that companies, being vehicles to obtain economic and social well-being, should rather be rescued if at all possible, than "killed" in a winding-up process. However all stakeholders will have to participate *bona fide* all the time and within the prescripts of the law.

[48] I have already indicated, *supra*, certain of my viewpoints pertaining to some of the sections of the Act and do not

intend to repeat same here. I am satisfied that the manner in which the business rescue practitioner has conducted proceedings cannot be approved. Although the present practitioner cannot be blamed for the initial delay of more than a year, he himself is responsible for a further delay of several months. The business rescue process was initiated on 31 October 2011, nearly two and a half years ago. I take cognisance that these applications were already filed at the end of September 2013. This was most definitely not the idea of the legislature that creditors could be held ransom and be prevented from exercising their normal contractual rights for such an extraordinary period of time.

[49] I need to mention briefly why I decided to dismiss the applications for postponement even though it might be possible to settle all those debts which the practitioner regards as the two entities' debts upon receipt of the purchase price of the farm property of Properties. The practitioner was not entitled to sell the immovable property. He did not act in accordance with an approved business plan, or in the ordinary course of business of Properties. Its business is investment in immovable property and thus that of a property holding company. It does not trade in or speculate with immovable property and this was admitted in the answering affidavit. The seller was not authorised to sell, and the same applies to the purchaser *ex facie* the papers. The purchaser is cited as the Eldorado Trust. There is no indication who signed the deed of sale on behalf of the

trustees of the trust and/or whether this person was duly authorised by the trustees who have to act together. Mr Hack confirmed that the bank's position will remain the same if postponements were to be granted and the transaction was allowed to proceed. The effect hereof, according to the practitioner's unequivocal viewpoint, is that the bank is not a creditor of Valuations anymore and consequently it has nothing to gain or to forfeit. Thus, based on the practitioner's approach, if business rescue is allowed to proceed, it would be highly prejudicial to the bank who has shown that the practitioner's submissions are based on an improper understanding of the law.

[50] Further problems were faced by the two entities, backed by the practitioner, who not only deposed to the founding affidavits in the postponement applications and the ss 131(7) applications, but also deposed to confirmatory affidavits in the main applications. Clearly, he not only has the interests of Mr and Mrs Davis in particular at heart, but he is particularly subjective in his approach to the saga. In considering the applications for postponement I took cognisance of the time wasted so far, the various time limits ignored by the practitioner and his predecessor, the fact that the business rescue proceedings should have been finalised a long time ago and the stance of the bank that the business rescue is void, alternatively terminated. Mr Hack was more concerned to keep Valuations "alive" insofar as it would become entitled to valuable shares by the end of the year. There is no concrete and admissible evidence before me

hereof and Mr Heymans correctly referred thereto as "a pie in the sky".

[51] Mr Hack strenuously argued that the matter should be adjudicated in accordance with the principles laid down in **Plascon Evans** and in so doing the application should be dismissed. He relied on what he called three foreseeable disputes, to wit (a) the bank's reliance on deeds of suretyship whilst the relevant mortgage bonds and deeds of suretyship were not attached to the papers – an aspect which was dealt with by Mr Davis is his answering affidavit on the basis that he could not admit or deny the existence thereof; (b) the outcome of the meetings of 1 July and precisely what was discussed and resolved and (c) the applicability of the time periods and the practitioner's proceeding with the sale of immovable properties. I do not agree with these submissions. The practitioner never doubted and in fact accepted at all relevant times that the bank was the holder of covering bonds and that deeds of suretyship as stated on behalf of the bank existed. The dispute turned around the practical and legal effect thereof which is a matter of law and not fact. The practitioner's version in respect of the second issue is untenable and I am not prepared to accept it as correct. Even if I am wrong in this regard this is not the end of the matter for the reasons set out herein. I have already dealt with the time periods and also refer to what is stated *infra.* The practitioner cannot be heard to say, as he and Mr Hack do, that time doesn't matter and that since his appointment time periods could effectively be disregarded.

[52] It is also apparent from the papers that the practitioner has in mind the liquidation of the respondents, not in terms of the provisions of Chapter 14 of the 1973 Act, but in his own time and in accordance with his own processes and procedures. He is utilising an informal kind of winding-up in the words of Brand JA in **Oakdene Square Properties** which should not be tolerated. I am also concerned with the extravagant fees which he has charged up until May last year already, which is in excess of R147 000.00. I do not know what his fees are up and until the time these applications were filed, but I have reason to believe that he is of the view that he is owed much more. If one considers the statutory fees to which a liquidator would be entitled *in casu*, it would be less than already claimed and being paid to the practitioner.

[53] The bank voted against the adoption of the business rescue plan in the case of Properties and there is no reason why its opposition could be ignored or frowned upon. It cannot be branded unreasonable as it was entitled to vote against the adoption of the plan. Fact is that the plan was rejected. The whole process that followed in terms whereof its voting rights were to be purchased, is flawed and totally contrary to the provisions of ss 153(1)(a). Fact is that no documents in this regard have been filed with the court, or even disclosed during the voluminous e-mail correspondence between the parties that were attached to the papers. There is not only two different versions before me, but even on Property's version, which appears to be untenable and false but which I

accept for the moment, no proper offer was made for any voting rights and nothing was accepted. I refer to the passages in the judgment of Gorven J in **DH Brothers Industries** quoted with approval *supra.* The practitioner should have acted in terms of ss 153(5) and filed a notice of termination of the business rescue, but failed to do so. This should have happened in July 2013 already.

[54] The business rescue plan of Valuations was approved by creditors, but in that matter, the practitioner decided *mero motu* that the plan had in fact not been approved on the basis that the plan in respect of the one entity could not be approved whilst the plan in respect of the other was rejected. No such condition surfaced at any stage during any meeting. He took the view that this approved plan was in fact not approved, alternatively could be amended by him unilaterally. This is an untenable situation and makes a mockery of the meeting of creditors and their decisions. In the process the practitioner unilaterally prepared a revised plan based on the bank's claim being "purchased" by BDL Trust of Mr and Mrs Davis for the ridiculous amount of R2 901 by unlawfully utilising ss 153(1) procedure. This happened without the bank's consent or input. This sub-section does not apply when a business rescue plan has been adopted as *in casu.* Even if anything else is disregarded for the moment, this extremely controversial issue is sufficient to conclude that it is just and equitable that the business rescue of Valuations be terminated.

[55] I have taken cognisance of the fact that the farm property of Properties might be sold, bearing in mind the written offer received after filing of the affidavits and just prior to the application being argued, at a purchase price which would probably be sufficient to cover all debts of both entities. This might be so and if it is indeed the case, it may eventually lead to a discharge of the rule *nisi* that I intend to make, but cannot stand in the way of the orders I intend to issue. Fact is that the practitioner had no right to sell the farm. It is admitted in the answering affidavit of Properties, confirmed under oath by the practitioner, that Properties was not trading in property but was a property holding company. The selling of its immovable assets is therefore not part of its ordinary business.

[56] Although there is cogent authority for the viewpoint that the business rescue proceedings of both entities have lapsed or became a nullity due to non-compliance with procedural requirements set out in s 129 and/or s 150, I am of the view that *in casu* the better approach would be to issue a declaratory order based on the non-compliance with several other requirements. In doing so I shall have regard to the just and equitable ground stated in s 130(5). A serious waste of time occurred during the time that Gagiano acted as business rescue practitioner. The two entities must be blamed for doing nothing until end of December 2012. Thereafter the practitioner was appointed, but he also dragged his feet, but certainly not to the extent of Gagiano. The first meetings of creditors were held late as was the

case with the presentation of the business plans. It took nearly five months instead of twenty five business days. The practitioner should have utilised ss 141(2) and applied for discontinuance of the business rescue when it became clear that the adopted plan of Valuations could not be implemented, but he decided to proceed on a wrong path. Pertaining to Properties the only way out under the circumstances was to immediately file a notice of termination of business rescue in terms ss 153(5), but he failed to act accordingly. Gorven J is of the view that if the time limit of twenty five days is not adhered to, provided no extension was granted, the business rescue proceedings come to an end automatically for the reasons advanced. This appears to be an attractive viewpoint. No application for extension was sought at any stage *in casu*. On a conspectus of the Act, chapter 6 in particular, and the extraordinary delays that occurred herein together with the conduct of the practitioner I am of the view that the business rescue proceedings should be declared to have terminated.

[57] The practitioner has not complied with his duties as could have been expected of a reasonable business rescue practitioner. He acted without any regard to time periods and even at the stage of hearing of the application supported the view of the two entities that all time periods had become immaterial upon his appointment. He has no idea of the meaning of enforcement action or the rights to be enforced by a third party during business rescue referred to in s 133. The bank never intended to enforce its rights; it merely

insisted that its rights as surety be acknowledged, which the practitioner was not prepared to do. The practitioner carried on with the sale of property belonging to Property in business rescue without an approved plan and contrary to the provisions of the Act. It is time for winding-up and the appointment of a liquidator who will take charge and liquidate strictly in terms of the applicable legislation, being chapter 14 of the 1973 Companies Act. Some faint argument was raised that no case had been made out that the two entities are factually insolvent or not in a position to pay their debts as they fall due and thus commercially insolvent. This is an untenable argument in light of the history of events and the fact that the bank is still struggling to obtain payment of what is due and payable to it. Valuations is dependent on the finances of Properties and its adopted business rescue plan could not be implemented when Properties' plan was rejected. Mr Davis admitted in paragraphs 171 and 172 of his answering affidavit, again confirmed by the practitioner, that if business rescue is allowed to proceed, all affected parties will receive a just and equitable dividend, but in case of winding-up, the benefits will not be close to what they would have received under business rescue. This is a clear acknowledgment of insolvency.

[58] The costs of 24 October 2013 and 28 November 2013 which stood over for later adjudication should be considered. Mr Heymans conceded that the bank is not entitled to the costs of 24 October 2013 and I shall not make any order in that

regard, but the costs of 28 November 2013 should be costs in the application. No counter arguments were raised in this respect. In light of the authorities quoted *supra* the costs of opposition of the application should not be allowed to be costs in the liquidation. The opposition was not reasonable and *bona fide,* but in any event, at no relevant time was there any reasonable prospect of the opposition proving successful. No special circumstances exist to warrant an order that the costs of opposition be included in the costs of liquidation. Mr Heymans submitted that the practitioner should be ordered to pay the costs of the application. I do not believe that such order is justified, even bearing in mind what I mentioned in the previous paragraph and elsewhere. Business rescue procedure is still relatively new and the Act is not as clear and straightforward as one might have expected. Mr Hack agreed that the costs of the condonation applications wherein the two entities sought condonation for the late filing of the answering affidavits be paid on an unopposed basis.

[59] I conclude therefore that a proper case has been made out for the relief sought in both notices of motion adjusted as indicated in my orders.

[60] The following orders are made:

Application 3813/2013 (the application concerning CRIR Properties CC):

1. It is declared that the business rescue proceedings of second respondent have terminated.

2. The estate of second respondent is placed under provisional liquidation in the hands of the Master of the High Court.
3. A rule *nisi* is issued calling upon all interested parties to furnish reasons, if any, to this court on Thursday 8 May 2014 why a final winding-up order should not be issued against second respondent.
4. That this order be served on the registered address of second respondent.
5. A copy of the order must be served on
   (i) any registered trade union that, as far as the sheriff can reasonably ascertain, represents any of the employees of second respondent;
   (ii) the second respondent’s employees, if any, by affixing a copy of the order to any notice board to which the employees have access inside second respondent’s premises, alternatively by affixing a copy thereof to the front gate, where applicable, failing which the front door of the premises from which the second respondent conducts any business.
6. That this order should be served upon the South African Revenue Services.
7. That this order be published without any delay in the Volksblad and Government Gazette.
8. The costs of this application, including the costs of 28 November 2013, but excluding the costs of opposition of this application, shall be costs in the liquidation and

second respondent is ordered to pay the costs of the condonation application on an unopposed basis,

Application 3915/2013 (the RCIR Valuations (Pty) Ltd application):

1. It is declared that the business rescue proceedings of second respondent have terminated.
2. The estate of second respondent is placed under provisional liquidation in the hands of the Master of the High Court.
3. A rule *nisi* is issued calling upon all interested parties to furnish reasons, if any, to this court on Thursday 8 May 2014 why a final winding-up order should not be issued against second respondent.
4. That this order be served on the registered address of second respondent.
5. A copy of the order must be served on
   (i) any registered trade union that, as far as the sheriff can reasonably ascertain, represents any of the employees of second respondent;
   (ii) the second respondent's employees, if any, by affixing a copy of the order to any notice board to which the employees have access inside second respondent's premises, alternatively by affixing a copy thereof to the front gate, where applicable, failing which the front door of the premises from which the second respondent conducts any business.

6. That this order should be served upon the South African Revenue Services.
7. That this order be published without any delay in the Volksblad and Government Gazette.
8. The costs of this application, including the costs of 28 November 2013, but excluding the costs of opposition of this application, shall be costs in the liquidation and second respondent is ordered to pay the costs of the condonation application on an unopposed basis.

J. P. DAFFUE, J

On behalf of applicant:	Adv P.J. Heymans Instructed by: EG Cooper Majiedt Inc BLOEMFONTEIN
On behalf of second respondent:	Adv B. Hack Instructed by: Hugo & Bruwer Attorneys BLOEMFONTEIN

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