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

CASE NO: **2040/2022**

Reportable: YES / **NO**

Circulate to Judges: YES / NO

Circulate to Regional Magistrates: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

SNYMAN, FPM	First Applicant
SNYMAN, AA	Second Applicant
SNYMAN, WV	Third Applicant

and

SPRINGFIT ESTATES (PTY) LTD *(In Liquidation)*	First Respondent
STEENKAMP, JURGENS JOHANNES, N.O.	Second Respondent
CAROLUS, PETER N.O.	Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent
ALL KNOWN CREDITORS OF THE FIRST RESPONDENT AS PER ANNEXURE “A” (FIRSTRAND BANK LTD AND THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA)	Fifth Respondent

SNYMAN, JOHANNES HENDRIK Intervening Party

Neutral citation: *FPM Snyman and Others v Springfit Estates (Pty) Ltd (In Liquidation) and Others* (2040/2022) (18 February 2026)
Coram: Nxumalo J
Heard: 07 February 2025
Delivered: 27 February 2026
Summary: *Business rescue – Section 131 of the Companies Act 71 of 2008 – Requirements – Reasonable prospects of rescue and/or better return for creditors and shareholders – Prospects must be based on reasonable grounds – None established.*

ORDER

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1. The application is hereby dismissed with costs.

JUDGMENT

Nxumalo J

INTRODUCTION:

[1] This application, in the main, pertains to the placement of the first respondent under supervision and for business rescue proceedings to be commenced under Section 131(1) and (4) of **THE COMPANIES ACT**[1] ("***the Act***"). The papers are somewhat voluminous and the disputes, many and complex.[2] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not

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[1] 71 of 2008.
[2] A total of 8 Volumes.

designed to determine probabilities.[3] Unfortunately, the Legislature has deemed it fit to prescribe motion proceedings in matters where an order is sought for the business rescue of a company.[4]

[2] Secondly, the applicants seek the appointment of one Jacques Du Toit of Du Toit Business Rescue (Pty) Ltd, as an interim business rescue practitioner of the first respondent as contemplated in Section 131(5) of the Act, pending ratification of such appointment as contemplated in Section 147 of the Act; alternatively, a substitute proposed by the applicants to the Companies and Intellectual Property Commission,[5] in the event that Mr Du Toit's appointment is or becomes unsuitable or impossible for any reason. Thirdly, the applicants seek the costs of this application to be costs in the business rescue proceedings. The applicants lastly seek further and/or alternative relief, as the Court deems meet.

[3] It is common cause that liquidation proceedings had already been commenced by the FirstRand Bank[6] against the first respondent at the time this application was lodged. It is also so that if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of Section 131(1), the business rescue application will suspend those liquidation proceedings until: (a) the Court has adjudicated upon the application; or (b) the business rescue proceedings end, if the Court makes the order applied for.[7]

<u>BRIEF STATEMENT OF THE LAW</u>:

[3] ***National Director of Public Prosecutions v Zuma (Mbeki and Another Intervening)*** [2009] 2 All SA 243 (SCA); 2009 (2) SA 277 (SCA) para 26.

[4] See ***Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and Others*** [2012] 2 All SA 433 (GSJ) para 2.

[5] Cited as the fourth respondent herein.

[6] Which forms part of the fifth respondent in *casu*.

[7] Section 131(6) of the Act.

[4] Section 131(1) of the Act expressly stipulates that, unless a company has adopted a resolution contemplated in Section 129, an affected person may apply to a Court at any time for an order placing the company under supervision and commencing business rescue proceedings.

[5] Section 131(4) of the Act, for its own part, empowers this Court, after considering an application in terms of subsection (1), to:

> *"(a) make an order placing the company under supervision and commencing business rescue proceedings, if this Court is satisfied that-*
>
> *(i) the company is financially distressed;*
> *(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or*
> *(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or*
>
> *(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation."*

[6] Section 131(5) of the Act, expressly stipulates that if this Court makes an order in terms of Section 131(4)(*a*) of the Act, it may make a further order appointing as interim practitioner, a person who satisfies the requirements of Section 138, and who has been nominated by the affected person who applied in terms of Section 131(1) of the Act, subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in Section 147 of the Act.[8]

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[8] The said Section regulates the first meeting of creditors; viz:

"147. First meeting of creditors

(1) Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of creditors, at which-
(a) the practitioner-
(i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company; and
(ii) may receive proof of claims by creditors; and

[7] Of significance is the fact that in addition to the powers of this Court on an application contemplated in Section 131 of the Act, this Court may make an order contemplated in Section 131(4) or (5) of the Act, if applicable; at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.[9] It is also so that a company that has been placed under supervision in terms of Section 131 of the Act: (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with Section 132(2); and (b) must notify each affected person of the order within five business days after the date of the order.[10]

THE PARTIES:

[8] The first applicant in these proceedings is one Frederick Pieter Mattheus Snyman, a retired farmer, residing in Kimberley. The second applicant is one Abraham Adriaan Snyman, a pensioner residing in Jeffreys Bay. The third applicant is one Willem Venter Snyman, a pensioner, residing in Barkly West. The third applicant is the deponent to the founding and replying affidavits, against which this application is predicated.

[9] The first respondent is one Springfit Estates (Pty) Ltd (in liquidation), duly registered in accordance with the company laws of the Republic, with its registered office situate at 1[...] P[...] R[...] Street, New Park, Kimberley. The second respondent is one Jurgens Johannes Steenkamp *N.O.*, an insolvency practitioner in the employ of one JJS

(b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee.

(2) The practitioner must give notice of the first meeting of creditors to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner, setting out the-

(a) date, time and place of the meeting; and

(b) agenda for the meeting.

(3) At any meeting of creditors, other than the meeting contemplated in Section 151, a decision supported by the holders of a simple majority of the independent creditors' voting interests voted on a matter, is the decision of the meeting on that matter."

[9] Section 131(7) of the Act.

[10] Section 131(8) of the Act.

Administrators (Pty) Ltd, carrying on business at office 3[…], T[…] Floor, T[…] P[…] Building, W[…] v[…] S[…] Drive, Tyger Valley. The third respondent is one Peter Carolus *N.O.*, an insolvency practitioner of MX3 Consultants, carrying on business at T[…] Floor, B[…] C[…] Building, Bellville, Cape Town. The fourth respondent is the Companies and Intellectual Property Commission, a statutory body appointed as the Companies Office for the Republic, in terms of the Act.

[10] The fifth respondent is 'All known creditors of the first respondent as per Annexure "A"', i.e. the FirstRand Bank ("the Bank"), and the Land and Agricultural Development Bank of South Africa (trading as the Land Bank). The former is a registered bank and public company, with a share capital and limited liability, duly incorporated in accordance with the company and banking laws of the Republic. Its registered office is situate at F[…] Floor, […] M[…] Place, corner Fredman Drive and Rivonia Road, Sandton. The latter is a body corporate capable of suing and being sued in its own name, established in terms of the laws of the Republic. The Land Bank has however remained moribund in these proceedings.

[11] The Bank, for its own part, delivered an answering affidavit on 23 March 2023, seeking an order for the application to be dismissed with costs. The delivery of the said affidavit, out of time, was condoned by this Court, upon application of the Bank.

[12] The intervening party is one Johannes Hendrik Snyman, who at some stage resided at De Hoop Farm, Barkly-West, Northern Cape Province. The intervening party is also a director of the first respondent with a 25% shareholding therein.

<u>BACKGROUND</u>:

Overview of the salient facts:

[13] The first respondent is essentially a property holding company which apparently owns a number of immovable properties; to *wit*: Harrisdale 226 (valued at R20.3 million); Harrisdale 362 (valued at R10.2 million); Williamstown (valued at R13.9 million); and Sunnydale (valued at R24 million). The first respondent is said to indirectly lease these immovable properties to two of the three operating farming companies, to *wit*: Harrisdale Boerdery (Pty) Ltd and Na-Myns Boerdery (Pty) Ltd. The third operating farming company, which does not lease any of the first respondent's farms, is O2 Boerdery (Pty) Ltd. Mortgage bonds were registered in favour of the Bank and the Land Bank over only two of the first respondent's immovable properties; to *wit*: Harrisdale and Sunnydale.

[14] The debt owed by the three above-mentioned operating farming companies to the Bank was called by the Bank on 01 April 2019. The debt owed by the first respondent; the surety and co-principal debtor, was contemporaneously called-up. Prior to the first respondent's liquidation: Harrisdale Boerdery (Pty) Ltd, owed the Bank an amount of approximately R1 785 686.28; O2 Boerdery (Pty) Ltd owed approximately R1 395 450.44; and Na-Myns Boerdery (Pty) Ltd approximately R2 301 788.69. The total of the foregoing is approximately R5 482 925.41.

[15] One Mr Japie van Zyl of Japie van Zyl Attorneys (Mr van Zyl), at all material times hereto, was acting for the first respondent. Mr van Zyl, on behalf of the first respondent, responded to the above-mentioned call-up letter on 12 April 2019, *vide* an e-mail, in terms of which he requested for the matter to be held over in order for a meeting to be arranged with representatives of the Bank to "advise the Bank of the processes followed therein". Further communication with Mr van Zyl followed, but the debt was not settled, nor any proposal to settle it received. As the indebtedness of the first respondent was not in dispute, the Bank handed it over to its attorneys of record to take further steps.

[16] De Klerk & Van Gend Incorporated, almost nine months after the debt was called up, in January 2020, addressed a notice in terms of Section 345 of **THE COMPANIES ACT** 61 of 1973 ("***the 1973 Act***"), to the first respondent.[11] Similar notices were also addressed to the so-called farm operating companies. It is so that by 06 March 2020, the first respondent had not responded to the said notice, nor had it attended to payment of the Bank's demand. In the circumstances, the said attorneys addressed an e-mail on the said date to Mr van Zyl, attaching a copy of the said notice. Mr van Zyl acknowledged receipt of same on 11 March 2020 and undertook to revert in due course, he however did not.

[17] Consequently, a further e-mail was addressed to him on 19 May 2020, informing him that the Bank will proceed with legal steps, unless a response was received by the close of business on Friday 22 May 2020. Thereafter, it seems certain "without prejudice" correspondence was exchanged, to no avail, for more than three months. The Bank thereafter instructed its attorneys to proceed with the liquidation application, which was issued on 19 October 2020, under case number 1823/2020. A provisional order of liquidation was sought and granted by this Court against the first respondent on 06 November

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[11] The said Section expressly stipulates as follows;
"345 When a company deemed unable to pay its debts
(1) A company or body corporate shall be deemed to be unable to pay its debts if-
(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
(b) any process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.
(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."

2020. The second and third respondents were contemporaneously appointed as joint provisional liquidators.

[18] The initial return date of the provisional liquidation was determined as 11 December 2020. On the eve of the return date, the first respondent elected to enter appearance. The first respondent however never delivered an answering affidavit to resist the said application. This notwithstanding, on the said date, the *rule nisi* was nevertheless extended to 22 January 2021. On 15 December 2020, the applicants launched their first business rescue application under case number 2250/2020 ("the first business rescue application"). Consequently, on 22 January 2021, the *rule nisi* was further extended to 12 February 2021; and thereafter to 26 March 2021 and finally to 06 August 2021.

[19] What can be deduced from the foregoing in sum, is the following. First, it is not in dispute that the debt in question became due and payable to the Bank as early as April 2019. It is also not in dispute that the first respondent, at all material times hereto, could not pay the said debt and was therefore deemed commercially insolvent and consequently liquidated by this Court. Second, it is apparent that none of the contents of the correspondence that ensued between the parties is denied. The liquidators at all material times hereto rejected the offers pertaining to the sale of the first respondent's property to defray the debt in question. It is further so that there are three properties owned by the first respondent which may be sold to defray its indebtedness to the Banks.

The dismissal of first business rescue application and the placing of the first respondent in final liquidation:

[20] The Bank opposed the first business rescue application and requested that same be heard together with the final liquidation application. On 06 August 2021, the business rescue and final winding-up applications were heard simultaneously.

[21] In the said counterapplication, the applicants contended that placing the first respondent in business rescue instead of final liquidation would maximise its likelihood of continuing on a solvent basis by selling the three farms, the profit from which the first respondent would be able to discharge its liabilities to its creditors, thereby allowing it to operate on a solvent basis as a property-owning entity.

[22] The Bank, for its own part, opposed that business rescue application for, *inter alia*, the following reasons: (a) the essence of the proposed business rescue plan was not different to the liquidation of the first respondent and was thus only sought to delay the inevitable; and (b) the business rescue application would not achieve any of the two goals contemplated in Section 128(1)(*b*) of the Act. The Bank also pointed out that the first respondent has not only repeatedly breached the terms of the overdraft facilities, but has also failed to provide the Bank with the relevant annual financial statements to enable it to review the impugned overdraft facilities.

[23] After hearing the parties, this Court on 06 August 2021, dismissed the business rescue counter-application and confirmed the 06 November 2020 *rule nisi*. That order has never been appealed and therefore remains extant.

[24] Thereafter, on 06 October 2021, the first meeting of creditors was convened by the Master of this Court. The second meeting was held on 28 February 2022. At the latter meeting, the liquidators arranged for an auction of two of the first respondent's farms on 20 October 2022.[12] These farms formed the security for the debts owed to the two Banks. On the said action date, the two farms were auctioned in amounts sufficient to cover the first respondent's indebtedness to both Banks.

[12] Harrisdale and Sunnydale farms.

<u>THE SECOND BUSINESS RESCUE APPLICATION</u>:

The Applicants' main case, in sum:

[25] The said sales could, however, not be confirmed since the applicants, on 19 October 2022 (i.e. a day before the auction), issued this application which was served on the Bank on 24 October 2022. Thereafter, both the intervening party and the fifth respondent i.e. the Bank in particular, entered the fray.

[26] In this application, the applicants maintain that although a willing and able "cash buyer" could not be found for Williamstown since 2018, one Tidal Winds (Pty) Ltd had, on 14 March 2022, made a formal cash offer to purchase the said farm for a total amount of R8 million ("the first offer"). That this notwithstanding, the liquidators have, for various "technical reasons", not been prepared to finalise that transaction on behalf of the first respondent.

[27] The applicants also maintain as follows. That given the fact that the first respondent is principally a property-owning company, its immovable assets by far exceed its liabilities and is thus factually solvent. That the first respondent is in any event not responsible for the fact that the trading entities breached their overdraft facilities provided by the Bank. That the Land Bank is the only other major creditor of the first respondent. That the first respondent is capable of being rescued and restructuring its affairs so as to ensure that its creditors are paid in full, as there is a willing and able buyer for the above-mentioned farms.

[28] That it is so even though De Hoop farm does not belong to the first respondent, since the owner (Hans Kanon Plase) of the said farm undertook to pay over the sale proceeds of the said farm to settle debts within the so-called Snyman group. That a similar arrangement also pertains to the sale proceeds of the Doornhoek farm owned by

Doornhoek Plaas. In addition to the foregoing, they also maintained that they are confident that if the affairs of the other companies in the "Snyman group" can be restructured in the manner proposed by them, same would facilitate the continued existence of the first respondent in a state of solvency. That the proposed exercise would not only facilitate the payment of the debt of all the creditors of the first respondent, but would also yield a far better nett return of capital in favour of its shareholders than would result from a process of liquidation.

[29] Significantly, contemporaneous to the foregoing, the applicants averred that they have secured another offer for the purchase of Williamstown farm, in the amount of R9 million, from one KAL Boerdery (Pty) Ltd (the second offer). Significantly also, the applicants, in paragraphs 27 and 28 of the founding affidavit, averred that the liabilities of the first respondent in the main is the loan granted by the Land Bank. That the liability that arose from the deeds of suretyship executed in favour of the Bank, for the debts of the farming entities, totalled the sum of approximately R3.8 million only, as at the time of the first respondent's liquidation in 2020.

[30] According to the applicants, the foregoing is as a result of the farming entities' "alleged breaches" of their financial commitments towards the Bank, and that the Bank called in the facilities and demanded immediate payment of the outstanding balances from the first respondent. As a further result and by virtue of the suretyships, the first respondent became indebted to the Bank, which ultimately led to the first respondent's liquidation, since the said respondent did not have the capital or cash reserves to settle the debt called by the Bank. The applicants referred this Court to the liquidation application instituted under case number 1823/2020, in support of the foregoing.

[31] Further, the applicants averred that they have put up the first respondent's "draft annual financial statements" for the year which

ended on 29 February 2020, to indicate that the first respondent's assets exceed its liabilities by a large margin. That the same holds true in respect of the latest set of the 2022 "draft financials" prepared by the first respondent's new auditors. According to the applicants, the said draft financials indicate an equity in the first respondent, to the tune of R43.5 million. These draft statements have been attached to the founding affidavit as FA3.1 and FA3.2.

[32] It is against this backdrop that the applicants maintained that they can readily demonstrate that a reasonable prospect exists of achieving one of the two goals contemplated in Section 128(1)(*b*)(iii) of the Act. That it is so since the sale of Williamstown to Tidal Winds as part of the business rescue proceedings, the first respondent would be able to exist in a state of solvency, having paid-off its creditors in full, and realising a nett capital balance for its shareholders that can be utilised towards partly paying off the debt of the other entities in the so-called Snyman group.

The Intervening Party's case, in sum:

[33] The intervening party is opposed to the relief sought by the applicants. In relevant part *sans* repetition, he averred that he is also a director of and 25% shareholder in the first respondent. That there are no farming operations currently being conducted on the Williamstown farm, which is registered in the first respondent's name. Since the first respondent is utilised only as a property-owning entity and does not conduct any other business, it has no business to be rescued.

[34] The relationship between himself and the applicants (i.e. his brothers and remainder of the shareholders and directors of the first respondent) has broken down to such a level that they only meaningfully communicate through their respective attorneys. The intervening party averred further that he and his three brothers are divided into two opposing camps, with him standing alone and the

remaining three aligned against him, and that he has been excluded from decision-making within the "Snyman group", including in relation to the affairs of the first respondent. He averred further that numerous disputes have arisen among the directors, shareholders and members of the Snyman commercial entities, both prior to and following the liquidation application, which disputes have given rise to multiple litigation proceedings. That although the brothers resolved to unbundle the "Snyman group" in an effort to address these difficulties, the implementation of the unbundling plan proved unworkable and culminated in a deadlock; attempts to resolve the impasse were unsuccessful and instead intensified the existing animosity, leading to further litigation. On this basis, he maintained that the directors and shareholders, including those of the first respondent, are hopelessly deadlocked in the management of the entities and that the shareholders and members are unable to break the deadlock.

[35] The intervening party pointed out that at all material times hereto, the applicants were desirous to dispose of, *inter alia*, the Williamstown farm for an amount of R8 million. The said proceeds and proceeds from the sale of other farms such as De Hoop (R20 million); Farm 167 Barkly West (R12 million) and Trentham (R4.5 million) are intended to be used to settle an estimated debt of R43 060 655.00, incurred by Doornhoek; Springfit; Hans Kanon Plase (Pty) Ltd; O2 Boerdery; Harrisdale and Na-Myns farms. This is evinced from Annexure JS2, being the applicants' attorney's letter dated 18 October 2022. That the offer of R8 million, that the applicants are willing to accept for the Williamstown farm is less than half of the valuation of the same, regard being had to Annexure JS3.

[36] Further that, as a result of the deadlock between the directors and shareholders of the first respondent, the latter's business cannot be conducted to the advantage of all the shareholders, generally. The premise on which the application is based is therefore flawed and not able to be executed or implemented. He averred that the only

pragmatic solution is to proceed with the liquidation of the first respondent, including the other entities that make up the “Snyman group”. He denies that the liquidators are prejudicing any of the rights of the first respondent’s shareholders. That it is so because the liquidators are attempting to dispose of the Williamstown farm for a purchase price of R13 million; as evinced in Annexure JS4, attached to his answering affidavit. Further that such a sale would have resulted not only in the payment of the first respondent’s creditors, but also that some amount would be available to shareholders to pay their creditors.

[37] That the foregoing notwithstanding, the applicants are frustrating the liquidators by interfering with the liquidation process by attempting to sell Doornhoek and De Hoop farms to settle the first respondent’s liabilities. The foregoing is evinced in Annexure JS5 and 6. The former is a copy of an e-mail from the liquidator transmitted on 16 March 2022. The latter is also a copy of an email of the liquidator transmitted to the applicants dated 19 October 2022. In both emails, the liquidator pointed out that the liquidators correctly declined to consent to the sale of the Williamstown farm being made conditional on the sale of the other immovable properties of the other Snyman entities. The intervening party also denied that any written lease agreements were ever concluded between Hans Kanon Boerdery CC and any of the “property-owning” companies. Alternatively, he invited the production of such agreements to be produced by the applicants in reply to no avail. He also maintained that rental due and payable to the first respondent remains unpaid, at all material times hereto.

[38] The intervening party also disputed the applicants’ recordal of the various entities debts and maintained that the first respondent’s obligations have not been included in the same. He also averred that the liquidators would be derelict of their duties should they accept the offer of R8 million, for the Williamstown farm, as the said amount is less than half of its market value. Further, he took issue with the

proposed business rescue. The argument being that the applicants do not illustrate or prove how the business rescue of the first respondent will facilitate the payment of its creditors, unless the assets belonging to other entities are simultaneously sold. Keeping the first respondent in liquidation will ensure an impartial and objective payment to the advantage of creditors, so averred the intervening party.

[39] That he has filed an application under case number 2038/2022, in terms of which he seeks that the resolution of the majority of shareholders of Hans Kanon Plase (Pty) Ltd, at the meeting of 02 August 2022, pertaining to the sale of De Hoop, be set aside. That motion was still pending before this Court when pleadings were filed in *casu*. He also intended to oppose the sale of Doornhoek farm to be confirmed *vide* Section 115 of the Act. He therefore denied that the only impediment to the sale of the latter farm are the terms of the liquidators.

[40] The intervening party also averred that the proposed interim business rescue practitioner ("the practitioner") is clearly not independent and will not take the interests of all affected parties into account in the management of the first respondent. That it is so since the said practitioner takes instructions exclusively from the applicants and their attorney of record. That the applicants intend to sell immovable properties registered in the names of Doornhoek and Hans Kanon Plase (Pty) Ltd, far below their market value, to settle the first respondent's debts and theirs. Further that the applicants, despite being requested to provide information on how the debts of the different entities would be settled, have failed to do so, at all material times hereto.

[41] Further that, if the sales of Doornhoek and De Hoop were to proceed, he and his son would lose the immovable property from which they generate income, whilst the applicants would be debt-free and still retain the immovable properties they are currently residing and

farming on. It is against this backdrop that the intervening party sought this application to be dismissed with costs.

The Bank's main case, in sum:

[42] According to the Bank, it initially had resolved not to oppose this application in the hope that the business rescue plan foreshadowed by the applicants would lead to the speedy realisation of the first respondent's assets, for it to be paid. It however had changed tact once the intervening party successfully applied to intervene. It did so since it was only then that it became apparent that there were various disputes of fact and legal processes which made the business rescue plan improbable, if not impossible. It is on these bases that the Bank belatedly instructed its attorneys of record to prepare answering papers as soon as possible, which it did. The Bank has requested that the late filling of its answering affidavit be condoned as doing so would not be prejudicial to the applicants. This Court agreed and ruled accordingly.

[43] The Bank, in the main, contended that since the nub of this application is the contention that if the first respondent sells only one of its three farms, i.e. Williamstown farm, for a purchase price of R8 million; the first respondent would be able to continue trading on a solvent basis. It follows that the sale of other properties belonging to the other related companies should be discounted since what is relevant is only the first respondent's exclusive assets and liabilities in these proceedings.

[44] That since the applicants maintain that the first respondent in the main only owes the Bank R3.9 million and the Land Bank R2.8 million, respectively; this application is without merit since any such asset realisation would in any event be made by the liquidator, as it was intended with the 20 October 2022 auction. The Bank also averred that the liquidators justifiably rejected the conditional offer of Tidal

Winds as same imposed very onerous obligations on the first respondent and consequently on the liquidators. That the reasons the liquidators refused the first offer are neither technical nor nebulous as alleged by the applicants. That the applicants failed to address the issues raised by the liquidators during October 2022, shortly before the auction, but instead provided the liquidators with a second offer, from one KAL Boerdery (Pty) Ltd ("KALB"), who was allegedly willing to provide all the guarantees as requested by the liquidators in response to the Tidal Winds offer.

[45] The Bank averred that the applicants, in the first business rescue application, alleged that they had resolved to voluntarily place Hans Kanon Plase in business rescue. This averment has not been denied in the applicants' replying affidavit, which was filed on 08 February 2024.[13] This stance is careless of the fact that the intervening party, who at all material times hereto has occupied the De Hoop farm, is opposed to the sale of the said property, the business rescue or his eviction from the said farm. That litigation is pending regarding this dispute. And the applicants have not fully considered or disclosed the import of the other legal disputes they have with one of the first respondent's shareholders and director, in these proceedings. There are various disputes of fact and legal processes which make the business rescue plan implausible or improbable; especially regard being had to the stance taken by the intervening party.

[46] All things considered, it is the view taken by the Bank that it would ordinarily follow that the transfer of the said farm cannot take place soon, if at all. That the applicants' reliance on the alleged second offer is misplaced since same also lapsed by effluxion of time. That it is so since it was subject to the resolutive condition that the prospective purchaser would have delivered bank guarantees for the purchase price within 90 days, from the date of acceptance of the offer, failing which the offer simply lapsed, regard being had to the provisions of

[13] *cf* para 64, p776 and para 22, pp 839-840, Vol 8, Pleadings.

clause 5.3 of the offer to purchase same. That the said bank guarantees, at all material times hereto were never delivered.

[47] The business rescue proceedings are not meant to enable companies to liquidate their assets at their own time and pace, so averred the Bank. That the process is temporary and meant to address the rehabilitation of companies in the short run. That the examination of the history relating to the dispute between the shareholders and directors of the first respondent bears out that this application was brought solely for the purposes of delay. For instance, despite demand by the liquidators, no rental from the operating companies has been received to date. Accordingly, so averred the Bank, there is therefore no legitimate reason why there should be any further delays in the liquidation of the first respondent because in the interim, the interest continues to accrue on the debt owing to the Bank.

[48] That the applicants have not evinced that there will be a better return for the first respondent's creditors or shareholders than would result from the immediate liquidation of the first respondent.[14] That it is so because as a property holding company, in which property has to be realised to pay creditors, there is no material difference between business rescue and liquidation. There is accordingly no basis for the applicants to have launched this application in order to stop the realisation of the first respondent's assets because the end results would be the same.

[49] Further, the Bank averred that where a company does not trade and the application for business rescue envisages the disposal of its assets only; business rescue is unlikely to achieve any of its primary goals because same was not intended to achieve the winding-up of a company to avoid the consequences of liquidation proceedings. To the contrary, a liquidator is well placed to deal with such issues in the interest of all parties as opposed to a business rescue practitioner. A

[14] Section 128(1)(*b*) of the Act.

liquidator also has investigative powers by way of inquiry mechanisms and the ability to set aside impeachable transactions. A business rescue practitioner has no such powers. The matter has been dragging on for long and the Bank may need the liquidator to invoke the relevant provisions of the insolvency and company legislation.

[50] That a liquidator will realise the first respondent's properties for the best possible value. Whether by auction or private treaty. There is therefore no reason to believe that a business rescue will achieve a better return than the immediate realisation of the first respondent's assets by the liquidators. It is the Bank's view that the condition precedent that the De Hoop transaction must proceed for the Williamstown transaction to succeed, appears to be too difficult, if not impossible, in the short term to fulfil.

[51] The Bank concluded that this application, in essence, therefore amounts to an "informal winding-up" which cannot achieve either of the goals contemplated in Section 128(1)(*b*) of the Act. That this application is not *bona fide* and does not establish that the benefits of a successful business rescue will be achieved. It is against this backdrop that the Bank sought this application to be dismissed with costs in the liquidation.

The Applicants' reply, in sum:

[52] In their replying affidavit delivered on 08 February 2024, the applicants pointed out that it is telling that the Bank initially decided to abide by the outcome of this application. That clearly, the Bank took that stance because it believed that the business rescue plan was viable and that it would be paid as and when same is put into place. That unfortunately, the minority shareholder, Mr JH Snyman (the intervening party), irresponsibly and out of sheer spite and/or unreasonably, decided to intervene in these proceedings and to oppose same.

[53] That in the bigger scheme of things, the majority of the Snyman shareholders seek to secure the continued existence of the three solvent property-owning companies (i.e. Doornhoek; Hans Kanon and the first respondent) that own substantial assets that by far exceed their debts/liabilities, and to thereby preserve their shareholder's interests in the substantial value represented in the value of the farms that were and remain under threat of forced sales.

[54] That these sales in liquidation or execution have largely been averted by the dismissal of the liquidation application and the business rescue order pertaining to Doornhoek; and the successful sale and transfer of De Hoop and Trentham farms to settle the GWK's debt in full. That the same result will be achieved in this matter by the sale of only the Williamstown farm to Tidal Winds, to the benefit of all parties. That the applicants do not merely seek to achieve an informal winding-up of the first respondent. To the contrary, they seek to protect its continued existence and the farms it owns; which will be severely and irreversibly damaged by the process of liquidation. The applicants contended that the objectives of business rescue are capable of being achieved and, in reply maintained that, business rescue will yield a better return for creditors and shareholders than liquidation.

[55] The applicants relied on paragraph 12 of the Bank's answering affidavit and averred that, it is common cause that the Bank is the only principal creditor of the first respondent in the amount of R5.48 million. It was further averred that De Hoop has already been bought and transferred to Tidal Winds on 29 March 2023, after the Bank delivered its answering affidavit on 20 March 2023. Furthermore, the occupiers of De Hoop have since vacated, and Tidal Winds has taken full occupation thereof. There is accordingly no legal impediment to the sale and transfer of the Williamstown farm, which can be dealt with by the appointed business rescue practitioner, without the sort of impediments and difficulties raised by the liquidators.

[56] That despite the existence of a viable sale of the middle-valued farm, which sale will result in the payment of all the first respondent's debts, it is ironic that the liquidators saw it fit to rather sell the more valuable farms on auction, i.e. Harrisdale and Sunnyside. The results were that the extremely valuable farms were to be obtained at bargain prices, i.e. the former for R13 million and the latter for R5.3 million, only.

[57] The sale of these highly valuable farms, valued in excess of R50 million, to pay debts totalling approximately R9 million, will severely prejudice the shareholders' value and interest in the first respondent. This is distinguishable from the scenario where the Williamstown farm is sold to cater for all creditors' claims, so continued the applicants' averment. In reply, the applicants persisted in contending that the application was brought in good faith and for a proper purpose, that at least the secondary objective of business rescue is capable of achievement; that there are reasonable prospects of rescuing the company; and that it would be just and equitable in the circumstances to grant the order sought. To the applicants, the business rescue plan is achievable and sound.

[58] That regard being had to the foregoing, the "tongue-in-cheek" stance taken by the Bank that it still has to agree to the sale cannot be genuine. That it is so since the Bank is only interested in getting paid, which it will from the successful cash sale and transfer of Williamstown farm to Tidal Winds or any other willing and able buyer. The private sale of Williamstown will result in achieving the statutory objects of business rescue. Liquidation, on the other hand, would be far more prejudicial to the first respondent's shareholders. That it is so because the liquidators intend to sell off the said farms, which are more valuable and sizeable, for prices far below their market value.

[59] Further, that these sales of the higher valued farms, whilst also settling all creditors' claims, will result in higher liquidation costs and clear prejudice to the shareholders of the first respondent. The applicants consequently deny that there will be no material difference in the results between business rescue and liquidation proceedings.

[60] To the contrary, Williamstown can and will be sold for a cash price of R8 million, which is a price much more realistic of its true value, and which will yield sufficient proceeds in order to pay all the debts of the first respondent. Such a sale can indeed provide a basis for a business rescue plan, and for placing the first respondent under business rescue, the applicants so concluded.

<u>THE ARGUMENTS</u>:

The Applicants':

[61] The following was in sum submitted on behalf of the applicants. That the first respondent, whose only real business is that of a property holding company that owns substantial assets, can, as a result of new circumstances, be returned to solvency and creditors paid in full. The prejudice to be suffered by the shareholders in the liquidation scenario is substantial and real; to *wit*: (a) the liquidators intend to proceed with the sale of Harrisdale and Sunnydale farms at R13 million and R5.3 million, respectively, in circumstances where the said properties have been valued in excess of R50 million. That the said properties are to be sold at bargain prices to cater for debts totalling a mere fraction of their value i.e. debts totalling R6.5 million; only. To the contrary, the sale of the smaller Williamstown farm, for a consideration of R8 million, will be sufficient to cater for all the debts.

[62] The applicants further submitted that, since Doornhoek Plase (Pty) Ltd has been placed in business rescue on 02 February 2024, by agreement between the applicants and the intervening party, it puts

paid to the latter's opposition to this application. That, although the first respondent is under final winding-up, it has been held that there is no sensible justification for drawing the proverbial line in the sand between pre and post-final liquidation in circumstances where the prospects of business rescue exist. The Legislature did not do so, and to restrict business rescue to those cases in which a final winding-up order has not been granted would be inimical to the Act.[15]

The Intervening Party's:

[63] The intervening party, for its own part, *inter alia*, contended as follows. That the applicants have not appealed the dismissal of the first business rescue counter-application or the order placing the first respondent in final liquidation, before launching this second business rescue application. The *onus* is on the applicants to show that there are reasonable prospects of either of the two goals contemplated in Section 128(1)(*b*)(iii) of the Act being achieved. The applicants have failed to do so in accordance with the rules of motion proceedings, which, generally speaking, require that it must evince same in its founding papers.

[64] The applicants in their founding papers go no further than to allege that business rescue would be more beneficial for the creditors and shareholders, so argued the intervening party. The intervening party went further and argued that, the applicants merely state that a market related price for the Williamstown farm will be more beneficial than the forced sale of one or more of the other farms at less than ideal prices. That the argument of the applicants that a sale by the liquidator would result in a less than ideal price, which would be prejudicial to the creditors and shareholders, fell away because the applicants were quite happy to accept an offer far below the market value of the said farm.

[15] See ***Richter v ABSA Bank Ltd*** 2015 (5) 57 (SCA) para 17.

[65] The applicants' proposal that the Williamstown farm be sold by the business rescue practitioner and not the liquidators was labelled by the intervening party as nothing more than an alternative informal kind of winding-up of the first respondent. It was pointed out that this would be outside the liquidation provisions of the Act, which cannot be sustained, regard being had to the *ratio decidendi* enunciated in ***Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others***[16] ("*Oakdene*"). The applicants are said to have therefore failed to show that business rescue would result in a better return for shareholders and creditors than immediate liquidation would.

[66] The intervening party highlighted that the applicants failed to attach to the replying affidavit any lease agreements from which the purported rental income would flow to the first respondent, despite the intervening party inviting them to do so. It was also submitted that, in addition to the foregoing, both the second respondent and Enslins Auditors' letter dated 10 November 2022, confirm that no rental income is flowing to the first respondent. The first respondent is therefore only a property holding entity with no income flowing from any rental agreement. The only possible income would require the immovable properties to be sold, whereafter, the substrate of the first respondent would no longer exist. Thereafter, the continued existence of the first respondent on a solvent basis would be impossible.

[67] That whilst all might be well if the Williamstown farm is sold, finding a buyer for same in the open market has proven unsuccessful on three occasions, to date. First, during the first business rescue application. Second and third being the Tidal Winds and KALB offers, both of which expired by effluxion of time. The first respondent, therefore, remains a property holding entity, with no rental income and no prospective buyer for the Williamstown farm. Which farm the applicants contended will result in it continuing in existence on a

[16] 2013 (4) SA 539 (SCA).

solvent basis; or result in a better return for its creditors or shareholders than would result from its immediate liquidation.

[68] Further, the intervening party submitted that, regard being had to two scenarios apparent from the applicants' founding affidavit, the applicants have dithered between same. On one hand, the applicants are saying that only the sale of Williamstown is required to achieve the objective contemplated in Section 128(1)(*b*)(iii) of the Act. On the other hand, the sale of two other properties (De Hoop and Doornhoek) belonging to two entirely different and separate entities is said to be required. The foregoing begs the question, which is it. The intervening party is adamant that the sale of two other properties and the Williamstown farm in this application for business rescue is stillborn from the outset. That the true situation is that the directors and shareholders are deadlocked and embroiled in bitter litigation with no end in sight. Nonetheless, he proceeded to submit that, if only the sale of the Williamstown farm is required, the applicants must at least show that they have a prospective buyer and a selling price that would benefit the creditors and the shareholders. In truth, they have neither, so argued the intervening party.

[69] From the foregoing, the applicants have failed to lay a factual foundation for a reasonable prospect that placing the first respondent under business rescue would achieve either of the two objectives set out in the Act, so argued the intervening party. It is against this backdrop that the intervening party prayed that the application should be dismissed with costs.

The Bank's:

[70] The Bank, for its own part, *inter alia*, submitted as follows. It is common cause that the final liquidation of the first respondent came about as a direct result of the "operating companies'" default to repay their loan repayments to the Bank, for which the first respondent stood

as a surety, approximately six years ago. It is also common cause that the so-called operating companies at all material times hereto remain indebted to it as follows: Harrisdale Boerdery- R1 785 686.28; O2 Boerdery- R1 395 450.44; and Na-Myns Boerdery- R2 301 788.69. It is so that on 19 October 2020, some 19 months after the debts were called up, the Bank instituted liquidation proceedings against the first respondent, as surety of the said debts.

[71] It follows that the first respondent, being the surety, remains liable to the Bank in the aforesaid amounts, plus interest which is accruing on a monthly basis at prime plus 3%, as from 16 March 2023. The Bank therefore decried the fact that after the lapse of 6 years, liquidation proceedings which commenced more than four years ago are still in limbo.

[72] The Bank submitted that the chronology of the events evinces that on 06 November 2020, a provisional liquidation order was granted and the return day was extended on several occasions. The applicants thereafter lodged the first business rescue application which was heard with the final liquidation application on 06 August 2021. The former was dismissed and the latter confirmed. There was no appeal against these orders.

[73] Thereafter, the liquidators convened an auction for the two Farms belonging to the first respondent (Harrisdale and Sunnydale), which it has put up as security as surety for the debt in question. Consequently, the Bank and the Land Bank are secured creditors of the first respondent. It is the Bank's contention that the proceeds from the said auction would have been sufficient to cover the first respondent's indebtedness to both banks as well as all other concurrent creditors. The remaining property, Williamstown farm, over which neither bank held any security, could accordingly have been distributed to the first respondent's shareholders along with its remaining funds, thereby effecting an orderly distribution of its assets

to creditors and shareholders. The foregoing notwithstanding, on 19 October 2022, a day before the auction, the applicants lodged a second business rescue application. As a result, the auction sales could not be confirmed by the liquidators. Furthermore, some other interlocutory applications were lodged and adjudicated in the intervening period, which further contributed to the delay in the liquidation of the first respondent.

[74] The Bank pointed out that in paragraph 16 of the founding affidavit delivered in the present application, the applicants averred that the first business rescue application was predicated against the fact that the sale of the three farms would have discharged the first respondent's liabilities and enabled it to carry on business on a solvent basis. The Bank submitted that, this contention was rejected there and then by the Court in the said application.

[75] The Bank submitted that the applicants have subsequently sought to bolster their case and overcome the foregoing hurdle by contending as follows: That whilst the above-mentioned scenario remained largely unchanged, there is now in this application, a "cash buyer" for some other farms belonging to other entities in the so-called Snyman group, and it is only the liquidator who is standing in the way of the said properties being realised and the proceeds being used to cover all the debts in question. That the liquidators have quite sensibly refused to agree to the onerous conditions contained in the impugned offer, which in any event had expired on 18 March 2022 at 14h00, which should be the end of the matter.

[76] The Bank contended that, if regard is had to the documents attached to the founding affidavit, it appears that there is a complete inability on the part of the first respondent to generate any rental income from its properties. For an example, the financial statements of the first respondent relied upon by the applicants for the six months ending 31 August 2022, reflect a rental income for the three farms belonging

to it of a mere R320 000.00. This translates to approximately R26 000.00, per month only. It is however evident that the first respondent never received any of the above-mentioned amounts since Hans Kanon Boerdery CC owed an amount of R3 804 767.00, to the first respondent by the end of August 2022. This amount increased to R4 105 670.00, plus interest by the end of August 2022.

[77] To allow the head-lessee to incur an ever-increasing debt on a loan account, which it is completely unable to pay to the first respondent, is clearly not commercially viable. In the circumstances, it must be accepted that none of these companies are commercially viable or have any assets of substantial value. It also follows that the property-owning companies, being intrinsically linked to the so-called operating companies, are similarly circumstanced financially. It is so since it is clear that the operating companies cannot pay their respective debts to the Bank and/or their rentals to Hans Kanon Boerdery CC, the latter who is acting as the so-called head-lessee in terms of the alleged written or verbal leases concluded with each of the so-called property-owning companies.[17]

[78] The Bank submitted that, from the foregoing, it follows that the applicants' failure to deal with the financial position of each of the so-called operating companies, is a failure to deal with the financial position of Hans Kanon Boerdery CC. This is especially problematic for the applicants' case given that Hans Kanon is ultimately responsible to pay rental to the first respondent, for the latter to trade as a viable going concern, if one or two of its three properties are sold. It is so since the rentals, if any, that are paid to Hans Kanon Boerdery CC, have not been disclosed. The question is therefore whether the first respondent can operate as a commercially viable going concern if one or two of its three properties are sold.

[17] The second respondent has confirmed that rental income owed to the first respondent has never been paid to the first or second respondent (intervening party's answering affidavit, p 519, para 25).

[79] The applicants' submission that although the De Hoop farm does not belong to the first respondent, but to Hans Kanon Plase; the latter will pay over the sale proceeds to settle debts within the so-called Snyman group, was also questioned. So was the submission that this is also the case with the Doornhoek farm. In this regard, the Bank submitted that the De Hoop farm has, however, already been sold for R12 million, without the Bank being paid. What remains is the transfer of Doornfontein (probably meant Doornhoek farm), in respect of which an offer of R20 million, was allegedly received by the practitioner more than a year ago. To date, however, nothing has come of this. That it is evident from the foregoing that the properties of the so-called conglomerate are steadily being sold-off, in a piecemeal fashion, without revealing how the proceeds were being utilised.

[80] The Bank has also impugned the so-called cash offers by Tidal Winds and KALB, which this application is mainly predicated against. The Bank, in the main, contended that both offers have expired. The former on 18 March 2022 and the latter on 05 November 2022. That it is therefore impossible for the applicants to place any reliance on either of the said offers in this application. That the purchase of De Hoop by Tidal Winds and the latter's alleged offer to purchase Doornhoek more than a year ago are still shrouded in mystery. Also, to the extent that no confirmatory affidavit with regard to Tindal Winds has been attached in these proceedings, the applicants' allegations regarding the said company are therefore inadmissible hearsay, with no evidential value.

[81] In any event, Annexure FA5 does not constitute an "out-and-out" offer to purchase the Williamstown farm, so argued the Bank. That it is so for the following reasons. Firstly, clause 3.5 thereof expressly stipulates that the offer and the so-called De Hoop agreement are linked to each other such that the former cannot proceed unless the latter does. Secondly, the impugned offer stipulated that the liquidator had to comply with various onerous conditions, including that the

liquidator shall: (a) accept the responsibility to settle all liabilities; direct or indirect; including contingent and prospective liabilities that may arise prior to date of registration; (b) provide an unconditional indemnity in respect of the foregoing; (c) be responsible for all costs and expenses of the farming enterprise on the property up until the date of registration; and (d) follow acceptable farming practices during this time.

[82] Whilst the applicants deny that some of these farms would be sold below their market value, despite having been in the market since 2016. The applicants have revealed that an online auction was also held on 18 June 2018, for the purchase of some of the farms, but the offers were too low and therefore not acceptable. That, given the fact that the applicants were unable to sell the farms since 2016 or to accept the offers received at the said online auction, they remain unwilling to accept that the true market values of the farms are much lower than their unrealistic expectations.

[83] The Bank submitted that the foregoing facts render the applicants' allegations of the first respondent being rescued even more implausible. It is more so if it is proposed that the assets of the first respondent be sold and the proceeds distributed amongst its creditors and shareholders. The reasoning being that, there would no longer be a going concern which is commercially viable.

[84] That if regard is had to, *inter alia*, the breakdown of trust between the directors, the applicants have failed to show that there is a reasonable prospect that the first respondent could continue to trade as a commercially viable entity. In the premise, what the applicants are seeking is clearly an alternative, informal kind of winding-up of the first respondent by a practitioner, outside the liquidation provisions of the Act. That, that is not what business rescue proceedings are intended for. If regard is had to the law laid down by the Supreme Court of

Appeal ("***the SCA***"), the applicants' contentions in this regard do not constitute a valid basis for the relief sought.

<u>DETERMINATION</u>:

[85] It follows from the foregoing that the issues for determination in these proceedings are:

85.1. Whether the applicants were entitled to lodge this second business rescue application, despite the fact that they have not appealed the dismissal of the first business rescue application and confirmation of the liquidation order;

85.2. Whether the foreshadowed plan to rescue the first respondent, if approved, would restructure its affairs; business property; debt and other liabilities; and equity:

85.2.1. in a manner that maximises its likelihood of continuing in existence on a solvent basis; or

85.2.2. result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the first respondent.

[86] I deal first with the first issue for determination. It can be gathered from the founding papers that the most pertinent distinction between the first business rescue application and the present, in the main, is the intended sale of Williamstown to one Tidal Winds and/or KALB. With regard to the former, the applicants alleged that on 14 March 2022, the said company offered to purchase the said farm for R8 million, and that the same company is not only "extremely desirous" to continue with the said sale, but also with the purchase of De Hoop and Doornhoek farms. That although the De Hoop farm does not belong to the first respondent, the owner thereof (i.e. Hans Kanon Plase) will pay over the sale proceeds of its farm to settle the debts within the so-

called Snyman group, which includes the first respondent. Further that, the same applies to the proceeds from the sale of Doornhoek farm.

[87] With regard to KALB, the applicants allege that they secured an offer from the said company for the sale of the same Williamstown farm for an amount of R9 million. That the said company is willing to provide all guarantees, as requested by the liquidators in the previous offer to purchase.

[88] It is clear from the foregoing that the foregoing offers, if valid, would amount to changed circumstances of the first respondent. In the premise, this Court finds that the applicants were entitled to lodge this second business rescue application, despite the fact that they have not appealed the dismissal of the first business rescue application and confirmation of the liquidation order.[18] I proceed to deal with the second issue for determination, i.e., the merits of the second business rescue application.

[89] It is trite that the purpose of the Act is, *inter alia*, to: provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.[19] Section 128(1)(*b*) of the Act, for its own part, defines the expression "business rescue" as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:-

> *"(i) the temporary supervision of the company, and of the management of its affairs, business and property;*
>
> *(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
>
> *(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and*

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[18] ***Richter v ABSA Bank Ltd*** 2015 (5) SA 57 (SCA) paras 15-17.

[19] *Section 7(k) of the Act.*

> *other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."*

[90] It is so that the interests of all the shareholders and their support for business rescue must be considered. It is also so that business rescues cannot only be in the interests of some shareholders. Thus, where our Courts are required to weigh up the competing interests of the impugned company and its creditors, the interests of the creditors must prevail.[20]

[91] In *casu*, it is common cause that the first respondent is currently indebted to the Bank in the amount of approximately R5 482 925.41, made up as alluded to above. That much is "noted" by the applicants in paragraph 17 of the replying affidavit, for the purposes of the present proceedings.[21] It is therefore settled that the first respondent has failed to pay the said amount, in terms of the obligations under various terms of the surety contracts, as contemplated in Section 131(4)(*a*)(ii) of the Act.

[92] The only remaining question is therefore whether it is just and equitable for financial reasons to grant an order placing the first respondent on business rescue, and whether there are reasonable prospects for rescuing the first respondent; regard being had to the facts and circumstances of this matter.

[93] In sum, according to the applicants, this business rescue application is predicated against the fact that a cash buyer has made an offer for the purchase of the three farms. That the said sales would discharge the first respondent's liabilities and allow it to carry on business on a solvent basis thereafter. Further that, whilst the position remained largely unchanged, the liquidators are steadfastly standing in the way

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[20] ***Swart v Beagles Run Investments 25 (Pty) Ltd*** *2011 (5) SA 422 (GNP) para 41.*
[21] *P838, RA, Vol 8.*

of the properties being realised, and the proceeds being used to cover all of the first respondent's outstanding debts.

[94] The applicants, in sum, contended that the first and most pertinent aspect of the intended business rescue plan, in the main, concerns the sale of Williamstown to Tidal Winds. They maintained that, in this regard, the liquidators have been "stumped" by the procedures and impracticalities of the process of liquidation. Whilst the applicants also contended that Tidal Winds made a cash offer to purchase Williamstown farm on 14 March 2022, "coupled" with "the De Hoop transaction". It is, however, evident from a cursory glance at the said offer that to date, it remains unsigned and therefore would have expired on Friday 18 March 2022, regard being had to clause 3.4 thereof. The KALB offer, for its own part, expired on Friday, 05 November 2022, without being accepted by the liquidators.

[95] It follows, from the foregoing that, the lapse of the abovementioned offers puts the first respondent back to where it was when this Court granted a final order of liquidation on 06 August 2021. Significantly also is the following. The financial statements of the first respondent for the year ended 29 February 2020 have not been signed by the intervening party. The applicants have also only put up draft financial statements for the six months ending 31 August 2022.

[96] It is trite that financial statements are designed to provide reasonable, but not absolute assurance as to the state of a company's financial position. Further, such statements are meant to adequately safeguard, verify and maintain accountability of assets, and prevent and detect misstatements and loss. Financial statements of companies are therefore vitally important to everyone with interests in those companies. The Act compels companies to prepare annual financial statements within six months after the end of each financial

year.[22] Regard being had to the facts and circumstances of this case, this Court is of the view that, financial statements would have served as a cogent proof of the assets of the respondent, its debts and expenditure. No such evidence serves before this Court.

[97] Seminally, in *Oakdene,* it has been held as follows:

> *"… As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427(1) of the 1973 Companies Act (see e.g. Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) para 21). On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on 'reasonable' – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the Court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers."*[23]

[98] Undoubtedly, in order to succeed in an application for business rescue, the applicants ought to have placed before this Court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. The applicants' averments are vague and merely speculative. Vague averments and mere speculative suggestions are not sufficient to obtain the order sought.[24]

[99] Over and above the foregoing is the fact that in *casu*, the intervening party and the Bank have strenuously opposed this application. The grounds are, *inter alia*, in fact and law meritorious. It is so for, *inter alia*, the following reasons. Regard being had to the facts and circumstances of this case; business rescue is not appropriate since there is no trading business to be rescued. It was submitted that, this is because the first respondent only owns immovable property and does not trade beyond its non-existent rental income from the so-

[22] Section 30 of the Act.
[23] ***Supra*** fn 16 para 29.
[24] ***Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another*** 2013 (1) SA 542 (FB) para 11.

called trading/operating companies. So much is said to have been conceded by the applicants in paragraph 24 of the founding affidavit.[25] Further, it was averred that the second respondent confirmed that rental income owed to the first respondent has never been paid to the first or second respondent.[26] A letter from Enslins Auditors dated 10 November 2022, also confirms that no rental income is flowing to the first respondent.[27]

[100] In ***Knipe v Kameelhoek and Others***,[28] the Free State High Court said it well that business rescue is not appropriate if there is no trading business to be rescued, i.e. when a company does not trade, has no employees, and only owns immovable property.[29]

[101] Moreover, in *casu,* it is evident from the papers filed that there is infighting between the majority and minority shareholders. It has also been well said that business rescue is not even available to a solvent company, in liquidation on the just and equitable ground, due to infighting between shareholders.[30]

[102] Finally, without proof of rental income for the first respondent, it is difficult to understand how the applicants cannot be said to attract the SCA's remarks in ***Oakdene***[31]:

"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, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. 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

[25] p 14, FA, Vol 1.
[26] See the Intervening party's answering affidavit, p 519, Vol 5, para 25.
[27] ***Ibid*** para 26.2.
[28] (2120/2016) [2017] ZAFSHC 116 (22 June 2017).
[29] ***Ibid*** para 31.
[30] ***Ibid*** paras 26-29; see also ***Knipe v Kameelhoek (Pty) Ltd and Others*** (2120/2016) [2016] ZAFSHC 193 (10 November 2016) paras 17-18.
[31] *Supra* fn 16 paras 33-34.

> *rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.*
>
> *In any event, I believe that, even on its own terms, the appellants' proposal consisting of not more than an alternative winding-up, cannot be sustained."*

[103] In light of the discussion above in its entirety, and the authorities cited therein, it follows that this application must fail.

ORDER:

[104] In the premise, the following order issues:

THE APPLICATION IS HEREBY DISMISSED WITH COSTS.

____

APS NXUMALO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances:

For Applicants:	**ADV AM HEYSTEK SC**
Instructed by:	**Japie Van Zyl Attorneys** Potchefstroom c/o **Van De Wall Inc.** Kimberley
For Fifth Respondent:	**ADV RB ENGELA**
Instructed by:	**De Klerk and Van Gend Inc.** Cape Town c/o **VDH Law** Kimberley
For Intervening Party:	**ADV J HARMSE**
Instructed by:	**PGMO Attorneys Inc.** Kimberley