IN THE GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Heard on 26 September 2013
CASE NO: 56399/2013

In the matter between:

11/10/2013

JAN HENDRIK NEL N.O.	1st APPLICANT
CHARMAINE NEL N.O . (as the duly authorised appointed trustees of the JAN NEL TRUST (No IT660/86)	2nd APPLICANT
and	
PANAMO PROPERTIES (PTY) LTD (In business rescue)	1st RESPONDENT
LIEBENBERG DAWID RYK VAN DER MERWE N.O.	2nd RESPONDENT
THE COMPANY AND INTELLECTUAL PROPERTY COMMISSION OF THE RSA	3rd RESPONDENT
TREVOR PAYNE	4th RESPONDENT
PINK PARROT INVESTMENTS (PTY) LIMITED	5th RESPONDENT
and	
FIRSTRAND BANK LIMITED	6th RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Applicants, duly authorised as trustees of the *inter vivos* Jan Nel Trust ("the trust"), that is the sole shareholder of Panamo Holding (Pty) Ltd ("1st Respondent") under business rescue, launched an urgent Application seeking a final declaratory relief:-

[1.1] declaring that the resolution to commence the business rescue proceedings and place First Respondent under supervision of a business rescue practitioner lapsed and is a nullity;

[1.2] declaring that the appointment of 2nd Respondent on 28 October 2011 as business rescue practitioner of the First Respondent is void;

[1.3] that the costs of the Application be paid by any person or party who opposes this Application;

[1.4] Further and/or alternative relief.

[2] The relief is sought against the 1st Respondent, the business under rescue, Mr Liebenberg Dawid Van der Merwe ("2nd Respondent") the appointed business rescue practitioner and the Companies Intellectual and Property Commission (3rd Respondent"). The 4th and 5th Respondents, purchasers of the immovable property of the business under rescue are cited as interested parties. The 1st, 2nd and 5th Respondents are opposing the Application.

BACKGROUND FACTS

[3] Pursuant a resolution in terms of s 129 (1) (a) of the Companies Act, 71 of 2008 ("the Act") taken by the Applicants (trustees) Jan Hendrik Nel and Charmaine Nel on 19 August 2011 in their capacities as 1st Respondent's sole directors and shareholders, to voluntarily begin business rescue proceedings, 1st Respondent was placed under business rescue.

[4] On 18 October 2011 the resolution together with a sworn statement deposed to by the 1st Applicant was filed at the 3rd Respondent. The affected persons were sent a letter on 19 October 2011 with a notice of the resolution to commence business rescue proceedings. The 3rd Respondent then issued a registration certificate on 26 October 2011 certifying that, can act as 1st Respondent's business rescue practitioner. On 28 October 2013, a Notice confirming the appointment of 2nd Respondent as 1st Respondent's business rescue practitioner was filed with the 3rd Respondent.

[5] 2nd Respondent was to remain in control of the First Respondent. Incidentally, on 24 April 2012, as part of the business rescue proceedings and in pursuance of the approved business rescue plan, he sold 1st Respondent's immovable property described as the remaining extent of Portion 502 of the farm Boschkop 199, Honeydew, situated at 168 Blueberry Street, Honeydew, Gauteng ("Blueberry property"), to the 4th Respondent who then nominated the 5th Respondent to take transfer.

[6] Through the initiative of the 2nd Respondent rates and taxes that were owed on the property to the municipality that were hampering the transfer of the property were paid and the hold placed on the transaction by the South African Revenue Services ("SARS") for arrear taxes owed by 1st Respondent is to be uplifted soon. As a result of the transfer of the property being imminent, Applicants conceded that it prompted their launching of this Application on an urgent basis.

APPLICATION

[7] Applicants grounds for seeking the relief as prayed are that:

[7.1] The resolution to begin business rescue proceedings and place First Respondent under supervision lapsed and is a nullity for the reasons that:

[7.1.1] the notice of the resolution that was sent to the affected persons within 5 days of the adoption and filing of the resolution was not accompanied by a sworn statement; and also

[7.1.2] not published as required in terms of s 129 (3) (b). The letter sent by the 1st Respondent's attorneys on 19 October 2011 purporting to give notice to the affected parties is not a publication as required by the Act

[7.1.3] the business rescue practitioner was not appointed within the specified period as stipulated in the provisions of s 129 (3) (b) Act.

[7.2] When 2nd Respondent was issued with a registration certificate to act as 1st Respondent's business rescue practitioner on 26 October 2011, five (5) days had already expired by 25 October 2011, and his appointment was formally signed and filed on 28 October 2011, eight (8) days after the resolution was filed.

[8] In opposition, 1st and 2nd Respondent raised as point *in limine*, the statutory non-suitability of the Applicant to bring this Application on the basis that;

[8.1] the Applicants launched the Application in their representative capacities as trustees of the Jan Nel Trust, which they allege owns 100% of the shares in 1st Respondent, and as the sole shareholder of 1st Respondent they an affected party in terms of the Act. The Applicants have intentionally omitted to allege (their *locus standi*) that they are affected parties.

[8.2] If Applicants allege that they do not bring this action in their capacity as affected parties but in some other capacity, they are then prohibited to bring the Application under the Act as Chapter 6 does not permit persons unconnected with the company to invoke any of its provisions.

[8.3] the requisite majority of the holders of voting interests on 27 January 2012 adopted the business rescue plan being eighteen months ago. Both Applicants in their personal as well as their capacity as trustees, lodged claims against 1st Respondent in the course of the business rescue proceedings and as creditors voted in favour of the plan. As set out in s 130 of the Act, it is no longer open to any affected person to apply to Court to set aside the resolution.

[8.4] The Applicants should have sought their relief under s 130 instead of disguising the relief to be some form of declaratory order to avoid the necessity of having to have launched the Application before the adoption of the business rescue plan.

[8.5] The Applicants being the directors of 1st Respondent passed the resolution as such. They are therefore precluded by s 130 (2) (a) from applying for its setting aside. The section provides that an affected person who as a director of the company voted in favour of s 129 resolution, may not apply to court in terms of s 130 (1) (a) to set such resolution aside, making the Applicants non-suited to bring this Application.

[8.6] First Rand Bank ("FRB") is the holder of a mortgage bond over the sold property and the sale will be halted if the business rescue plan is declared a nullity. Applicants had initiated the business rescue proceedings preventing FNB that obtained judgment on 21 September 2011 against the 1st Respondent, from selling the property under execution, having caused a writ to be issued on 11 October 2011. In all other Applications that Applicants brought to set aside the business rescue, they have joined FNB as having a direct and substantial interest. Therefore this Application has got to be dismissed for non-joinder of FNB.

FNB

[9] The First Rand Bank Limited brought an Application to intervene whilst launching a Counter- Application against the Applicants and Respondents which it qualified to be conditional on the court granting the declaratory relief sought and not ordering the 1st Respondent to be placed under final winding up, that it will seek an order to be joined in the Application as the 6th Respondent and for 1st Respondent to be placed under final winding up.

[10] In its Answering Affidavit filed also in support of the Counter Application FNB alleges that it is the 1st Respondent's major creditor with the largest claim as

holder of three mortgage bonds registered against three immovable properties owned by 1st Respondent and in the other three Applications that Applicants instituted querying the business rescue proceedings, its interest was acknowledged and it was joined as a party in the Applications and therefore raises non-joinder as well as allege to be an affected party in terms of s 128 (1) (a) (i) that is entitled to participate in terms of s 130 (4).

[11] In addition, it also alleges that the Applicants are abusing the business rescue proceedings that were launched to frustrate the intervening party so that they can continue not to pay rental. Nevertheless deny that the appointment of the business rescue practitioner was fatally defective resulting in the proceedings being void, instead refers to the abusive conduct of the Applicants in their management of the 1st Respondent that they do not deserve to be protected.

[12] Moreover states that the Applicants are limited to the relief under 130 to which they are not entitled as with their support, the plan has been adopted and the Applicants themselves are the ones as directors of the company who have failed to comply with the Act. Also no prejudice has been alleged to have been suffered.

[13] On the counter application alleges that 1st Respondent committed an act of insolvency when it sent a letter dated 24 July 2013 to SARS, relying on its own failure to pay tax dating back from 2009, stating that:

> "Notice should be taken that the business rescue practitioner has sold (which we deny) the only income producing asset of the company on 24 April 2012 and that this action caused that the company immediately became insolvent. In this regard the following should be understood:
>
> 1. SARS will not qualify as preferential creditor with business rescue.
>
> 2. SARS will not receive any outstanding funds due to it with relation to outstanding VAT201 and IT14 taxes dated back to 2009 if the property is transferred.
>
> 3. SARS will however become preferential creditor if the company is liquidated. We intend to file for liquidation as stated in the attached letter from our lawyers once the time frame expired. Documentation with relation to the liquidation will be drafted and served to be heard on an urgent basis in the North Gauteng High Court in Pretoria if the business rescue practitioner does not respond positively to the said letter addressed to its attorney.

on that basis intend applying for the liquidation of 1st Respondent.

REPLY

[14] In brief, Applicants replied as follows to the Answering affidavits and Counter-Application:

[14.1] They do not oppose FRB's intervention in the proceedings but deny that it should have been joined as a party. A copy of the Application was e-mailed to FNB notifying it of the Application. The non-joinder issue is no longer relevant in the light of their Application to intervene.

[14.2] They further do not oppose FRB's Application that the 1st Respondent be placed under final liquidation if the relief they are seeking is granted, however, deny that the liquidation proceedings can be brought under s 130 (5) © (i) of the Act as they do not seek setting aside the resolution to commence business rescue proceedings in terms of s 130 but a declaratory order based on the voidness of the business rescue proceedings. FNB has anyway complied with the provision of Chapter XIV of the Act applicable to insolvent companies like 1st Respondent.

[14.3] The business rescue proceedings lapsed and are a nullity, therefore cannot be attacked. If the resolution lapsed it became legally invalid and incapable of revival later.

[14.4] They have been throughout advised that 2nd Respondent did not comply with many of the provisions of the Act and as a result dissatisfied with the conduct of the 2nd Respondent but have never been advised that the Act provides for nullity of the proceedings.

[14.5] The imminent sale and transfer of the property will result in a sale and transfer that is a legal nullity due to the voidness of the proceedings

[14.6] They deny that they lack *locus standi* and or that they are by statute barred from bringing the Application as they seek relief in terms of s 129 (5) (a) and s 130 (1) and 130 (2) do not apply, being the reason why they do not rely on the latter sections for their *locus standi.*

[14.7] They admit being affected persons and parties with a substantial interest in the subject matter of the pending litigation as the Trust owns 100% of the issued share capital.

Application for intervention and joinder

[15] FRB established that it is the largest creditor with a substantial and material interest in the outcome of this Application. As the affected party under the

definition given in s 128 (1), FRB is entitled to service being effected upon it, allowed to intervene at any time of the proceedings therefore the Application to intervene was not necessary. In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd & others* no 12746/2011 of 11 August 2011 (WCC), the court also pointed out that as all affected persons had the right to participate in hearings, they did not have to apply for leave to intervene. Indicating that "Procedures for the filing of affidavits will have to be developed in order to ensure fairness to all parties."

[16] As a result the issue of non-joinder that was referred to in the Affidavits and heads of argument was not followed or further canvassed during the hearing and FRB who confirmed to having been properly served with the Application, was as a result allowed to intervene and joined as party to the Application as the 6^{th} Respondent.

ISSUES TO BE DETERMINED

[17] The main issue is if there was non-compliance with the provisions of s 129, if so, what is the implication of a resolution that lapses and is a nullity as a result of such non- compliance. Can the provisions of s 130 (1) and (2) and (5) (a) be invoked? If yes, are the Applicants legible to bring up such proceedings, specifically as per provisions of s 130 (2) of the Act?

[18] Pertinent is also the question that if the court grants the declaratory order of nullity, has a case been made for 1^{st} Respondent to be placed under final liquidation in terms of s 130 (5) or Chapter XIV of the Companies Act and the Insolvency Act?

[19] The main issue raised will also address and establish the points relating to Applicants *locus standi* that have been raised *in limine.*

APPLICABLE LAW

[20] The provisions of the relevant sections of the Act are:

Section 129 - (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) ...; and
(b) <u>has no force or effect until it has been filed.</u>

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

(a) <u>publish</u> a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice <u>a sworn statement</u> of the facts relevant to the grounds on which the board resolution was founded.
(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) <u>its resolution to begin business rescue proceedings and place the company under provision lapses and is a nullity</u>; 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).

Section 130– (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of s 129, until the adoption of a business rescue plan in terms of s 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 from rescuing the company; or
(iii) The company has failed to satisfy the procedural requirements set out in s 129;

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

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

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

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

(c) ...;

(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 the 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.

(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) ...;

(c) If it makes an order under (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) ... ;

[21] Business rescue proceedings are also governed by the following regulations published in terms of the Act-

Regulation 123-(1) A Notice of Commencement of Business Rescue Proceedings contemplated must be in form CoR 123.1, and filed in accordance with section 129, together with a copy of the board resolution to commence business rescue proceedings.

(2) After filing its Notice of Commencement of Business Rescue Proceedings, the company must publish that Notice as required in section 129 (3) (a), by-

(a) delivering a copy of the Notice and resolution to every affected person in accordance with regulation 7; and

(b) conspicuously displaying a copy of the Notice –

(i) at the registered office of the company, the principal places of conducting the business activities of the company and at any work-place where employees are employed;

(ii) or any website that is maintained by the company and intended to be accessible by affected persons; and

(iii) if it is listed company, on any electronic system maintained by the relevant exchange for the communication and interchange of information by and among companies listed on that exchange.

(3) ...;

(4) After filing its Notice of Appointment of a Business Rescue Practitioner, the company must publish a copy of that Notice as required in section 129 (4) (b) by either-

(a) by delivering a copy of the Notice to each affected person in accordance with regulation 7; or

(b) informing each affected person of the availability of a copy of the Notice, in the manner contemplated in section 6 (11) (b) (ii) and regulation 6.

Regulation 7 – See s 6 (10) and (11) - (1) A notice or document to be delivered for any purpose contemplated in the Act or these regulations may be delivered in any manner-

(a) Contemplated in s 6 (10) or (11); or
(b) Set out in Table CR.3

Section 6 (10) provides that- If, in terms of the Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and cost.

Section 6 (11) (b) (ii) provides that if, in terms of this Act, a document, record or statement, other than a notice contemplated in subsection (10), is required-
to be published, provided or delivered, it is sufficient if-

a notice of the availability of that document, record or statement, summarising its content and satisfying any prescribed requirements, is delivered to each intended recipient of the document, record or statement, together with instructions for receiving the complete document, record or statement.

[22] It is not in contention that the resolution to commence business rescue proceedings was adopted on 19 August 2011, and together with a sworn statement signed by the 1st Applicant as the director of the 1st Respondent on 15 September 2011, filed with the 3rd Respondent on 18 October 2011. The sending of a registered letter by the attorneys acting on behalf of 1st Respondent to the affected parties the next day on 19th October 2011 with a notice of the resolution to commence business rescue proceedings *sans* a sworn statement of the facts relevant to the grounds on which the resolution was founded was certainly in contravention of s 129 (3) (a), the Act being very rigid in that regard.

[23] However Applicants' allegation that the Notice to affected persons was not published in the manner required by s 129 (3) (a) is not quite accurate. In terms of the relevant and applicable regulation 7 and Sec 6 (10) and (11) referred to in Regulation 123 that outlines the requirements of publishing as envisaged in the context of s 129 proceedings, delivery of a copy of the notice to each affected person includes any delivery of the notice of the availability of the document with instruction for receiving a complete document. Hence sending the notice by a registered post suffices. In *Ex parte: Van Steen NO* 2013 JDR 0364 (GSJ) Rautenbach AJ with reference to s 6 (9) that is not mentioned herein went further and indicated that compliance with regard to publication of notice to each affected person required by the Act is in the context of s 6 (9) accommodative to substantial compliance and not as stringent as it is perceived to be by s 129. The subsection affords deviation from the prescribed manner unless such deviation materially reduces the possibility that the intended recipient will receive the document, record, statement or notice; or is such as would reasonably mislead a person to whom the document, record, statement or notice is to be delivered then the delivery would be invalidated. However non-delivery is not condoned. There still have to be delivery to each of the affected persons to make sure that the rights and interest of all stakeholders are protected. Rautenbach AJ concluded by stating that:

> "the subsection enabled the court to find that there was substantial compliance with giving notice to all affected parties if it is established that all affected parties had full knowledge of its contents", within the prescribed time limits, (my emphasis).

[24] On the requirement to conspicuously display the Notice at any workplace where employees of the company are employed, Applicants themselves indicated that the company does not have employees so publication in that sense was not a requirement. Therefore compliance in terms of s 129 (3) (a) was deficient only

because of non-inclusion of the sworn statement on the notice to the affected persons.

[25] The appointment of 2nd Respondent as business rescue practitioner of the 1st Respondent that was filed with the 3rd Respondent on 28 October 2011 following the issuing of his licence or registration certificate on 26 October 2013, was delayed by eight days from the date the resolution was filed. In the letter sent to affected persons, on 19 October 2011, 1st Respondent's attorneys stated that the company has appointed Professor Marius Maritz as a business rescue practitioner which was not true as this could only happen if 3rd Respondent had issued a certificate or licence for Maritz to act as such and the company has filed the appointment with the 3rd Respondent. 1st Applicant had proposed in the sworn affidavit that was not sent to the affected persons that Maritz be appointed confirming that Maritz has accepted and is registered in terms of the Act. As those facts were not true, it resulted in the delayed appointment of 2nd Respondent. The delay resulted in non-compliance with the provisions of s 129 (3) (b).

[26] Accordingly as provided in s 129 (5), the resolution to begin business rescue proceedings and place the company under supervision lapsed and was a nullity. The meaning of "lapse" and "nullity" in relation to the resolution should be interpreted from the context of the Act itself that provides in s 129 (2) that the resolution has no force or effect until it has been filed and in s 132 (1) (a) where it provides that business rescue proceedings begin when the company files a resolution to place itself under supervision in terms of s 129 (3). These two provisions are very important and the reference to compliance with s 129 (3) to mark or denote the commencement of business rescue proceedings is highly significant for understanding the implication of the use of the two words "lapse" and "nullity" in s 129 (5). The words at first glance might sound repetitious but are distinctive in their context. In terms of s 129 (2), the resolution comes into force and effect on its filing and lapses when subsection ("ss") 3 is not complied with. The resolution's effectiveness to trigger or cause the business rescue proceedings to begin becomes a nullity, in other words it will not cause the commencement of the business rescue proceedings, in that sense become a nullity. The end result being that the business rescue proceedings did not commence (did not come into existence).

[27] It is therefore deliberate that s 132 would refer to s 129 (3) and not to 129 (2) for the proceedings to begin. The nullity of the resolution is therefore with reference to its effectiveness in bringing about the business rescue proceedings. A context inferred from the definition of the word in The Shorter Oxford English Dictionary that refers to "nullity" as coming from the Latin word "*nullus*" meaning "no", "none", and as a noun described as:
(1) A fact or circumstances causing invalidity;
(2) The condition of being non-existent; nothingness;
(3) A mere nothing; nonentity

[28] The lapsed resolution caused an invalidity that prevented the coming into existence of the business rescue proceedings. And so *ex lege* there was no business rescue proceedings. The conclusion has serious implications on the invocation of the other provisions of the Act. There cannot be an Application in terms of s 130 to set aside a non-existent situation or a resolution that amounts to nothing.

[29] Mr Gilbert, Counsel for the 1st, 2nd and 5th Respondents' argument and Mr that the Applicants should have sought their relief under s 130 instead of disguising the relief to be some form of declaratory order to avoid the necessity of having to launch the Application before the adoption of the business rescue plan, carries no weight if the resolution is of no force or effect. As much also is the allegation that Applicants lack *locus standi* being non-suited by the provisions of s 130, since legally there are no business rescue proceedings that have come into existence that Applicants are barred from challenging. Fabricius J *in Advanced Technologies & Engineering Company (Pty) Ltd v Aeronautique Et Technologies & Others*, unreported case number 72522/2011 (NGHC) in par 27 concluded in respect of this section that:

> "The purpose of s 129 (5), is plain and blunt. There cannot be an 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."

[30] It was also raised on behalf of the Respondents that Applicants as directors of the 1st Respondent were abusive in their conduct of the company affairs and should not be protected against the effect of the proceedings. All the Respondents held the sentiment that it is the Applicants themselves that passed and adopted the resolution and for that reason they are precluded by s 130 (2) from setting the resolution aside. Fundamentally, one can only set aside what exists and not a nonentity. Unfortunately it would seem that the consequence of s 129 (3) and (4) were not well thought out or fully appreciated by the legislator in the quest to force swiftness in the handling of the process. Fabricius J confirms the sentiment in *Advance Technologies* stating that:

> " 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"

with unintended results that may frustrate the same stakeholders that the act was seeking to protect.

[31] The barring of any challenge to the proceedings after the approval and adoption of the business rescue plan has been adopted does not, under the circumstance, apply, since the effect of s 129 (5) is to invalidate the business rescue proceedings that were purportedly brought by the lapsed resolution. The business rescue proceedings are considered never to have existed since the lapsed resolution has a retroactive effect.

[32] In that case, FRB's counter application that was conditional upon the declaration sought by the Applicants being granted merits consideration. The parties are agreed that the 1st Respondent was commercially insolvent at the start of the business rescue and that without realising its major asset, the blueberry property, it was unable to pay its debts and since then the situation has gone worse as it is not generating an income. The Applicants, directors of the company are utilising the property for accommodation without paying rental. They have themselves, admitted that the company is insolvent and in a letter to the South African Revenue Services ("SARS") indicated that even with the selling of the available major asset that is of substantial value the 1st Respondent will still not be able to meet its debts and that only through insolvency will the creditors be protected. Now with due regard also of the manner in which the Applicants as directors have conducted the affairs of the 1st Respondent, including the delay by the Applicant in resolving the and dealing with the financial distress of the company, it is reasonable, just and equitable that the court considers the placing of the 1st Respondent under final winding up.

[33] FNB has complied with the requirements of s 346 (3) of the Companies Act 61 of 1973 and obtained from the Master the required certificate for the tendered security. The necessary affidavits by an attorney confirming proper services upon the Master, South African Revenue Services, and other interested or affected parties Applicant has also been filed. It is not disputed that 1st Respondent does not have employees however FNB has taken satisfactory measures, in case thereof. Basically, FNB , the major creditor has complied with the requirements for the final winding up of the 1st Respondent.

[34] Mr Gilbert for the Respondents argued that for the reason that the Applicants in their capacity as owner trustees, sole shareholders and directors of the 1st Respondent initiated the proceedings and are responsible for the non-compliance with section 129 (3) and (4) that rendered the resolution they adopted a nullity, invalidating the business rescue proceedings, the costs incurred in the course of obtaining an order declaring such resolution a nullity and the proceedings invalid should be borne by the Applicants, notwithstanding the results. He submitted that it would be unfair for the 1st and 2nd Respondent to be saddled with any costs and therefore the order should be made against the Applicants in their personal capacities *de bonis propiis,* jointly and severally, even though they have brought the action as trustee representative.

[35] In view of the Applicants catastrophic bearing towards the business and the business rescue practitioner appointed to oversee the defective process, who as an officer of the court was striving to make the process work. Also that not only did Applicants bring about the defective proceedings but followed that with a litany of legal proceedings in a bid to stop the 2nd Respondent from implementing the business rescue plan and the sale of the blueberry property, and their delay in bringing this Application, the court would be justified to consider an order that deviates from the norm and not only award an order for forfeiture of costs but the *de bonis propiis* award as sought by the Respondents.

[36] In these matters the question of costs rarely is a problem because a party who would normally seek such a declaration order would be an affected person other than the directors that were responsible for the adoption of the resolution and its nullification through non-compliance. Under the circumstances a fair question to ask would be whether it would be just to make the Applicants pay. Wessels J in *Scheepers and Nolte v Pate 1909* T.H. 353 explained the test as follows:

> "The point is not whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success".

[37] The Applicants carry the responsible as the directors for the proper management of the business making sure that an appropriate assessment is made on the viability of the company and proper measures are correctly taken in time to deal with the situation. Applicants well aware of what is expected of them by the Act as deduced from their letter and sworn statement made on 15 September 2011 that spells out the exact process to be followed, nevertheless failed to comply with the process, prejudicing the innocent parties that were strung along in the defective process, that they believed to be genuine. Thereafter Applicants delayed to launch this Application and now are doing so, as conceded, only for selfish reasons when they realised that it will not be possible to stop the imminent transfer of the property to the 5th Respondent. They even went further than placing the business under business rescue and voted in favour of the business plan that included the sale of the immovable property, that now prompted the present application to nullify the process. It would consequently be ludicrous for either the 2nd Respondent or 1st Respondent to be placed in this precarious position and then be saddled with costs. Especially the 2nd Respondent, his opposition of the Application was bona fide, believing that s 130 (2) might be applicable, labouring under the mistaken believe that he is acting in the best interest of the creditors. The Applicants have acted to the company's detriment with a disastrous outcome. At the end of the day any costs against 1st, 2nd Respondent or Applicants would be at the expense of the general body of

creditors. See *Gulmin and Another* 1982 (2) SA 4785 (W), where the headnote reads:

> *"Where there is litigation in the name of a company but the persons effectively litigating are the directors or co-owners of the company, it is competent for the Court to order one or other of them to pay costs de bonis propiis."*

[38] Under the circumstances I hereby make the following order:-

[38.1] 6th Respondent is granted leave to intervene in the main Application for a declaratory order;

[38.2] Declaring that 1st Respondent's resolution to commence business rescue proceedings and place First Respondent under supervision of a business rescue practitioner lapsed and is a nullity;

[38.3] declaring that the purported appointment of 2nd Respondent on 28 October 2011 as business rescue practitioner of the First Respondent is void.

[38.4] Applicants are ordered to pay the costs of the Application for a declaratory order de bonis propiis, (in their personal capacity) jointly and severally.

COUNTER APPLICATION

[38.5] The 1st Respondent is placed under final winding up

[38.6] The costs of the winding up Application to be costs in liquidation.

N V KHUMALO
JUDGE OF THE GAUTENG HIGH COURT -PRETORIA

Delivered on 11 October 2013

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