IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,

(MBOMBELA MAIN SEAT)

Case No.: 5767/2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: **YES**	
(2) OF INTEREST TO OTHER JUDGES: **YES**	
(3) REVISED **YES/NO**	[redacted]
30 April 2025 DATE	SIGNATURE

In the application between:

WILLEM CONSTANTYN JANSON **APPLICANT**

and

EBUNDU (PTY) LTD (IN BUSINESS RESCUE) **FIRST RESPONDENT**
Registration Number: 2016/195834/07

PHAHLANI LINCOLN MKHOMBO N.O. **SECOND RESPONDENT**

NTOMBIZODWA KATLEGO TSHABALALA **THIRD RESPONDENT**

ALBERT SIBUSISO TSHABALALA **FOURTH RESPONDENT**

THE COMPANIES AND INTELLECTUAL COMMISSION OF SOUTH AFRICA **FIFTH RESPONDENT**

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED — **SIXTH RESPONDENT**

INTERESTED AND AFFECTED PARTIES: LIST "A" — **SEVENTH RESPONDENT**

JUDGMENT

FOURIE AJ

INTRODUCTION:

[1] The Applicant, a 33.3% shareholder in the First Respondent, makes application to this Court and seeks an order, as per his Notice of Motion, in the following terms:

[1.1.] That consent be granted in terms of Section 133(1)(b) of the Companies Act, 71 of 2008 ("The Act") to proceed with the current application against the First Respondent.

[1.2.] Declaring that the Applicant has a secured claim of R 8 000 000.00 against the First Respondent

[1.3.] That the resolution of 6 October 2023 accepting the business rescue plan be set aside.

[1.4.] That the meeting of creditors of the First Respondent held on 6 October 2023 be set aside.

[1.5.] Declaring that the business rescue of the First Respondent has lapsed.

[1.6.] That the appointment of the Second Respondent as the business rescue practitioner of the First Respondent be set aside.

[1.7.] Declaring that the appointment of the Second Respondent has lapsed.

[1.8.] That the Court Order dated 26 October 2022 be set aside.

[1.9.] That the business rescue of the First Respondent be set aside.

[1.10.] Placing the First Respondent under final winding up in the hands of the Master on the grounds that the First Respondent is unable to pay its debt, alternatively that its liabilities exceed its assets and further alternatively that it would be just and equitable if the First Respondent is to be wound up.

[1.11.] Prayers 11 to 14 of the Notice of Motion, seemingly on the same grounds as Prayer 10, seek as an alternative that the First Respondent be placed under provisional liquidation.

[1.12.] That the costs of the application be costs in the administration of the winding up of the First Respondent.

[1.13.] Further and/or alternative relief.

[2] The First and Second Respondents grouped together opposed the application, and similarly, the Third and Fourth Respondents, grouped together, opposed the application.

[3] The respective Respondents seek that the application be dismissed with costs.

[4] The Fifth Respondent did not oppose the application, and the Sixth Respondent filed a Notice to Abide.

PRELIMINARY ISSUES:

[5] At the hearing of the matter, and before the Court was requested to adjudicate upon the merits thereof, two preliminary issues needed to be dealt with:

[4.1.] The Third and Fourth Respondents' application for condonation for the late filing of the Rule 6(5)(d)(iii) Notice.

[4.1.1.] The Third and Fourth Respondents have filed a comprehensive condonation application seeking condonation for the late filing of their Notice to Oppose the application as well as for the filing of their Rule 6(5)(d)(iii) Notice.

[4.1.2.] The Application remained unopposed as at the hearing of the matter.

[4.1.3.] The Court evaluated the application and at the onset of the hearing of the matter ordered that condonation for the late filing of the Third and Fourth Respondent's Notice of Intention to Oppose and its Rule 6(5)(d)(iii) Notice was granted with no order as to costs in respect of that specific application.

[4.2.] The late filing of the First and Second Respondents' Answering Affidavit.

[4.2.1.] On 11 December 2023 the current application was brought and served on the respective Respondents shortly thereafter.

[4.2.2.] On 10 January 2024 the First and Second Respondents filed a Notice to Oppose the current application.

[4.2.3.] On 1 March 2024 and outside of the time allowed for same by the Uniform Rules of Court, the First and Second Respondents filed an Answering Affidavit.

[4.2.4.] Although the Answering Affidavit was filed out of time, the First and Second Respondents made no attempt to make either a separate application in terms of Rule 27 of the Uniform Rules of Court nor to address the late filing of the Answering Affidavit in their papers seeking condonation for the late filing thereof.

[4.2.5.] On 15 March 2024 the Applicant filed a Conditional Replying Affidavit, such Conditional Replying Affidavit being filed on condition that the court accepts the Answering Affidavit of the First and Second Respondents.

[4.2.6.] The matter was ultimately heard on 15 April 2025.

[4.2.7.] The Applicant, on several occasions raised the issue of the late filing of the Answering Affidavit of the First and Second Respondent as is evident from the record provided to Court. The Applicant extensively dealt with this issue in its Conditional Replying Affidavit and further dedicated a considerable amount of time addressing the non-compliance of the First and Second Respondents in the Applicant's Heads of Argument.

[4.2.8.] If, for whatever reason, the First and Second Respondents after receiving the Conditional Replying Affidavit, believed that, due to a lapsation of time their Answering Affidavit would merely be accepted by the Applicant, the Applicant's position in respect of their non-compliance was made clear when the Applicant's Heads of Argument were filed.

[4.2.9.] Despite being made aware of the objections raised by the Applicant, the First and Second Respondents took absolutely no action in respect of the late filing of their Answering Affidavit.

[4.2.10.] Not only would it have been necessary for the First and Second Respondents to address the late filing of their Answering Affidavit and to seek condonation for the late filing of thereof simultaneous with the late filing of their Answering Affidavit, the First and Second Respondents could not be prejudiced by filing, in the considerable time they had since the filing of their Answering Affidavit up until the hearing of the matter, a comprehensive application seeking condonation for the late filing of their papers.

[6] The fact that the First and Second Respondents throughout the proceedings remained totally silent on the late filing of their papers is to be frowned upon by this Court.

[7] The aspect of the late filing of their papers is not even addressed at all in their Heads of Argument.

[8] The First and Second Respondents not only failed to address their non-compliance but similarly failed to address their passive approach towards seeking condonation when the matter was ultimately heard.

[9] The Court has taken notice of the fact that the Applicant did not invoke the provisions of Rule 30A of the Uniform Rules of Court to seek compliance by the First and Second Respondents. The Court has further evaluated the matter, and can it not be seriously contended by the Applicant that they had suffered any prejudice either in the presentation of their case or the preparation thereof due to the non-compliance by the First and Second Respondents.

[10] I say so, resultant from the fact that the Applicant was able to draft and file a Replying Affidavit, albeit conditional, more than a year prior to the hearing of the matter.

[11] Irrespective however of the fact that the late fling of the First and Second Respondents' Answering Affidavit might not have had any practical effect on the hearing of the matter, the Court addressed during the hearing of the matter with the First and Second Respondents' legal representative, Adv Moloi, the fact that their non-compliance followed by the absolute silence in the respect of condonation was not only a flagrant disregard of the Rules of Court but cannot be seen in any other way than disrespectful towards the Applicant and more importantly so the Court.

[12] Whilst the Court understands that it ought not take a formalistic approach in litigious matters and the Court needs to understand that, under appropriate circumstances, given the fact that hearing dates, unfortunately so, are obtained for opposed motions and trials, more than a year after same has been applied for, strict compliance with the Rules of Court cannot be emphasised enough. The rules have been enacted for a specific purpose and the Court would not want litigants to, out of their own accord and without proper reason therefor attend to litigious processes however they deem fit without proper reason or the leave of the Court. The structured manner in which pleadings are exchanged between parties forms one of the cornerstones that protect the legal profession from absolute chaos. It would be a very sad day if Courts get to the point where the non-observance of Rules is, without implication, condoned without a party even

making the effort of seeking condonation for such non-observance of Court Rules.

[13] Given the importance of the issues that have been raised by the respective parties in the current matter and the importance of the legal issues not only to the parties before Court but the possibility of similar litigants being faced with the same legal conundrum, and because the Court has found that the actions of the First and Second Respondents have not prejudiced the Applicants in either the presentation or preparation of their case, the Court shall accept the Answering Affidavit of the First and Second Respondent.

[14] The acceptance of the First and Second Respondents' affidavit should however, in no way be regarded as a condonation of the First and Second Respondents' non-observance of the Court Rules without any implication.

[15] The actions of the First and Second Respondents are to be discouraged in the strongest terms, and as such, the Court is of the intention of making an appropriate cost order in this matter, which shall follow at the end of this judgment.

ISSUES TO BE DETERMINED:

[16] Having found as aforesaid on the preliminary issues the Court is requested, in essence to pronounce upon the following issues:

[16.1.] Whether a case has been made out for the upliftment of the moratorium placed upon the instituting of legal proceedings against a company in business rescue as per Section 133 of the Companies Act, 71 of 2008.

[16.2.] The definition of a creditor in terms of the Companies Act, 71 of 2008 and whether the Applicant holds the necessary *locus standi* to bring the current application.

[16.3.] Whether it would be just and equitable for the company, currently in business rescue, to be wound up.

<u>WHETHER A CASE HAS BEEN MADE OUT FOR THE UPLIFTMENT OF THE MORATORIUM PLACED UPON THE INSTITUTING OF LEGAL PROCEEDINGS AGAINST A COMPANY IN BUSINESS RESCUE AS PER SECTION 133 OF THE COMPANIES ACT, 71 OF 2008.</u>

[17] Section 133(1)(b) of the Companies Act, 71 of 2008 states as follows:

> *"133. (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).........*
> *(b) with the leave of the court and in accordance with any terms the court considers suitable;*
> *(c) ....*
> *(d) ....*
> *(e) ...."*

[18] The First and Second Respondents, in their Answering Affidavit, take issue with the fact that no well-motivated separate application has been brought by the Applicant to obtain relief in respect of Section 133(1)(b) of the Act. The First and Second Respondents have throughout their opposition in their Heads of Argument persisted with this line of reasoning.

[19] The understanding by the First and Second Respondents that a separate application ought to be brought to first uplift the moratorium on the institution of

legal proceedings against a company in business rescue and thereafter for an application such as the current application to be brought is simply incorrect.

[20] The proposed *stratagem* of the First and Second Respondents is not supported by any legal principles and will lead, if so applied, to a duplication of issues serving before the Courts.

[21] As duplication of issues and the proposed *stratagem* of the First and Second Respondents would lead to unnecessary time delays which stands opposite to the purpose of both business rescue proceedings, as well as, where applicable, liquidation proceedings.

[22] Specifically, Section 5 of the Act stipulates that the Act must be interpreted and applied in a manner that gives effect to the purposes as set out in Section 7 thereof. Section 7 and specifically Subsection 7(k) provides that it is an express purpose of the Act to provide for the efficient rescue and recovery of financially distressed companies, in the manner that balances the rights and interests of all relevant stakeholders.

[23] The specific manner in which an application to uplift the moratorium as per Section 133(1)(b) is to be brought is yet to be formulated either by the legislature or by the Courts, as is the test to be applied by the Court in deciding whether or not to grant leave in terms of Section 133(1)(b) of the Act.

[24] I align myself with **BORICHOWITZ J** in the matter of **ARENDSE AND OTHERS v VAN DER MERWE N.O. AND ANOTHER** (2015/40324) [2016] ZAGPJHC 292 where the Court stated as follows:

"I am unaware of any judgment, and none has been referred to me, in which the test to be applied by a Court in deciding whether to grant leave in terms of S 133(1)(b) has been formulated. It is authority for the proposition that a

Court being asked for leave to proceed against business rescue must receive "a well-motivated application for that so that it could apply its mind to the facts and the law if necessary and then be in a position to make a ruling in accordance with any terms it may consider suitable in peculiar circumstances."

(See Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Co (Pty) Ltd 2013 JDR 1019 (GSJ) para 67) and Redpath Mining SA (Pty) Ltd v Marsdon NO and Others [2013] ZAGPJHC 148, the same learned Judge held that:

"Only in exceptional circumstances may a Court permit litigation against a business rescue plan or related thereto."

[25] It is to be noted that in neither of these cases did the Court lay down a general test or pronounce on what constitutes "a well-motivated application" or define the minimum threshold that must be met for an Applicant to obtain such leave.

[26] From an evaluation of Section 133(1)(b) it is evident that this Court has a wide discretion "on any terms the Court considers suitable" to deal with an application under Section 133(1)(b) and to grant an order as the Court deems just.

[27] It will accordingly be appropriate for a Court to have knowledge of what a party is of the intention to achieve by the upliftment of the moratorium and to evaluate whether sufficient grounds exist that justify the moratorium to be lifted. I believe the Court will not be in any better position to evaluate whether the moratorium ought to be lifted than to evaluate all the facts of the matter and having regard to the ultimate relief the Applicant seeks to achieve.

[28] I accordingly find that there is no necessity to make a separate application for the upliftment of the moratorium as proposed by the First and Second Respondents. The upliftment of the moratorium is the first relief the Applicant seeks in the current application. If the Applicant fails to make out its case in the papers in respect of the relief they seek, the moratorium will not be lifted.

[29] In the current matter the Applicant needs to prove its *locus standi* and that it is just an equitable for the company, currently in business rescue, to be wound up. If the Applicant fails on any of these two scores, the Court cannot apply its discretion for the upliftment of the moratorium. The opposite to this is also true in that, if the Applicant proves its *locus standi* and convinces the Court that it would be just and equitable for the business rescue process to be converted into a winding-up process of the company, the Court will have no other option but to find that it would be just and to apply its discretion in favour of the upliftment of the moratorium as prayed for.

<u>THE DEFINITION OF A CREDITOR IN TERMS OF THE COMPANIES ACT, 71 OF 2008 AND WHETHER THE APPLICANT HOLDS THE NECESSARY *LOCUS STANDI* TO BRING THE CURRENT APPLICATION.</u>

[30] At the start of the hearing, as well as in his Heads of Argument Adv Rossouw SC for the Applicant indicated that the Applicant was not persisting with prayers 5, 6, and 7 of its Notice of Motion, in essence being the relief sought in respect of the lapsing of the business rescue and the lapsing of the appointment of the Second Respondent. This concession is well received by the Court under the circumstances as the relief as initially prayed for is unsupported by any legal principles.

[31] The principles pertaining to these conceded issues have been dealt with by the Courts on many occasions and given the concession by the Applicant I do not believe it necessary to traverse them in the current judgment.

[32] The Applicant in the current application seeks declaratory relief to declare that the Applicant has a secured claim of R 8 000 000.00 (Eight Million Rand) against the First Respondent.

[33] The Applicant premised the total of his claim on the fact that the Applicant, on his version, holds a secured claim of R 8 000 000.00 (Eight Million Rand) which claim was not recognised by the business rescue practitioner and accordingly not incorporated in the business rescue plan of the company at the moment when same was accepted and approved.

[34] It was argued by Adv Rossouw SC for the Applicant that the business rescue practitioner has never regarded the Applicant as a creditor of the company and that, not being regarded as a creditor since the onset of the business rescue process, the principles enunciated in the Act, pertaining to business rescue processes, specifically where they deal with creditors, do not find application on the Applicant, resultant from the notion that the Applicant has never been regarded as a creditor.

[35] The Applicant further argues that, by not being recognised as a creditor, the meeting of creditors held on 6 October 2023 is to be set aside and that the resolution of 6 October 2023 is similarly to be set aside.

[36] Adv Rossouw SC conceded during argument that, if the Court does not expressly declare that the Applicant has a secured claim of R 8 000 000.00 (Eight Million Rand) against the First Respondent, the necessary relief being granted for the claim of the Applicant to be instituted against the company in business rescue and the Court does not set aside the business rescue plan so accepted on 6 October 2023 the Applicant holds no *locus standi* in the current matter.

[37] The parties are *ad idem* that the Applicant's claim is disputed.

[38] Section 145(1) of the Act gives a "creditor" certain rights.

"Participation by creditors 145.

(1) Each creditor is entitled to—

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

(2) In addition to the rights set out in subsection (1), each creditor has—

(a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and

(b) if the proposed business rescue plan is rejected, a further right to—

(i) propose the development of an alternative plan, in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.

(3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.

(4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests—

(a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and

(b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.

(5) The practitioner of a company must—

(a) determine whether a creditor is independent for the purposes of this Chapter;

(b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4)(b); and

(c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151.

(6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to—

(a) review the practitioner's determination that the person is, or is not, an independent creditor; or

(b) review, re-appraise and re-value that person's voting interest, as determined in terms of subsection (5)(b)."

[39] The legal representatives by the respective parties seemed to agree that the fact that the term "creditor" has not been defined in the Act might lead to some uncertainty and a proposed lacuna in the law as the Act seemingly fails to indicate how a party, not being regarded as a creditor ought to be dealt with.

[40] I align myself with what **WILLSON J** stated in the matter of **WESTCOAL MINING (PTY) LTD AND ANOTHER v PHAHLANI LINCOLN MKHONBONO** [2023] ZAGPJHC 1097; 2024 (2) SA 563 (GJ) 2 October 2023, where he stated at paragraph 17 that:

> *"Section 128 of the Companies Act defines a number of terms germane to business rescue proceedings. It does not, however, define the term "creditor". I cannot say why the drafters of the Companies Act decided not to define that term. It seems a bit like passing a law that governs elections without bothering to say who is entitled to vote in them. Creditors are "affected persons" in Section 128, but they are lumped together in that category with other classes of persons such as employees and shareholders."*

[41] The Oxford Dictionary defines the word "creditor" as:

"a person, company, etc. that somebody owes money to"

[42] In evaluating whether the Court could come to a definition of the term "creditor" by deriving the same from other legislation, the Court evaluated the National Credit Act, 34 of 2005. The National Credit Act, 34 of 2005 provides definitions for the terms "credit", "credit agent", "credit bureau", "credit agreement", "credit facility", "credit guarantee", "credit insurance", "credit life insurance", "credit provider", "credit regulator", "credit transaction", "credit co-operative" but provides no specific definition of "creditor".

[43] If regard is had to the Insolvency Act, 24 of 1936, the Act decided to define the term "debtor" but elected not to define "creditor".

[44] Having regard to the academic definition of "creditor", and the surrounding definitions of the National Credit Act, 34 of 2005, and without attempting to propose to the legislature how it ought to be bound, this Court believes a creditor to mean: a person or juristic entity to whom a debt is owed and who, therefore, has a right to claim payment of a sum of money or an obligation due to him or them.

[45] Whether a person or a company is a creditor of another person or company can never be a discretionary evaluation. It is a position premised upon fact. Either a person or a company is a creditor of another person or company premised upon certain facts or he is not.

[46] Having regard to business rescue proceedings, a creditor does not become a creditor because he is recognised as such by the business rescue practitioner. Whether a business rescue practitioner recognises the claim of a creditor or not is a different proposition altogether, but one that does not detract from the factual position on whether or not a person is a creditor or not.

[47] The Applicant has set out in its founding papers why it seeks this Court to declare the Applicant to have a secured claim of R 8 000 000.00 (Eight Million Rand)

against the First Respondent. The grounds upon which the Applicant relies for the relief it seeks are not relevant for purposes of the current judgment, as will be apparent hereinafter.

[48] Of relevance for the current judgment is the fact that, on 30 June 2023, a list was published by the business rescue practitioner indicating the creditors of the company, further indicating whether their claims have been accepted by the business rescue practitioner or rejected. I emphasise that the list is a list of creditors because same has been identified as such and annexed to the Applicant's application as Annexure "WJ9".

[49] Irrespective of the Applicant's understanding of the terminology of who or what a creditor is, it cannot be contested that, on 30 June 2023 the Applicant received knowledge that he formed part of the list of creditors and that the business rescue practitioner did not recognise his claim.

[50] Whether the business rescue practitioner was correct in not recognising the Applicant's claim when the list of 30 June 2023 was published is at the current junction for this Court irrelevant. I say so for the following reason, and that is that on 30 June 2023 the Applicant knew that his claim was not recognised by the business rescue practitioner and that he needed to take certain remedial steps in order to have his claim recognised by the business rescue practitioner. I do not believe that the Applicant could harbour under any other understanding when the initial list of creditors was published by the business rescue practitioner than that the business rescue practitioner would not give any recognition to Applicant's claim.

[51] For the period between 30 June 2023 and 6 October 2023 the Applicant did not make an application to Court to interdict the approval of the business rescue plan whilst the Applicant attempted an application, similar in nature to the current application to have his claim recognised nor did the Applicant on an urgent basis and before the meeting of creditors on 6 October 2023 seek the urgent intervention by this Court to have his claim as creditor recognised.

[52] The Applicant, knowing of the implications of the business rescue plan of the company being adopted would have, ought to have protected his interests by making any of the aforesaid applications prior to the meeting of 6 October 2023 at which the business rescue plan was adopted. I say that the Applicant ought to have known of the implications of the business rescue plan being accepted as the Applicant was at that time legally represented and if the Applicant personally did not know of the consequences, then surely his legal representatives ought to have informed him of such accordingly.

[53] Section 152(4) of the Companies states that:

> *"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."*

[54] The parties are in agreement that the Applicant was present at the meeting of 6 October 2023 but, resultant from having no voting right did not actively partake therein.

[55] The business rescue plan being adopted on 6 October 2023 binds the Applicant up until and unless set aside by this court. On 6 October 2023 the Applicant's own version was that he was a creditor of the company which had not proven his claim against the company.

[56] If the Applicant wanted to challenge the position and his recognition as a creditor with a recognised claim, he ought to have done so before the business rescue plan was accepted.

[57] I pause to mention that the Applicant, being present at the meeting, at the very least, as an affected person, did not act in terms of Section 153(2) seeking the postponement of the meeting in order to allow the Applicant to make any sort of application to have his claim recognised.

[58] Section 154(2) of the Act states that:

> *"(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan."*

[59] In the current matter the business rescue plan allows for a dispute resolution mechanism that deals with how any relevant parties to the business rescue are to attend to disputes that exist on claims, quantum of claims, securities claimed by a creditor, or surrounding aspects. Save for the aforesaid, Section 154(2) of the Act finds application, and a creditor whose claim was not recognised at the adoption of the business rescue plan would have no right to claim against the company at a later stage.

[60] Read together with the binding nature of a business rescue plan as per Section 152(4) of the Act, the Applicant knew alternatively reasonably ought to have foreseen, that the recognition of his claim before the adoption of the business rescue plan was an absolute necessity, alternatively he could only proceed thereafter in terms of the mechanism provided to him as laid out in the business rescue plan itself.

[61] The position at the time remained unchallenged, by way of any formal litigious process, when the resolution of 6 October 2023 and the meeting of creditors of 6 October 2023 that was properly constituted, giving effect to the business rescue plan that was adopted on that date was so adopted.

[62] Having found that the business rescue plan was validly adopted and that same binds the Applicant, the Applicant, if it wanted to dispute the non-recognition of its claim or any aspects relating thereto needed to act in line with the dispute resolution clause of the business rescue plan. I could find no proof that the Applicant proceeded in line with the dispute resolution mechanism as offered in the business rescue plan and the Applicant went as far as to state that it does not regard itself to be bound by the business rescue plan and the dispute resolution clause embedded therein. For all the reasons previously stated, the view of the Applicant in this regard is simply incorrect.

[63] The current application brought at the time when it is so brought is neither brought at an opportune time, being prior to the business rescue plan being adopted nor is it brought for the purpose of being recognised as a creditor to have his claim paid by the business rescue practitioner. I say so as a result of the relief the Applicant seeks. The Applicant has seemingly adopted the approach that his claim will not find favour with the business rescue practitioner and that, if the Applicant is able to persuade the Court that the company ought to be converted from a position of business rescue to being wound up, then the Applicant might find favour in pressing home its claim with the liquidator of the company.

[64] The position might have been significantly different if the Applicant was not informed of or part of the decision making nor being aware of the proposed business rescue plan or the dates for the meeting upon which same would be adopted in which event the Court might have found it necessary to embark upon a more lenient approach towards the Applicant in order to establish whether justice would dictate the Court applying its discretion in the lifting of the moratorium and the entertaining of the Applicant's claim.

[65] In the current application I am not persuaded that the Applicant has made out a proper case for the Court to apply its discretion in favour of that which the Applicant seeks. The current matter is rather one where the Applicant has failed to timeously take the necessary steps to protect its own interest, and upon

realising that he holds no available remedy to enforce his claim, seeks the upliftment of the moratorium in order for the business rescue process to be converted into a winding up process.

[66] Given the drastic implications on the other affected parties of the company the Court does not believe it to be an appropriate order to have the company wound up to have the Applicant's recognised, which is in essence what the Applicant seeks herein.

WHETHER IT WOULD BE JUST AND EQUITABLE FOR THE COMPANY, CURRENTLY IN BUSINESS RESCUE, TO BE WOUND UP.

[67] Having found the aforesaid it necessarily follows that the Applicant has failed to prove the existence of a recognised claim against the company in business rescue. As such and resultant from the fact that the Applicant is barred from enforcing any claim against the company in business rescue in the absence of having obtained relief from Court to do so, the Court cannot find, as is sought by the Applicant that the company in business rescue is unable to pay its debts premised upon a claim of the Applicant remaining unsatisfied.

[68] Having been vested with the matter the Court evaluated the total of the facts presented to me to ensure that it would not be otherwise just and equitable if the company is wound up.

[69] I can find no reason why the Court needs to, on the information provided to me, change the *status quo* on the just and equitable principle to order that the company ought to be converted from that of being one in business rescue to that of being one in liquidation.

[70] I wish to point out that, even if the Applicant managed to persuade the Court on all the aspects which the Court has already found the Applicant has failed to do,

the Applicant would have failed in seeking the winding up of the company due to non-compliance with the provisions of Section 346(4A)(b) of the Act.

[71] At the hearing of the matter Adv Rossouw SC on behalf of the Applicant conceded that there has been non-compliance with Section 346(4A)(b) of the Act.

[72] In respect of Section 346(4) of the Act, being the old Act, compliance is peremptory.

[73] At the hearing of the matter the Applicant tried to explain that an affidavit titled a Service Affidavit was indeed filed. It was conceded however, rightfully so, that the Affidavit did not comply with the provision of Section 346(4) of the Act.

[74] The provision of Section 346(4A)(b) of the Companies Act, 1973 is applicable by virtue of the provisions of Item 9 of Schedule 5 of the Companies Act, 2008.

[75] The relevant provision states that:

> *"(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application-*
>
> *(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and*
>
> *(ii) to the employees themselves-*
>
> *(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or Page 11 of 55 Prepared by:*

(bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;

(iii) *to the South African Revenue Service; and*

(iv) *to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.*

(b) *The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with."*

[76] Specifically, in as far as it relates to service on the employees of the company, the Applicant fell well short of what would have been necessary to prove compliance with the relevant statutory provision.

[77] I am fortified in my opinion by following the reasoning of the Court in the matter of **PILOT FREIGHT (PTY) LTD v VON LANDSBERG TRADING (PTY) LTD** (13/5839) [2014] ZAGPJHC 2003; 2015 (2) SA 55(GJ) (25 July 2014) the principles of which have now become trite and have constantly been applied.

[78] The current matter was not one brought as an urgent application and there simply exists no reason why the Applicant could not be kept to strict compliance with the statutory provisions of the Act to prove that service was properly affected.

[79] The Court will not merely as a "fallback position" grant a provisional winding up order because the Applicant has failed to have its house in order when the application was heard initially. When a Court makes an order that affects the status of a company it affects the rights of all the affected persons of such of company also. In the current application, it would have had enormous ramifications on all affected parties if the Court extended its discretion in favour of the Applicant to uplift the moratorium, to recognise the Applicant's claim and to convert the business rescue process into that of liquidation. To do so under circumstances where the Applicant's house was not in order to ensure compliance with the Act would simply not make any sense. If the Applicant were to be afforded the right of a provisional winding up order to allow the Applicant to get its house in order in respect of statutory compliance when the non-compliance was neither addressed or applied to be condoned, it would not be proper. The ordering of a provisional order would not only have delayed the finalisation of the matter but would have adversely affected the rights of all the affected parties.

[80] I hold no doubt that a Court may under certain circumstances condone non-compliance with the statutory provision of Section 346(4A)(b) when the facts of the matter deserve such non-compliance to be condoned, under which circumstances it might then be appropriate for the Court to safeguard the interest of an Applicant by ordering the provisional winding up of a company whilst affording protection to affected parties ordering compliance with the Act before a final winding up order would be issued. This is however to be regarded as the exception to the rule and not the standard to be applied. When parties, such as in the current mater had more than a year to ensure that their papers were properly before Court and similarly had the same amount of time to ensure compliance with each and every aspect which would have been necessary to obtain the relief they seek, the Court cannot be expected to grant the application as a provisional order when their non-compliance is pointed out by the Court at the hearing of the matter.

[81] The non-compliance of the Applicant with the statutory provisions undermines his own case.

COSTS:

[82] Ordinarily, the cost of an application ought to follow its result.

[83] The current application, at least in part, is one that is deserving of this Court showing its displeasure with the manner in which a litigant has conducted himself during the litigious process by deviating from the norm.

[84] In coming to the conclusion the Court is doing, the Applicant as the unsuccessful litigant would ordinarily be liable to pay the costs of suit of the First and Second Respondents as well as the Third and Fourth Respondents.

[85] Insofar as it relates to the Third and Fourth Respondents, the Court is satisfied that the Applicant should pay their costs on a party and party Scale B. The legal points raised by the Third and Fourth Respondents have disposed of the Applicant's application, and even if a disregard was to be had of the First and Second Respondents' Answering Affidavit, the Applicant would not have succeeded with the relief it sought in the Notice of Motion.

[86] Insofar as it relates to the First and Second Respondents, I have already indicated the Court's displeasure and frustration with the manner in which they dealt with the litigious process. Adv Moloi, acting for the First and Second Respondents correctly conceded that the Court, if the Court allows the Answering Affidavit of the First and Second Respondents may make an appropriate order as to costs which the Court is herewith doing. It would be unfair if the Court orders the Applicant to pay the costs of the First and Second Respondents under these circumstances and as such, insofar as it relates to the First and Second Respondents, I do not intend making any cost order.

[87] The First and Second Respondents shall accordingly be responsible for paying their own costs.

CONCLUSION:

[88] The Applicant has failed to succeed in convincing the Court that the moratorium against the institution of legal proceedings against a company in business rescue ought to be lifted for all the reasons as stated *supra*. The Applicant has failed to succeed in respect of each of its underlying prayers sought in its Notice of Motion that would lead the Court to find in favour of the upliftment of the moratorium to substantiate the ultimate relief the Applicant sought which was to convert the business rescue process into that of a liquidation process.

ORDER:

[89] In the premises, the following Order is made:

1. The application is dismissed.

2. The Applicant is to pay the Third and Fourth Respondents' costs on a party and party Scale, B.

3. The First and Second Respondents are ordered to pay their own costs, and no cost order is made against the Applicant insofar as it relates to the costs of the First and Second Respondents.

[redacted]

HF FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

Counsel for the Applicant:	Adv A Rossouw SC
Instructed by:	**JACO ROOS ATTORNEYS** **C/O WDT ATTORNEYS**
Counsel for the First and Second Respondents:	Adv T Moloi
Instructed by:	**RAMS ATTORNEYS** **C/O DU TOIT SMUTS & PARTNERS**
Counsel for the Third and Fourth Respondents:	Adv De Leeuw
Instructed by:	**BARNARD INC ATTORNEYS** **C/O VZLR ATTORNEYS**
Judgment reserved on:	15 April 2025
Date of delivery:	30 April 2025