



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

CASE NO. 2025-094544

In the matter between:

EUGENE JACQUES BRAND

Applicant

and

MORGAN CREEK BOERDERY (PTY) LTD

First Respondent

MORGAN CREEK OUDEMUUR (PTY) LTD

Second Respondent

MORGAN CREEK GELUKWAARTS (PTY) LTD

Third Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Fourth Respondent

and

CRAIG MACLEAN HATHORN N.O.

First Intervening Party

KAGISO SURPRISE DINAKA N.O.

Second Intervening Party

DINATH IMRAN N.O.

Third Intervening Party

*In their capacity as the joint liquidators of Morgan
Creek Holdings (Pty) Ltd (in liquidation)*

DOLE SOUTH AFRICA (PTY) LTD

Fourth Intervening Party

Coram: Morrissey, AJ

Heard: 7 August 2025

Delivered: 11 September 2025

ORDER

1. The applicant's business rescue application is dismissed.
2. The respondents are herewith placed into final liquidation in terms of section 131(4)(b) of the Companies Act, 71 of 2008.
3. The party and party costs of the applicant and the first to fourth intervening parties are to be costs in the administration of the respondents' winding up, with each respondent to be jointly and severally liable for those costs. Counsel's costs are to be on Scale C.

JUDGMENT

Morrissey, AJ

- [1] This is an opposed, urgent application to place three associated companies into business rescue.
- [2] Given the competing interests involved, I begin by identifying the relevant players.
- [3] The respondents are the three companies the applicant seeks to have placed into business rescue. They conduct fruit farming operations near Piketberg in the Western Cape, with two of them owning the land farmed and the third conducting the farming operations. The land owning companies, which I shall refer to as “*MC Oudemuur*” and “*MC Gelukwaarts*” generate income by leasing their land to the operating company, which I refer to as “*MC Boerdery*”. That rental is the sole source of income for the land owning companies. MC Boerdery is currently non-compliant with its rental obligations.
- [4] The respondents are all wholly-owned by another company, which I refer to as “*MC Holdings*”. MC Holdings is in final liquidation. Three of its four liquidators (“*the intervening liquidators*”) intervened to oppose the business rescue proceedings and to seek the winding up of the respondents by way of a notice of motion dated 7 July 2025.
- [5] Although the intervening liquidators were voted in as the final liquidators of MC Holdings at a meeting of creditors on 19 June 2025, their appointment had not been formalised by the date of intervention. A fourth final liquidator (“*Mr Theron*”)

was also voted in as a final liquidator at the 19 June meeting. His appointment had also not been finalised by 7 July 2025.

- [6] Although Mr Theron has not come on record or filed any affidavits in the proceedings, on 22 July 2025 he authored correspondence stating that “... *I support the notion that the Morgan Creek companies can reasonably be rescued and that it would be beneficial to all parties concerned.*”
- [7] MC Holdings has three shareholders, one being a company and two being trusts. I refer to the company as “*Dole Africa*”. It hold a 26% stake in MC Holdings. I refer to the trusts as “*BBT*” and “*BFT*”. They hold the balance of the shares in MC Holdings, 23% and 51% respectively. Dole Africa was the petitioning creditor in the application to wind up MC Holdings. Dole South Africa (“*Dole SA*”), a company associated with Dole Africa, has also intervened in the current proceedings. Like the intervening liquidators, Dole SA seeks to have the respondents wound up. It is undisputed that Dole SA is a creditor of each of the respondents, although there is some dispute about the extent of MC Boerdey’s indebtedness to it. Nothing turns on that dispute.
- [8] The applicant, Mr Brand, says he is a creditor of each of the respondents. He is also a director of each of them, and a director of MC Holdings. The liquidators say that he also controls BBT and BFT. The history of Mr Brand’s involvement with the respondents is encapsulated by the following statement in his replying affidavit:

“I acquired the farms with money I made during my professional career and from the sale of assets I had acquired as a young man. The farms and the business represent my life’s work. My wife, my elderly father and I reside on the farm Gelukwaarts, as do fifteen permanent staff members.”

- [9] MC Oudemuur and MC Gelukwaarts are indebted to ABSA Bank (“ABSA”). In his founding affidavit Mr Brand said that that indebtedness was some R28.9 million in the aggregate, of which some R3.2 million is in arrears. Per a 2024 ABSA valuation, the farms they owned had aggregate open market value of R88.1 million. ABSA has sent letters to each of the respondents in terms of section 345 of the Companies Act, 61 of 1973, demanding payment of some R12.2 million. The intervening parties have contested the valuations, but have not put up any of their own, informal or otherwise.
- [10] The respondents are also indebted to MC Holdings. As at the end of May 2025, that indebtedness stood at just over R41 million. In round figures, MC Boerdery owes R21.7 million, MC Gelukwaarts owes R3 million, and MC Oudemuur owes R16.3 million.
- [11] Mr Brand brought his application under section 131 of the Companies Act, 71 of 2008 (*“the Act”*), and sought to show that the respondents were financially distressed and that there was a reasonable prospect of rescuing them. There was no real dispute regarding the requirement of financial distress. The key disputes were Mr Brand’s standing as a creditor of the respondents and whether there was a reasonable prospect of rescue. The intervening parties also contested the urgency of the application.
- [12] The background facts need not be traversed in detail.
- [13] In 2019, the Morgan Creek Group, being MC Holdings and the respondents, undertook a restructuring exercise. Part of that exercise involved the group partnering with Dole Africa and Dole SA, which provided certain funding to the group. Further funding was later procured from ABSA.
- [14] The group’s fruit farming yields have been lower than hoped for since the restructure. Not only were the orchards young (which Mr Brand explained meant

they produced a limited yield), the COVID-19 pandemic adversely affected input costs and the late and heavy rainfall in 2023 and 2024 adversely affected the harvests in those years.

- [15] In his replying affidavit Mr Brand was also critical of the marketing of fruit by the Dole entities over that period (which they did in terms of a marketing agreement concluded at the time of the restructure), saying that the group lost hundreds of thousands of Rands in turnover by accepting low prices for fruit.
- [16] Whatever the causes may have been, the outworking was that the group's farming activities were not able to generate enough money to service its debt and pay its trade creditors. Mr Brand says that has created tension between the group and the Dole entities (as lenders), something that is particularly pronounced because representatives of the Dole entities sit on the respondents' boards. He described the parties as being at an impasse, and explained that the group's default under its obligations resulted in the proceedings to wind up MC Holdings.
- [17] The application was premised in part on a concern of winding up proceedings being imminent. However, what appears to have motivated the application being brought on an urgent basis was the need to secure financing in order to complete the 2025 harvest and to pay for the preparation of the orchards for the 2026 harvest.
- [18] In this regard, Mr Brand explained that fruit farming is very cost intensive during the harvest season (April to August). There are also critical costs that have to be incurred immediately after the harvest in order to prepare the orchards for the next season. That preparation includes pruning, feeding and spraying the trees. Because fruit farms only receive payment for a harvest some months after it ends, those preparation costs have to be funded by existing financial resources or facilities. Mr Brand says that the respondents do not have such resources.

[19] Mr Brand explained that the post-harvest preparation is critical because it impacts the yield the orchards will produce in the next season. He said that if it does not occur, the orchards “... *stand to yield significantly less the following harvest and, as a result, the value of the farms will reduce significantly*”.

[20] He went on to state the following in his founding affidavit, which he deposed to on 19 June 2025:

“Based on historic prices and market behavior, as well as the estimated yield of fruit, the expected value of the 2025 harvest amounts to R18 million. Without the additional funding to be obtained by an independent business rescue practitioner, the companies, especially MC Boedery, would be unable to pay some of the existing creditors that supply products required to continue harvesting the farms with a view towards the crop for 2026.

If the crop is not maintained, it would also be devastating to the farms themselves. A crop that is not maintained would adversely affect the company's ability to pay its creditors and, in addition, significantly reduce the value of the farms. This will further disadvantage the company's creditors and stakeholders.”

[21] I cite these paragraphs because they inform the applicant's case for urgency. Essentially, the applicant's position was that it should be permitted to jump the queue of other litigants seeking the Court's aid because it needed to ensure that it was able to undertake the necessary preparation for the 2026 harvest. The idea was that business rescue would achieve that goal because not only would it create a moratorium to prevent proceedings being instituted against it by its unpaid creditors, it would also permit the raising of post-commencement finance which could be used to cover those costs.

- [22] That is not to say that the applicant considered that business rescue would only entail the procurement of post commencement finance limited to that required to prepare the orchards for the 2026 season. Rather, Mr Brand envisioned a comprehensive rescue that would involve the respondent companies trading out of their current financial distress.
- [23] That larger rescue contemplated the restructuring of creditors' debt, securing external funding to fund the respondents' operations into the future, potentially selling the land owned MC Oudemuur or MC Gelukwaarts to pay off creditors, and securing the increasing yields produced by the currently young orchards as they matured over time.
- [24] The prospects of such a rescue being possible were motivated further in Mr Brand's replying affidavit, which was prepared on 24 July and about halfway through the 2025 harvest. Mr Brand said that he was expecting revenue that was "*exponentially higher*" than had previously been anticipated, and that as many as 223,037 cartons of fruit would be picked, as opposed to the 120,000 to 145,000 that had previously been predicted. He said that additional revenue would create a surplus estimated to be somewhere between R8 million and R14.6 million, which he believed was a trend that would continue for the 2026 to 2029 harvests.
- [25] Mr Brand did however also rely on an alternative business rescue plan that saw the respondents informally wound up in a way that would achieve a better return for creditors than if a winding up occurred. I draw this from the following statement in his founding affidavit:

"It is therefore essential that the Companies be placed in business rescue to enable a business rescue practitioner to raise the necessary operating finance to preserve the assets of the Companies and ensure that a better return is achieved for the creditors and shareholders in the

event that the companies are unable to trade after their present financial distress.”

[26] The applicant’s case can thus be summarised as follows:

- a. It is in the best interests of the respondents and their creditors to undertake the post-harvest preparation of the orchards in order to preserve their value.
- b. The respondents do not have the money to cover that cost, and the only way it can be raised is via post-commencement finance in business rescue. Business rescue would also provide other benefits, including a moratorium on winding up proceedings by creditors who were threatening to do so (such as ABSA).
- c. The essential preparation for the 2026 harvest needs to take place in about August/September, and the matter was thus urgent. If the applicant had to await a hearing in the ordinary course, all will be in vain.
- d. Achieving the short term goal of preparing the orchards for the 2026 harvest was beneficial even if the respondents’ creditors ultimately voted against business rescue, because it would have at least preserved the value of the farms if there was to be a winding up.
- e. Even if there was not to be a rescue of the respondents in the sense of having them trade out of their financial difficulties, there could be one that simply involved an informal winding up, and which would ensure a better return for creditors.

[27] The intervening parties contended that any urgency that existed was self-made. They chronicled a history of the applicant’s recognition of the financial woes of the respondents dating as far back as June 2023. I do not intend to repeat that chronology here, save to say that it makes it clear that the respondents’ financial woes are not a recent event, and that these proceedings could have been instituted far sooner than they were.

- [28] Indeed, it appears that one of the reasons a business rescue application was not forthcoming earlier was because the applicant considered the respondents could raise financing and trade out of their difficulties without the need for them, and wanted to avoid what was described as the limited financial harm caused by the business rescue process.
- [29] The intervening parties also challenged the assertion that there was a reasonable prospect of rescuing the respondents. In particular, their complaint is that no cogent or viable business rescue plan has been set out by the applicant.
- [30] I have to agree with both of the criticisms put up by the intervening parties, certainly insofar as the complaint regarding the absence of a reasonable prospect of rescue relates to the comprehensive rescue Mr Brand referred to.
- [31] While I appreciate that the applicant did not need to produce details of the sort contemplated in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (BB) at [11] (as endorsed in *Oakdene Square Properties v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 (SCA) at [31]), it remained necessary for him to establish a “reasonable prospect” of a rescue occurring.
- [32] The proposed rescue is formulated in very vague terms, and really amounts to nothing more than a list of steps that can potentially be taken if the respondents are placed in business rescue. There is little by way of what might actually be done in this case. That does not really assist me in determining whether the necessary “reasonable prospect” of rescue exists.
- [33] More fundamentally, and given that a key ingredient for the proposed rescue is post-commencement finance, I consider it was necessary for the applicant to have established a reasonable prospect of such finance being raised.

- [34] Although the applicant did allude to potential funders and discussions with them, the degree of detail provided, and the level of interest shown by such funders, was very low. Very few potential funders were even identified, and those that were had at most given a non-committal indication of a willingness to consider the respondent's position (as opposed to having done so and expressing some sort of willingness to advance funding). No indication was given as to the scale of funding being considered, in particular, whether it was a relatively small amount to enable the respondents to prepare for the 2026 harvest, or a larger amount to enable them to embark on a comprehensive rescue.
- [35] The lack of detail regarding potential funding is amplified by the fact that Mr Brand has already been looking for funding for some time. While I appreciate he was doing so outside of a business rescues scenario, the fact that he apparently cannot get even indicative commitments from lenders now that business rescue proceedings are in the offing also suggests that such funding is unlikely to be forthcoming.
- [36] In my view, while it cannot be said there is no prospect of funding materialising were business rescue to go ahead, I consider that the applicant has failed to establish that there is a reasonable prospect of that happening, as he is required to do.
- [37] I also have difficulty with the applicant having relied on an anticipated event, being the necessary post-harvest treatment of the orchards, as a basis for urgency. As I understood it, it was well-known that the post-harvest treatment would need to occur after the harvest was completed. It was not as though that treatment was not anticipated, and its sudden emergence created an urgent situation that could not have been foreseen. It seems to me that the urgency complained of was in truth self-created, and arose due to a failure by the

applicant to timeously react to the dire financial circumstances the respondents find themselves in.

- [38] What requires further discussion is the alternate business rescue plan discussed above, involving the respondents' business rescue practitioner securing a relatively small amount of money to undertake the post-harvest orchard treatment in order to preserve the value of their assets, and then selling them (as a going concern or otherwise) via an informal winding down of the business, alternatively, having that happen via a winding up.
- [39] While I have not been provided with an indication of the anticipated costs of the necessary treatment and the applicant has been very sparse on detail regarding the ability to raise post-commencement finance for it, for the sake of argument I am prepared to assume that the necessary amount could be raised.
- [40] The difficulty I have with this alternate proposal is that it is one that could be pursued even if the respondents are wound up. As was stated by the intervening parties in their answering affidavit:

“Brand further does not appreciate that liquidators would also be in a position to maintain the farms in order to ensure that they may bring in the 2026 harvest, and not lose value. He attempts to create the false impression that liquidators would somehow abandon all maintenance and operations and sell off the farms in haste. However, independent liquidators are bound to realise the best outcome for creditors and this may well entail ongoing maintenance and operations and even, if that seems financially prudent or necessary, bringing in the 2026 harvest... Moreover, liquidators also have the power, with a leave of the court, to raise money on security of the assets of the company. It is therefore misleading to suggest that liquidators of the subsidiaries would not be in

a position to continue the business, or raise money to do so, if they deemed this viable or prudent.”

[41] In reply to this Mr Brand said the following:

“I do appreciate that a liquidator might carry on the business and may apply for an extension of powers in order to also raise funds. However, I am perplexed by the suggestion that the respondents should be liquidated in order for a liquidator to be appointed who would then have to apply for an extension of powers only to be in a position to manage the business. Clearly, the more appropriate solution is for a business rescue practitioner to be appointed who will be able to raise finance and manage the business out of financial distress.”

[42] While that response would be valid if the applicant had established a reasonable prospect of rescue under the “primary” rescue plan, for the reasons set out above I have concluded that it does not. The upshot is that the alternate rescue plan fails to establish any advantage over winding up: Liquidators could borrow money and continue the respondents’ operations while seeking out a purchaser interested in acquiring it as a going concern, with a view to achieving the best return for creditors.

[43] In coming to that conclusion I have had regard to two issues that bear mention.

[44] The first issue is the correspondence from Mr Theron, the fourth liquidator. As will be recalled, he supported the notion of the respondents being rescued. He also said the following:

“The cost of liquidation, calculated on the ABSA Bank valuations will exceed R4 million whereas the cost of the business rescue proceedings will be less than R1 million.

If I am not mistaken, I think a business rescue plan must be submitted within 25 days of the appointment of the business rescuer, which is not a long time to wait and see whether the creditors will approve same. Even if the business rescue application is not successful, I still believe that the assets of the companies must be sold in the open market to obtain the best possible price in the interest of both creditors and shareholders.”

[45] It is unfortunate that Mr Theron did not depose to an affidavit embellishing on what he said. At the risk of speculating, it seems to me that the cost differential he was referring to was his estimation of the difference in fees between a liquidator and a business rescue practitioner selling the respondents’ assets.

[46] Promoting business rescue solely on the basis that it would result in a saving of fees was rejected in *Oakdene (supra)* at [33], where the Court said the following:

“My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding up of the company... I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding up of the company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.”

[47] That principle was reiterated in *Newcity Group (Pty) Ltd v Pellow NO (Rezidor Hotel Group South Africa (Pty) Ltd First Affected and Party Non-Unionised Employees Second Affected Party)* 2014 JDR 2155 (SCA) at [21].

- [48] I thus consider that, insofar as Mr Theron relied on nothing more than a cost-saving to promote rescue over liquidation, that consideration must be discounted.
- [49] The second issue I have considered is that by placing the respondents into business rescue the business rescue practitioner would be able explore the possibility of the primary plan succeeding, with an informal winding up as a fallback. For example, the business rescue practitioner could propose a rescue plan that entails securing a small amount of finance in the short term to preserve the respondents' assets; affording him an opportunity to seek out additional funding for a full-scale rescue; and then proceeding with it if funding is found, or proceeding with an informal rescue if it cannot be.
- [50] In my view that consideration also cannot be taken into account because it would serve to undermine the jurisdictional requirements of section 131(4)(a), which requires the Court to be satisfied that there is a reasonable prospect of rescue before granting an order placing a company in business rescue.
- [51] Stated differently, an applicant cannot bring a business rescue application on the basis that the ability to rescue a company might be established by a business rescue practitioner, and that no harm is done if that is not the case because there is always the fallback of an informal winding up. Rather, a reasonable prospect must be established to have a company placed under business rescue, with a business rescue practitioner then applying for the discontinuance of those proceedings if, on investigation, it appears that finding was misplaced, as contemplated in section 141(2)(a)(ii) of the Act.
- [52] A further consideration I have taken into account in coming to the view that business rescue is not appropriate is the resistance by the intervening liquidators and Dole SA, as creditors of the respondents (see: *Oakdene (supra)* at [38]).

- [53] I now turn to the question of Mr Brand's standing to institute his application. I shall provide an outline of the issues and then deal with each of the three respondents in turn.
- [54] It was common cause that the respondents' affairs were interlinked and that business rescue only made sense if all three of them were part of an overarching rescue plan. It was thus necessary for the applicant to establish standing in respect of all three respondents.
- [55] Section 131 of the Act provides that a business rescue application may only be brought by an affected person. Such a person is defined in section 128(1)(a)(i) as including "... *a shareholder or creditor of the company*". The applicant relied on his status as a creditor.
- [56] In respect of MC Boerdery, Mr Brand said he was owed just under R1 million on loan account. He relied on MC Boerdery's financial statements in support of that allegation.
- [57] In respect of MC Oudemuur, Mr Brand said he had agreed to stand surety for its debts to ABSA, and that his right of recourse against MC Oudemuur rendered him a creditor of it.
- [58] In respect of MC Gelukwaarts, Mr Brand said he had taken cession of a debt of some R50,000.00 it owed to a third party, and had thereby stepped into the shoes of that creditor.
- [59] The intervening parties challenged the claim against MC Boerdery on the basis that a note to the same financial statements Mr Brand relied on indicated that the loan had been ceded as security to ABSA. That cession was disputed in reply, but no explanation was given regarding the note the intervening parties referred to. Mr Brand maintained that even had there been such a cession he still

retained his reversionary interest in the claim, and that was enough to qualify him as a creditor.

[60] As regards MC Oudemuur, the intervening parties contended that Mr Brand would not be a creditor of it until he paid ABSA under the relevant suretyship. Mr Brand accepted this but contended that he remained a creditor because even such a “*contingent*” claim was sufficient to render him a creditor as contemplated in 128(1)(a)(i) of the Act, and thus an affected party as referred to in section 131(1).

[61] As regards MC Gelukwaarts, the liquidators said that the cession had evidently been undertaken as part of an attempt to establish standing, and that such creditors were not contemplated in section 128(1)(a)(i). Mr Brand said that it mattered not how he came to be a creditor. All that mattered was that he was one.

MC Boerdery

[62] As stated, the intervening parties challenged Mr Brand’s claim to be a creditor of MC Boerdery on the basis that his claim against it had been ceded to ABSA as security.

[63] The relevant agreement between the applicant and ABSA was not included in the papers. Rather, the intervening parties relied on a note that appeared in MC Boerdery’s financial statements.

[64] I do not think that the intervening parties’ interpretation of that note withstands scrutiny. It is headed “*Contingencies*” and reads as follows:

“Unlimited suretyship (cession of loan account included) is provided for the facilities at ABSA Bank Limited for Morgan Creek Gelukwaarts Proprietary Limited and Morgan Creek Oudemuur Proprietary Limited. Cession of loan account (unlimited) is provided for the facilities at ASSA [sic] Bank Limited for Morgan Creek Gelukwaarts Proprietary Limited and Morgan Creek Oudemuur Proprietary Limited.”

- [65] Notes 2 and 3 of the relevant financial statements indicate that MC Boerdery has made loans of just over R3 million to group companies, and has borrowed just under R29 million from group companies. It seems to me that the note cited above is alerting the reader to the fact that MC Boerdery has given ABSA a suretyship for the debts MC Gelukwaarts and MC Oudemuur owe it, and has ceded its intra-group loan claims as security for that suretyship obligation.
- [66] It is not, as the intervening parties suggest, a case of Mr Brand having ceded his loan claim against MC Boerdery. My interpretation is supported to some extent by the fact that ABSA has addressed a section 345 letter to MC Boerdery, for the same amount it claims from MC Gelukwaarts and MC Oudemuur.
- [67] On that basis alone I find that the intervening parties failed to establish that Mr Brand’s loan to MC Boerdery had been ceded as security to ABSA.
- [68] Even if it had been, I find that Mr Brand nevertheless remained a creditor as contemplated in section 128(1)(a)(i) of the Act.
- [69] As counsel for both parties accepted, without more such a security cession would entail Mr Brand retaining a reversionary right in his claim against MC Boerdery (*Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) at [22]).

- [70] While that reversionary right is insufficient to enable Mr Brand to fully enforce his claim against MC Boerdery by unilaterally instituting recovery proceedings against it, he continues to enjoy certain other rights arising from that claim.
- [71] Given the historic assessment of a security cession as an analogy of a pledge, there remains a degree of uncertainty as to the precise ambit of those other rights. As a general proposition, they include those that serve to protect the cedent's interest in the ceded debt, including the right to institute proceedings to sequester the principal debtor. This is discussed in GF Lubbe *LAWSA Vol 3* 3rd ed "Cession" at 182, esp. the text at footnotes 2-8; and S Scott "Scott on Session" at 447-448, with reference to the authorities cited in those texts.
- [72] Sequestration proceedings, like winding up proceedings, are not concerned with the enforcement of a debt. They are proceedings that alter the status of the relevant respondent. In that respect they are similar to business rescue proceedings. Although the focus in business rescue is on the recovery of the company, the interests of creditors feature prominently, and they manifestly have an interest in their financially distressed debtors being rescued.
- [73] I thus consider that even had Mr Brand ceded his loan claim against MC Boerdery to ABSA *in securitatem debiti*, by virtue of his reversionary interest he nevertheless remained a creditor of MC Boerdery as contemplated in section 128(1)(a) of the Act, and also remained entitled to exercise the right of a creditor to bring an application to have MC Boerdery placed in business rescue.
- [74] It is unnecessary for me to consider whether Mr Brand (as opposed to ABSA) would also be able to vote on that claim if it were proved in business rescue proceedings, and I should not be seen to be making any findings on that question.

- [75] As already mentioned, the dispute on this part of the case was whether a “*creditor*” referred to in section 128(1)(a)(i) of the Act includes contingent creditors. Mr Brand said he was a contingent creditor of MC Oudemuur because, by standing as its surety in respect of its indebtedness for ABSA’s, he will have a right of recourse against it for any monies he pays ABSA in honouring the suretyship.
- [76] In support of the submission that the reference to a “*creditor*” in section 128(a)(i) includes contingent creditors, *Mr de Wet*, who appeared for the applicant, submitted that it was suggested in *Dangerous Goods International SA (Pty) Ltd v Jag Freight (Pty) Ltd and another* [2024] All SA 481 (WCC) at [47] that the word “*creditor*” in section 81(1)(c)(ii) of the Act should be interpreted expansively so as not to exclude contingent or prospective creditors.
- [77] As I understood it, the thrust of the submission was that the word “*creditor*” in section 128(1)(a)(c) of the Act should be read as if it included the qualifier appearing in section 346(1)(b) of the Companies Act, 61 of 1973, which permits winding up proceedings to be brought by, among others, “*creditors (including contingent or prospective creditors)*”.
- [78] To avoid confusion, I should begin by explaining that the reference to “*contingent or prospective creditors*” is to creditors who, by virtue of some legal tie or *vinculum juris*, have a claim against another which may ripen into an enforceable debt on the happening of some future event on some future date (*Gillis-Mason Construction Co. v Overvaal Crushers* 1971 (1) SA 524 (TPD) at 528C-D).
- [79] The requirement of a *vinculum juris* is important because it serves to exclude someone who is merely likely to become a creditor in the future, such as a merchant who can be said to have every prospect of effecting a sale but has not

yet succeeded in so doing (*Du Plessis v Protea Inryteater (Edms) Bpk* 1965 (3) SA SA 319 (TPD) at 320).

[80] Having considered the decision in *Dangerous Goods*, I do not think it provides much support for the proposition *Mr de Wet* advanced.

[81] Firstly, the Court was considering section 81 of the Act, which is concerned with proceedings to wind up a solvent company. It may well be that the class of parties entitled to do so is not necessarily the same as the class of parties entitled to institute business rescue proceedings. Two different processes are involved: Section 81 is to be found in a chapter of the Act dealing with the dissolution of companies, and section 128 is found in a chapter concerned with rescuing them.

[82] Secondly, it appears that the broad interpretation of section 81(1)(c)(ii) of the Act the Court notionally supported was based on the decision in *Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) Ltd and Others* 2022 JDR 1031 (GP).

[83] In the latter case the applicant had sought to set aside a resolution by a company to be placed under business rescue. It alleged it was an affected person because it was a creditor of the company based on a claim under a construction contract. That claim was disputed by the respondent. The Court found (at [34]) that the applicant was a creditor despite that dispute, and even though the applicant's claim was unliquidated. Although not expressly considered by the Court, it appears to have accepted that the principles underlying the so-called *Badenhorst rule* did not apply when it came to the institution of business rescue proceedings.

[84] As I read the Judgment, while it seems that a submission was made that creditors having contingent or conditional claims are creditors for purposes of

business rescue proceedings, the learned Judge made no findings as to whether contingent creditors were included in the definition of creditors in Chapter 6 of the Act.

[85] Thirdly, it appears that in *Dangerous Goods* the Court recorded a submission by the applicant as to what *Rogal Holdings* found and noted that the respondents did not resist it, without necessarily deciding the point. In other words, the Court seems to have been prepared to assume the accuracy of the proposition for the sake of argument without deciding it, with the issue ultimately being of no moment because the applicant's case was dismissed for other reasons.

[86] In my view, a contingent creditor is not a creditor as contemplated in section 128(1)(a)(i) of the Act. That is because, whatever policy reasons might motivate a broader interpretation, the ordinary grammatical meaning of the word "*creditor*" is a person or entity to whom an unpaid debt is due (*Mashwayi Projects (Pty) Ltd and Others v Wescoal Mining (Pty) Ltd and Others (IWIRC Southern Africa Network NOP and another as amici curiae)* [2025] 2 All SA 57 (SCA) at [21]). As by definition nothing is due to a contingent creditor, it falls beyond the ordinary meaning of the word.

[87] I accept that the Court in *Wescoal* was not concerned with the question of whether the word "*creditor*" included contingent creditors. The matter before it was concerned with whether claims of creditors providing post-commencement finance should be treated differently from creditors that existed at the commencement of business rescue. The Court also referred to a case (at [24]) where the word "*creditor*" in section 424 of the Companies Act, 61 of 1973 was interpreted to include contingent or prospective creditors.

[88] Be that as it may, the Court's assessment of the ordinary meaning of the word leaves very little room, in my view, for adopting a wider interpretation of the same

term, not only in the same Act but in the same chapter thereof. The Court's highlighting of the fact that there is no *concursum creditorum* in business rescue and that creditors may come into existence after business rescue commences is also relevant, because it highlights that a creditor with a contingent claim at the time business rescue commences might become an "*unconditional*" creditor before business rescue is completed, if the relevant condition is fulfilled. Until they do, their remedy might be limited to instituting winding up proceedings, assuming they can establish the necessary inability to pay debts and the other requirements for such relief.

- [89] A further reason for settling on the grammatical meaning of the word "*creditor*" is because seeking to interpret it in a more purposive way tends to devolve into the formulation of policy considerations underlying business rescue. This is due, in part, to uncertainties in interpreting other provisions governing the business rescue process.
- [90] For example, the priority section 131(6) of the Act affords to business rescue proceedings over winding up proceedings signals a preference to rescuing companies than to winding them up. On that basis, and because a business rescue plan is binding on creditors by virtue of section 154(2)(c) of the Act, an extensive definition of the word "*creditor*" might be desirable in order to maximise the impact and extent of the business rescue plan in order to promote a successful rescue.
- [91] On the other hand, it also appears that business rescue is intended to be a swift process in which creditors are afforded a material say, as determined by the value of their claims. That value is determined by the business rescue practitioner, presumably on a relatively robust basis. That might motivate limiting the meaning of the word "*creditor*" to those having unconditional, undisputed and liquidated claims.

- [92] Parties having conditional, disputed or illiquid claims might become creditors if they can successfully negotiate the settlement/acceptance of their claims by the business rescue practitioner/the company (thereby rendering them unconditional, undisputed and liquidated). To the extent they cannot, those parties do not become creditors, and they and their claims are excluded from the business rescue process. Importantly, they are also not bound by the business rescue plan (section 154(2)(c)), or by section 154(2), which precludes the recovery of debts due before the commencement of business rescue proceedings, both of those subsections only applying to “*creditors*”.
- [93] As highlighted in *Wescoal* at [13] – [14], questions of policy are the preserve of the Legislature. It thus seems to me that in the absence of clear policy guidance in the Act, it is best to adopt the grammatical meaning of the word creditor and leave it to the Legislature to intervene if it considers that does not achieve its legislative intent.
- [94] Even if the word “*creditor*” is interpreted to include contingent or prospective creditors, the right of recourse claim Mr Brand relies on against MC Oudemuur should not be.
- [95] As recognised by section 48 of the Insolvency Act, 24 of 1936, some contingencies can be valued. However, the valuation of a right of recourse where the creditor has not called on the surety for payment and there is no certainty that the surety will be able to do so has been described as an impossibility (*Moti & Co v Cassim’s Trustee* 1924 AD 720 at 738; *ABSA Bank v Scharrighuisen* 2000 (2) SA 998 (CPD) at [28]).
- [96] While there may thus be a prospect of some conditional claims being attributed a value for purposes of voting on a business rescue plan, there is no prospect of that happening in respect of Mr Brand’s conditional claim against MC Oudemuur. There is thus no reason to include the holders of such claims as creditors,

because they will have no vote, and thus no say, in any business rescue plan proposed by a business rescue practitioner.

- [97] At page 448 of *Henochsberg* the learned authors submit that a surety in the position of Mr Brand is not a creditor for purposes of Chapter 6 of the Act. As I understand it, they contend that such a party is not even a contingent or prospective creditor because there is an absence of the necessary *vinculum juris* referred to above. That is because the ability to pursue a right of recourse only arises once the surety honours the principal debtor's debt.
- [98] *Zungu-Elgin Engineering (Pty) Ltd v Jeany Industrial Holdings (Pty) Ltd and Others* (1138/2019) [2000] ZASCA 160 (3 December 2022) at [13] confirms the authority in *Proksch v Die Meester en Andere* 1969 (4) SA 567 (A) that no payment is due by a principal debtor under a right of recourse until the surety pays the creditor, but it is not entirely clear to me that no *vinculum juris* exists between the surety and the principal debtor until such payment is made.
- [99] As was explained in *Wilde and Another v Wadolf Investments (Pty) Ltd and Others* 2005 (1) SA 354 (WLD) at [10] (rejecting *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W)), even though a surety's right of recourse only becomes due upon it paying the principal debt (or a part thereof), the true cause of the surety's claim is to be found in the original suretyship.
- [100] To borrow the imagery in *Gillis-Mason*, although the conclusion of the suretyship does not create a contractual tie between the surety and the principal debtor (the principal debtor might not even be aware of it), the act of concluding the surety nevertheless creates a *vinculum juris* between them which may ripen into an enforceable debt in the form of a right of recourse if the surety discharges the principal debtor's debt (or a part thereof).

[101] If I am wrong in the above construction, the contention advanced in *Henochsberg* is nevertheless a further reason why Mr Brand is not a “*creditor*” of MC Oudemuur for purposes of instituting business rescue proceedings.

MC Gelukwaarts

[102] I consider Mr Brand is on firmer ground regarding his claim against MC Gelukwaarts. For the reasons given in *Wescoal*, even parties that become creditors after business rescue proceedings have commenced are still creditors entitled to vote on the business rescue plan.

[103] I thus find it was open to Mr Brand to acquire a claim to become a creditor, even if that was motivated to give him standing to pursue business rescue proceedings. While there may be issues of policy militating against such a conclusion, that cannot alter the ordinary meaning of the word “*creditor*” (I refer again to the *dicta* in *Wescoal* at [13]-[14]).

[104] Given the inter-connectedness of the respondents, and even if Mr Brand had established a reasonable prospect of the respondents being rescued, it was not enough for him to establish his standing in respect of two out of the three respondents. It follows that my finding in respect of his lack of standing to institute proceedings against MC Oudemuur is enough to refuse his application in its entirety.

[105] *Mr Greig*, who appeared for all the intervening parties, submitted that the only possible results of the application were that it should be struck from the roll for a lack of urgency, or that the respondents should be wound up under section 131(4)(b).

[106] Although the intervening parties denied Mr Brand’s allegations about the urgent need to prepare the orchards for the 2026 harvest, they did not engage

substantively with them. It seems to me that little purpose would be served by simply striking the matter from the roll, notwithstanding my findings regarding a lack of urgency.

[107] Indeed, it appears to me that striking the matter would be detrimental the applicant, the intervening parties and the respondents' creditors generally. If there is in fact a risk of the value of the farms owned by MC Oudemuur and MC Gelukwaarts deteriorating significantly if the preparation required for the 2026 harvest is not urgently undertaken, and if the boards of the respondents are at the impasse Mr Brand says they are, then it would seem the respondents should be placed under the administration of a third party who can consider borrowing monies to undertake that work and to run them as a going concern sooner rather than later.

[108] I have considered the applicant's service affidavit and it appears from that that all affected parties were given notice of the application. I am thus not inclined to grant a provisional winding up order as that will only serve to delay matters further. I mention that on 25 August 2025 a report from the Master was delivered to my Registrar. The Master has confirmed that security has been provided and that there are no facts she is aware of that justify the postponement or dismissal of the application.

[109] As far as costs are concerned, I am inclined to order that the party and party costs of all parties should be costs in the winding up of the respondents.

[110] I say so because even though the business rescue application has failed, it has resulted in an advantageous result for the intervening parties and the *concursum creditorum*, who would otherwise not have been in a position to obtain it for some time due to congestion on the roll. While I have rejected Mr Brand's contention that the respondents could be rescued, it appears the application was made in good faith. It seems to me this was a case of "*hope springs eternal in the human*

breast” as opposed to a *mala fide* attempt to frustrate (or at least delay) the winding up of the respondents.

[111] I propose directing those costs to be recoverable jointly and severally. This is with a view to avoiding a partial recovery in the unlikely event that one or more of the respondents is unable to pay their proportionate share, and because the respondents were joined in the proceedings.

[112] One further aspect that bears mention is the standing of the intervening liquidators. As pointed out above, they intervened on 7 July 2025, after the meeting at which the final liquidators of MC Holdings were voted in, which included Mr Theron. No objection was made on the basis that all four final liquidators ought to have been joined to the proceedings, even though they had not yet been formally appointed by the Master. I have not investigated the issue further by virtue of the fact that Dole SA is also an intervening party and has echoed the relief sought by the intervening liquidators (as stated, the intervening parties were all represented by the same counsel). From a practical perspective that overcomes any difficulty that may exist as a result of Mr Theron not being cited as a party to the proceedings.

[113] In the circumstances I make the following order:

1. The applicant’s business rescue application is dismissed.
2. The respondents are herewith placed into final liquidation in terms of section 131(4)(b) of the Companies Act, 71 of 2008.
3. The party and party costs of the applicant and the first to fourth intervening parties are to be costs in the administration of the respondents’ winding up, with each respondent to be jointly and severally liable for those costs. Counsel’s costs are to be on Scale C.

MORRISSEY, AJ

Acting Judge of the High Court, Cape Town

APPEARANCES

Counsel for the Applicant:

Adv Rudi De Wet

rdewet@capebar.co.za

Instructed by:

De Klerk & Van Gend

Counsel for the First to Third Intervening parties:

Adv Mark Greig

markgreig@capebar.co.za

Instructed by:

Smith Tabatha Buchanan Boyes.