



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

**CASE NO.: 1793/2022
Date heard: 13-04-2023
Date delivered: 15-04-2024**

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL:
NORTHERN CAPE DEPARTMENT OF AGRICULTURE,
ENVIRONMENTAL AFFAIRS, RURAL DEVELOPMENT
AND LAND REFORM**

Applicant

and

HERMAN BESTER N.O.
(Joint business rescue practitioner of the third respondent)

1st Respondent

AVIWE NDYAMARA N.O.
(Joint business rescue practitioner of the third respondent)

2nd Respondent

NIEUWOUDTVILLE ROOIBOS (PTY) LTD
(Registration Number: 2008/023997/07)
IN BUSINESS RESCUE

3rd Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION (CIPC)**

4th Respondent

ALL KNOWN AFFECTED PERSONS

*Fifth and further
Respondents*

CORAM: WILLIAMS J

JUDGMENT

WILLIAMS J:**Introduction**

1. The applicant, the MEC of the Executive Council: Northern Cape Department of Agriculture, Environmental Affairs, Rural Development and Land Reform, referred to herein as either the MEC or the Department, brought this application on an urgent basis on 20 January 2023 seeking relief in Part A of its Notice of Motion that inter alia: The first respondent, Herman Bester NO (Bester) be suspended with immediate effect as business rescue practitioner of the 3rd respondent, Niewoudtville Rooibos (Pty) Ltd (the Company); that Bester hand over full control of all bank accounts and documentation in respect of the Company to the 2nd respondent, Aviwe Ndyamara NO (Ndyamara); and directing that pending the outcome of Part B of the application, Ndyamara be entitled to act as if he is the sole business rescue practitioner of the Company.
2. Part B of the Notice of Motion envisages the Department to make application for the removal of Bester as business rescue practitioner of the Company with immediate effect; to have Bester declared a delinquent director; and that costs of the application in the event of opposition be ordered on the attorney and client scale and in respect of Bester, de bonis propriis, jointly and severally.
3. After certain postponements, to which I will revert in due course, the application was eventually argued on 13 April 2023. At that

stage the parties agreed that the relief sought in Part A be disregarded and that Part B of the application be determined.

Background

4. The Company was registered during 2009 by the Department as a vehicle for the purchasing, packaging and marketing of rooibos tea in the Northern Cape. The main aim was to localise a rooibos tea processing plant, not only for the benefit of the province but to support and promote the emerging farmers in the Northern Cape. The goal was for these emerging farmers to obtain with shareholding in the Company together with commercial farmers, investors and the Department. At the moment the Department is still possessed of 100% of the shareholding in the Company.
5. The stockpiling of tea during 2018, when tea prices were escalating, to the sale of the tea at lower prices than what it was purchased for during 2019 due to floundering tea prices and the COVID19 pandemic of 2020, were amongst the factors which resulted in the Company experiencing cash flow problems during this period.
6. As a result, one of the largest commercial suppliers of tea to the Company, Cloudskraal Boerdery CC successfully applied during 2020 to place the Company under business rescue. Cloudskraal was owed R1, 7 million by the Company at the time. Bester was appointed as the business rescue practitioner.

The complaints against Bester

7. The department's complaints against Bester are manifold and include inter alia the following:
- 7.1 Bester's appointment as business rescue practitioner has not been confirmed at the first meeting of creditors (or any other meeting) as required in terms of s131(5) of the Companies Act 71 of 2008 (the Act);
 - 7.2 Contrary to the business rescue plan and the Memorandum of Agreement with the Department, he entered into additional procurement agreements with commercial farmers for the supply of tea when the Company was already over-supplied with tea stock and thereby increased the Company's indebtedness even further;
 - 7.3 Bester entered into loan agreements at excessive interest rates with entities not registered as financial service providers and despite the fact that the Department had already provided post commencement funding in an amount of R20 million.
 - 7.4 Bester decided to package tea at the processing plant, which is not done in the industry and which resulted in huge costs to the Company, thus further exacerbating its financial problems.
 - 7.5 He entered into agreements with Crown tea (Pty) Ltd and 365 brands (Pty) Ltd which were detrimental to the Company;
 - 7.6 He appointed consultants and additional contract workers, thus increasing operating costs;

- 7.7 He is incompetent, fails to comply with his obligations as a business rescue practitioner, may have engaged in illegal acts and has been shown to be conflicted and lacking independence;
 - 7.8 He failed to provide monthly reports to affected parties and the Court and has not prepared audited financial statements since commencement of the business rescue process;
 - 7.9 He failed to turn the Company around after more than two years of business rescue.
 - 7.10 He attempted to have the Company liquidated even though the Company is capable of being rescued; and
 - 7.11 He refuses to comply with the terms of the agreement entered into between the parties which was made an order of court in order to keep the liquidation of the Company in abeyance.
8. The Department is therefore of the view that the grounds for the removal of a business rescue practitioner as provided for in s139 (2) (a) to (e) of the Act are present. For the sake of completeness, s139 (2) in its entirety reads as follows:
- “139. Removal and replacement of practitioner.**
- (2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

- (a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
- (b) failure to exercise the proper degree of care in the performance of the practitioner's functions;
- (c) engaging in illegal acts or conduct;
- (d) if the practitioner no longer satisfies the requirements set out in section 138(1);
- (e) conflict of interest or lack of independence; or
- (f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

The business rescue practitioner's version

9. Bester in his answering affidavit denies the allegations against him as being mainly uncorroborated and/or hearsay. His version can be encapsulated as follows:

- 9.1 His appointment as business rescue practitioner was confirmed in a meeting with creditors held on 8 August 2020. He attached as confirmation hereof a minute of the meeting kept by one of the creditors Mr A Nel.
- 9.2 When he was appointed business rescue practitioner, the Company was in debt to the tune of R50, 9 million. The original business rescue plan provided for the reduction by 50% of the tea supply agreements of 2020 in order to reduce the obligations of the Company by about R15 million. After this deduction the indebtedness of the

Company was be reduced to about R35, 7 million. The first business rescue plan was published on 28 September 2020 and adopted on 10 October 2020. The Department's averment that the Company was indebted to the tune of R23.4 million at the start of business rescue is therefore wrong.

- 9.3 Bester, representing the Company, had entered into a Memorandum of Agreement with the Department during November 2020 in which the parties agreed inter alia to (i) The reduction in tea supply as stated above in paragraph 9.2; (ii) that supply agreements be renegotiated for the 2021 season based on market pricing; (iii) that services be procured to market especially retail-packed tea and value-added products utilising a fully paid high volume machine and associated packaging materials; (iv) that the Department will raise R15 million grant funding within 60 days of the meeting of 9 October 2020, which will contribute towards the payment of creditors, prioritising emerging farmers; the Department raised an additional payment of R5 million specifically for the payment of the high speed packaging machine and associated costs of packaging; (v) Bester was to raise outstanding funds through post-commencement financing and/or selling of tea or through other suitable means to the value of at least R20 million to pay the remaining creditors; (vi) Bester was to secure the services of a marketing agent or services to market the especially retail-packaged tea and value added products; (vii) Bester had to ensure compliance with the

business rescue plan as adopted and (viii) attend to payment of the credit facility with Standard Bank.

- 9.4 Bester maintains that he has complied with his obligations in terms of the business rescue plan and the MOA and that the complaints levelled by the applicant are without substance. He explains that:

9.4.1 He had reduced the 2020 tea volumes by 50% in terms of the business rescue plan and MOA, and that he did not sign additional contracts with the farmers as alleged. Tea was acquired in terms of the pre-existing contracts entered into by the Department. He could not simply suspend or terminate the contracts with the farmers since it would have made them pursue other markets leaving the company destitute when it needed supplies. In any event he explains, s136 of the Act is very clear under what circumstances a contract may be terminated and agreements cannot simply be suspended without a court order. I will revert to this last statement.

9.4.2 In line with his obligation to obtain post-commencement finance he sourced loans which were meant to be short term loans with the plan to exit these loans once an equity partner was obtained or a joint venture was concluded. The interest rates negotiated for

the loans were higher than those of commercial banks which were not interested in supplying finance to the Company due to the fact that it is in business rescue.

9.4.3 As far as the complaint that Bester appointed consultants and extra workers at additional operating costs is concerned, he explains that consultants were appointed in terms of the business rescue plan and MOA and that the extra workers could be employed after the contracts with Crown Tea and 365 Brands were entered into. This achieving one of the objectives of the company i.e. the uplifting and empowerment of the community.

9.4.4 He denies that there was anything untoward in the agreement entered into with Crown Tea. He states that the Crown Tea deal was vital to the Company to have at least one retailer to purchase packaged tea in order to obtain exposure to other such retailers and the international market. After signing the Crown Tea agreement the Company appointed 365 Brands as its distributor which negotiated a listing in respect of the Company's own brand – Bokkeveld Rooibos, with Pick 'n Pay. 365 Brand is in the process of sourcing other wholesale listings in addition to Pick 'n Pay.

He states that the selling price of tea to Crown Tea is in line with that of the Bokkeveld Rooibos brand. The packaging of the tea is done at the plant and with the High Speed packaging machine (also mentioned in the MOA and which was purchased for this purpose before the Company went into business rescue). The selling price of the tea to Crown Tea and through 365 Brands includes the packaging thereof and the Department is thus incorrect in alleging that the company is carrying the costs of such packaging.

Crown Tea unfortunately fell into arrears with their payment to the Company. An amount of R3. 9 million was thereafter written off in the books of the Company to recoup the input VAT, which amount was repaid by SARS. Crown Tea has however not been released from its obligation to make payment to the Company, but it would now be over a longer period.

9.4.5 Bester has also refuted the allegation by the Department that he failed to provide monthly reports to affected parties by attending such reports for each month that he had been business rescue practitioner and which he states have been circulated to all affected parties inclusive of the Department. He

however fails to deal with whether reports have been submitted to court as well.

9.4.6 He had also in terms of the business rescue plan and MOA attempted to procure equity partners in the shareholding of the company in order to relieve some of the financial burden, but those opportunities were not availed of by the Department since most of the interested entities required a majority shareholding. In furtherance of the need to find a suitable partner the Department appointed a transactional advisor, Nolutha Consulting. He provided Nolutha with all the relevant financial documentation required in order to fulfil its mandate. Audited financial statements were also provided to the Department's financial head, Ms Catita.

These are attached to his affidavit.

9.4.7 The difficulty in finding a suitable equity partner in order to save the company on the one hand and creditors demanding to be paid on the other, led to an amended business rescue plan.

9.4.8 Bester explains that he had proposed an amended business rescue plan which would make provision for a prospective business partner to enter into a long-term lease with the

Department in order to avoid the acquisition of shares by the partner.

9.4.9 The proposed amended business rescue plan was however not acceptable to the Department. This proposed plan of Bester was published on 22 October 2021, but was replaced with an amended business rescue plan, authored and published by the Department, which he accepted.

9.4.10 The amended plan proposed by the Department was adopted at a meeting of creditors on 31 January 2022, and makes provision inter alia for the Department providing the necessary funding for creditors to be paid on a staggered basis until all creditors are paid by 30 April 2022.

9.4.11 Bester states that the Department failed to honour the terms of the amended business rescue plan and he was subsequently instructed by creditors to proceed with a liquidation application.

10. The MEC and the Department intervened in the liquidation application and on 28 October 2022 the application was by agreement postponed sine die subject to inter alia the following:

10.1 That Ndyamara be appointed joint business rescue practitioner with Bester.

- 10.2 That Bester provided Ndyamara, at his request, with all information and issues concerning the Company including joint control of all bank accounts such as to place Ndyamara in a position to continue as sole business rescue practitioner should Bester vacate his position.
- 10.3 That pending finalisation of the liquidation proceedings the joint business rescue practitioners submit to the MEC/Department a monthly cash flow analysis, bank account balances, all known debts and expenses and income and balances for the past and coming month and any other relevant information.
- 10.4 That the MEC/Department shall continue to pay, by the 23rd of each month, as post - commencement finance, the shortfall on the Company's monthly operational costs.
- 10.5 That in the event of the creditors listed by Bester remain unpaid by 28 January 2023, the MEC/Department shall serve and file its opposing affidavits and any counter-application, with the liquidation application then to proceed in terms of the Uniform Rules.
11. The list of creditors referred to above in paragraph 10.5 was attached as Annexure A to the order by agreement and refer to creditors which were included in the amended business rescue plan which the Department undertook to make funds available for the discharge of the claims. On 25 August 2022, the acting

Head of the Department, Mr L Modise, who is also the deponent to the Department's affidavits made an irrevocable undertaking to Bester to settle the abovementioned claims on condition that Bester resign as business rescue practitioner with immediate effect. At date of the hearing of this application, the Department has still not paid these creditors. They first seek verification of these claims before payment is made, despite having agreed to doing so.

12. Thrown into this quagmire of distrust between the Department and Bester is Ndyamara, who was chosen by the Department as joint business rescue practitioner with a view apparently to take over from Bester upon his resignation. The Department in its founding affidavit refers to the ensuing unworkable relationship between Ndyamara and Bester and Ndyamara's threat of resignation should Bester not be removed. This alleged threat by Ndyamara was proffered as one of the grounds of urgency raised in the application. No confirmatory affidavit was deposed to by Ndyamara in this regard. Ndyamara did however file an affidavit in this matter at a very late stage, just before the arguments were to be heard. This necessitated a postponement of the hearing in order to give Bester an opportunity to respond to Ndyamara's affidavit. I do not intend to deal with Ndyamara's affidavit in great detail since at the hearing of the matter, Mr Siyo who appeared on his behalf informed me that the affidavit and heads of argument filed by Ndyamara represented the outcome of his initial or preliminary investigations in respect of Part A of the application, which has now been abandoned, and not Part B

of the application. The main issue relating to Ndyamara which need to be determined is that of costs, which I will address later in this judgment.

Discussion

13. I have gone to some length in listing the complaints levelled at Bester and his answers thereto to place this application in context. As it transpired Ms Hofmeyer SC who appeared to argue the matter for the Department in the place of Mr Willis SC who had been involved in the matter since its inception, relied on only S 139(2) (a) and (b) of the Act for the removal of Bester. The relief sought that Bester be declared a delinquent director was also correctly abandoned.
14. To reiterate, s 139 (2) (a) and (b) reads as follows:
 - “(a) incompetence or failure to perform the duties of a business rescue practioner of the particular company;
 - (b) failure to exercise the proper degree of care in the performance of the practioner’s functions;
15. Ms Hofmeyr’s reliance on these grounds is founded on six instances, which, so the argument goes, are not seriously disputed by Bester. Mr Van Niekerk SC, for Bester, holds a different view. Be that as it may, in *Knoop NO and Another vs Gupta and Another 2021 (3) SA 88 (SCA)* where the SCA discussed certain grounds for removal of a business rescue practitioner under s 139 (2), the court held at paragraph 17 thereof that:

“The court has a discretion to enter to grant or to refuse an order for the removal of a BRP. The discretion is exercisable if one or more of the grounds for removal set out in s 139(2) have been established on a balance of probabilities. However, proof of a ground of removal alone does not dictate that an order for removal must follow.”

16. With regard to the grounds under s 139(2) (a) and (b) which are relied on herein it was held at paragraphs 20 to 22 of the Knoop judgment that:

“[20] The first ground relied on in this case was incompetence or a failure to perform the duties of a BRP of the particular company. Reliance on this ground required evidence of specific instances of incompetence, or failure to perform the BRPs duties, in relation to the company under business rescue. Incompetence suggests that the BRP lacked the necessary skills to perform their duties. It may be established by proof that the BRP is 'of inadequate ability or fitness; lacking the requisite capacity or qualifications'. That is a reasonably high bar. Merely moderate ability does not amount to incompetence. Nor does the failure to meet the standards that the affected party would like to see achieved, whether that relates to the time taken to complete the business rescue process, or the prices at which assets are sold, or the manner in which the BRP approaches their task. The alleged incompetence must relate directly to the performance of the task of a

BRP. An inability to perform the role of BRP properly in relation to the circumstances of the particular company must be demonstrated.

[21] Where a failure to perform the duties of a BRP is relied on it is essential to identify the duties that the affected party says should have been performed and to show the respects in which they were not performed. A failure to convene meetings as required by the statute and the business rescue plan, or a failure to report to the creditors and other affected parties, come to mind as fairly obvious examples. A general neglect of the duties of a BRP, where the BRP simply fails to deal with matters requiring attention in a regular and timeous fashion, may suffice, but a BRP who is attending to matters in a manner which the affected party does not approve of is not failing to perform their duties.

[22] A failure to exercise a proper degree of care in the performance of their functions will in most instances require proof of negligence. It is difficult to see how that could be shown by way of general allegations without reference to specific instances of negligence. While proof of harm to the company, whether in the implementation of an approved business plan or from the perspective of its future operations after business rescue is terminated, may not be a prerequisite to proof of a failure to exercise a proper degree of care, in the absence of harm it may be difficult for a court to conclude that the BRP has not

exercised a proper degree of care. At the very least the potential for harm to have been caused by the actions of the BRP must be considered even if that harm was averted or did not materialise.”

17. With the above in mind I now deal specifically with the six instances highlighted as establishing the grounds for removal under s139 (2) (a) and (b).

17.1 That Bester exacerbated the company’s debt position by committing it to further supply agreements when it was already oversupplied with tea stock.

- 17.1.2 In the founding affidavit, the Department’s Modise relies on information received from the plant’s general manager, Mr M Baard in respect of the daily operations at the plant. In this regard it was stated that Baard had informed that Bester had acquired additional tea stock while there were good stockpiles available. As an example of such an additional tea purchase reference is made to tea bought from one Pierre with whom Bester had entered into an agreement to deliver tea to the company. Baard has however not deposed to a confirmatory affidavit to the founding affidavit. Some two weeks later a supplementary founding affidavit was filed wherein the

allegation that Bester bought additional tea from Pierre was retracted as well as the allegation referred to herein-above at paragraph 7.4 that it was unheard of in the industry to package tea. This supplementary affidavit was accompanied by a confirmatory affidavit from Baard. Only the bald allegation that Bester purchased additional tea stock, without any particularity, thus remains.

17.2 Bester entered into agreements with customers on prejudicial commercial terms.

- 17.2.1 This complaint relates to the Crown Tea deal and the allegation by the Department on the strength of the unconfirmed information received from Baard, that the company carries the cost of the packaging of the Crown tea. Bester has denied this allegation and stated that the price of the tea supplied to Crown included the packaging thereof. The rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) applies and this issue must be determined on the version of Bester.

17.3 Bester concluded unaffordable loan agreements at excessive rates of interest when the Company had

already received post-commencement funding from the Department in the amount of R20 million.

17.3.1 S135 (2) of the Act makes provision for obtaining post commencement financing. The MOA entered into between the parties provides for post-commencement financing over and above the R20 million funding the Department had undertaken to provide. Bester has in my view given a reasonable explanation for the high interest rates attached to the short term loans obtained.

17.4 Bester failed to comply with his most basic obligations as a business rescue practitioner such as providing monthly reports to affected parties and the Court.

17.4.1 After Bester had attached to his answering affidavit some twenty six reports he had sent to affected persons and the Department, the Department has in its replying affidavit admitted to being in possession of seven of the reports, the argument now, in an about turn, is that Bester has failed to prove that he had delivered all the reports.

Bester has not answered to the complaint that he had failed to provide reports to the court. I must therefore accept that Bester has in this regard not complied with 132 (3)(b) of the Act which places an obligation

on the business rescue practitioner to deliver monthly reports to the court if the proceedings had been the subject of a court order and it had not been finalised within three months of the start of the proceedings. This is a factor which must be taken into account when determining whether I should exercise my discretion in ordering the removal of Bester.

17.5 Bester misunderstood his powers and duties under the Act.

17.5.1 This complaint relates to the allegation that Bester failed to suspend certain producer supply contracts. The complaint appears to be two-fold. Firstly, that in breach of the business rescue plan and the Memorandum of Agreement, Bester failed to halve the intake and purchase of the 2020 volumes of rooibos, an allegation which Bester has denied. Secondly, flowing from his answering affidavit, that he cannot suspend contracts without a court order, the contention is that he does not understand the powers and duties of a business rescue practitioner since s136(2)(a) of the Act allows for a business practitioner, during the course of business rescue proceeding to:

“(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-

- (i) *arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and*
- (ii) *would otherwise become due during those proceedings . . .”*

In terms of s136 (2) (b) a court order is only required when the business rescue practitioner wishes to “entirely, partially or conditionally cancel” any obligations of a company as contemplated in s 136 (2) (a).

- 17.5.2 There is no indication, whether from the the business rescue plan or the Memorandum of Agreement, that Bester had a duty to suspend any contracts. The undertaking was that he reduce by 50% the tea volumes for 2020 and renegotiate volumes and prices of tea for 2021. The argument here is purely academic and that is that Bester is incompetent because he does not comprehend the difference between the suspension and cancellation of a contract. In this regard note should be taken of the remake in *Knoop* at paragraph 42 thereof that “*The conduct of the BRP’s can only be assessed in the light of their duties in terms of those [business rescue] plans.*”

(Own insertion in brackets)

17.6 Bester purported to have an amended business rescue plan adopted when the law does not provide for an adopted rescue plan to be amended.

17.6.1 This instance or ground of incompetence was not the case for the Department in the founding affidavit. The impermissibility to amend an adopted business rescue plan was pointed out in the affidavit of Ndyamara. In his answering affidavit to Ndyamara's affidavit Bester states that since the first business rescue plan allowed for an amendment by majority vote the amended business rescue plan was validly adopted.

17.6.2 Ms Hofmeyer relied in her argument on this issue on *LSO Consulting Engineering (Pty) Ltd and Another v Ndyamara and Others 2022 JDR 0212 (GP)*, a judgment in an application for leave to appeal (where Ndyamara *in casu* was one of the business rescue practitioners involved) in which Basson J held as follows in paragraphs 14 to 16 thereof:

“(14) The conspicuous absence from the Companies Act of any procedure to amend a plan that has been “finally” adopted at a meeting convened in terms of section 151 of this Act, cannot be ignored. And to reiterate, the scheme of the Act is that business rescue proceedings are supposed to end within a reasonable short time. There are strict time limits and procedures that must be followed for the development and implementation of a business rescue plan.

Unless a court otherwise permits, it must end within three months. It is therefore simply inconceivable that a situation can arise where the business rescue practitioner fails to implement the plan as adopted and then proceed to seek an amendment of the plan a year or more after its final adoption.

(15) Whilst the respondents fully recognise in their heads of argument the legal principle that courts may not supplement an omission in law as this would be the function of the legislature, the respondents nonetheless persist with the argument since there is no statutory prohibition in the Companies Act that precludes the amendment of an adopted business rescue plan, such an amendment would be “permissible”. I have indicated in my judgment why this is not permissible and why I do not agree with the respondents’ submissions in this regard.

(16) Lastly, regarding the submission that the creditors have voted by majority in favour of an amendment. I am not persuaded that another court would come to a different conclusion in respect of this court’s finding: There is simply no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan.”

17.6.3 Ms Hofmeyer also referred to paragraph 22 of *Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd 2022 JDR 3859 (SCA)* wherein the Supreme Court of Appeal reiterated that there is no provisions in the Act for the amendment of a business rescue plan once it has finally been adopted.

17.6.4 The *Vantage* case however dealt with the unilateral amendment of an adopted business rescue plan by the business rescue practitioner. Whilst the adopted

business rescue plan included a clause which made provision for the business rescue practitioner to “*have the ability, in his sole and absolute discretion, to amend, modify or vary any provision of the Business Rescue plan, provided that at all times the BRP act reasonably*”, the SCA held at paragraph 25 of the judgment that at most such a clause in an adopted plan would only allow for amendments of an administrative nature that do not affect the substance of the plan. The SCA explains in paragraph 25 of the judgment that:

[25] *The Companies Act is, however, clear on one aspect: business rescue plans are the product of engagement between the practitioner and the creditors. In terms of s 145(1) the creditors are entitled to be informed of ‘each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings’ and may ‘formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter’. As remarked in Booyesen, ‘control over the rescue proceedings is to be exercised by democratic majority vote of creditors and affected parties’. A clause in a business rescue plan that provides for the unilateral amendment of the plan by the practitioners is accordingly contrary to the scheme of the Companies Act. At most such a clause in an adopted plan would only allow for amendments of an administrative nature that do not affect the substance of the plan.*

(own underlining)

- 17.6.5 I do not understand from a reading of the *Vantage* judgment that an amendment to an adopted business rescue plan can never be sustained. It was in any event also recognised in the *Knoop* judgment *supra* that “One cannot treat a business rescue plan as being writ in stone or having the same status as the law of Medes and Persians.” (paragraph 48).
- 17.6.6 *In casu* the adopted business rescue plan of October 2020 in part C (iv) states as follows:
“Should there be a need to substantially amend the plan in a manner that affects the rights or is prejudicial to affected persons at any time after the approval thereof, the business rescue practitioner will be entitled to do so in consultation with creditors. Any amendments to the plan will be voted on by the creditors of the company by majority vote at a special meeting convened by the business rescue practitioner for the purpose to vote on the proposed amendments.”
- 17.6.7 There is no dispute that the meeting with creditors was held on 31 January 2022 and that the proposed amended business rescue plan was accepted unanimously. In light of what the SCA stated in paragraph 25 of the *Vantage* judgment, I am of the view that the MEC/Department failed to show that the amended business rescue plan was not validly adopted.

Discussion

18. With regard to the six instances discussed above, which it is contended by the Department, support their application for the removal of Bester on the grounds of incompetence and failure to exercise the proper degree of care in the performance of his duties as contained in s139 (2) (a) and (b) of the Act, I have already in part discussed these instances with reference to the comments made by the SCA in the *Knoop* judgment and which are reproduced in paragraph 16 herein. For instance the lack of particularity relating to the complaint of Bester committing to further supply agreements of tea stock, the hearsay evidence and speculation that the company failed to charge Crown Tea for the packaging of tea, the complaint relating to Bester's obtaining post-commencement financing and the exorbitant interest rates committed to in spite of the business rescue plan and the Memorandum of Agreement making provisions for post-commencement financing and what I consider to be a reasonable explanation for the high interest rates charged. In all of the above instances the Department has, in my view, not established on a balance of probabilities, the basis for removal of Bester as business rescue practitioner on the grounds set out in s136 (2) (a) or (b).

19. I have already dealt with the issue of the validity of the amended business rescue plan and all that remains of the specific complaints are the failure to report to court and to some extent Bester's failure to appreciate the difference between the suspension of a contract and the cancellation thereof. The

question, in my view, to be answered in this regard is whether the Company or the business rescue proceedings have been prejudiced as a result of Bester's failings in these respects. No prejudice has been shown by the Department in this regard. I also cannot fathom how Bester's failure to report to court caused the any prejudice, neither his misunderstanding of a business rescue practioners power to suspend contracts in circumstances where the business rescue plan does not impose a duty on him to suspend contracts.

20. Be that as it may, Ms Hofmeyer has argued that the listed complaints relied on by the Department should not be viewed in isolation but that I should have regard to the full conspectus of all the relevant issues, inclusive also of the fact that the Company has been in business rescue for more than two and a half years.
21. While it cannot be argued that the delay in the finalisation of the business rescue proceedings is worrisome, it is not necessarily indicative of incompetence on the part of the business rescue practitioner. S 139 (2) (a) speaks of incompetence or failure to perform duties in relation to the specific company. Herein lies the problem, in my view. The Company was established by the Department with lofty ideals, for the benefit, not only of the province but for the upliftment of emerging farmers. My sense, from a reading of the papers, is that Bester respects this underlying principle, hence for instance the amendment to the business rescue plan when it became clear that the Department

was not willing to relinquish part of its shareholding to a partner who would not necessarily share its vision, even though the necessity of a business partner was recognised in not only the first business rescue plan but also in the Memorandum of Agreement.

22. A business rescue practitioner however has an obligation to act in the interests of all the creditors and not only in the interest of the Department. In my view the weakness of Bester as business rescue practitioner is that he did not apply for the liquidation of the Company sooner. This however is not the case brought by the Department against Bester. In fact the Department has stated unequivocally that it will not allow the Company to be liquidated and that it will fight tooth and nail in opposing any such application.
23. Having said that, I am not of the view that the complaints raised by the Department sustain an order for the removal of Bester as business rescue practitioner.

Cost of the application

24. The attitude of Bester was initially that the application be dismissed for lack of urgency. After the ventilation of all the issues Mr Van Niekerk now argues that the issue of urgency and the manner in which the application was driven be considered in the determination of whether or not a punitive cost order should be granted against the Department.

25. The application was served on Bester's correspondent attorney on 21 December 2022, while Bester was on holiday with his family, and set down for 20 January 2023. The reasons given for the urgency of the matter were *inter alia* that the Company cannot be rescued under Bester, it is foreseeable that a creditor could apply to convert the business rescue proceedings into liquidation, Bester and Ndyamara have an unworkable relationship, the possibility of Ndyamara resigning is real and would be disastrous, by the time the application is heard in due course Ndyamara would in all probability have resigned and an urgent hearing, if successful, will result in the Department and Ndyamara being placed in a position to put a proper and workable plan before creditors before the end of January 2023.
26. Ndyamara did however not file a confirmatory affidavit with regard to his role in the alleged urgency of the matter and all that was left was the general assertion that business rescue proceedings are inherently urgent. This is not in my view sufficient explanation for the undue haste with which this application was placed before court, especially in light of the fact that already in September 2022, the Department's Modise, in his interim opposing affidavit to the liquidation application, states that an application for the removal of Bester would follow. More than three months before the application was served on Bester.
27. Quite understandably Bester did not have sufficient time to respond to a founding affidavit consisting of more than 600 pages inclusive of annexures and when the matter was first heard on

20 January 2023, he had only been able to file an interim opposing affidavit and requested time to file a supplementary opposing affidavit. On that day the applicants had also not yet given notice to all affected persons of the proceedings as required and the matter was in any event not able to proceed. The matter was then postponed to 10 February 2023 with the costs reserved.

28. On 10 February 2023 Ndyamara had joined the fray, having filed his affidavit on 8 February 2023 after having been served with the application on 21 December 2022. On this date the affected persons had still not been given notice of the proceedings, the papers were not properly paginated and Bester was entitled to respond to the affidavit of Ndyamara. The matter was as a result postponed to 13 April 2023 with the wasted costs occasioned by the postponement reserved.
29. As already mentioned herein, when argument was finally heard on 13 April 2023, the Department abandoned the majority of its complaints contained in the founding affidavit (which I attempted to set out as fully as possible herein), either because it would result in material disputes of fact, was speculative and/or hearsay. All of which the Department should have been aware of right from the start but which had resulted in the papers in this application amounting to close to 2000 pages in total.
30. I see no reason why Bester should in these circumstances be saddled with unnecessary costs relating to this application and

agree that a punitive cost order against the Department is appropriate.

31. Mr Van Niekerk's request that Ndyamara share in the costs of the postponement on 10 February 2023 is also not unreasonable in the circumstances. Mr Siyo's argument that the matter would in any event have been postponed as a result of the Department's failures is in my view opportunistic and not wanting of any further consideration. I do not however consider it appropriate that Ndyamara pay the costs *de bonis propriis* as argued by Mr Van Niekerk, in light of the fact that he had abandoned argument on the merits of Part B of the application.

In the circumstances the following order is made:

- (a) Part B of the application is dismissed with costs on the attorney client scale, inclusive of the wasted costs occasioned by the postponements on 20 January 2023 and 10 February 2023.**
- (b) The second respondent is ordered to pay the costs of 10 February 2023 jointly and severally with the applicant on the attorney and client scale.**



CC WILLIAMS
JUDGE

For Applicant: 20 January 2023, 10 February 2023
Adv R Willis SC with Adv M Phukubje
13 April 2023
Adv K Hofmeyr SC with Adv Phukubje
Dlamini Attorneys
c/o Mkhokeli Pino Attorneys

For 1st Respondent: Adv J Van Niekerk SC
Hurter Attorneys
c/o Duncan & Rothman

For 2nd Respondent: Adv L Siyo
Boqwana Burn Inc
c/o Van de Wall Inc