



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2025-047078

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
20/08/2026	
DATE	SIGNATURE

**DE VOS LANDGOED (PTY) LTD
(IN BUSINESS RESCUE)**

APPLICANT

And

ACCESS BANK (SOUTH AFRICA) LTD

RESPONDENT

And

**AL MABROOR AGRI (PTY) LTD
(IN BUSINESS RESCUE)**

INTERVENING PARTY

JUDGMENT

HERSHENSOHN AJ

Introduction

[1] This is an application by the joint business rescue practitioners (hereinafter referred to as “practitioners”) of the applicant, De Vos Landgoed (Pty) Ltd (in business rescue) (hereinafter referred to as “Company”), for an order in terms of section 153(7) of the Companies Act¹ (Hereinafter referred to as “the Act”) setting aside the vote of the respondent, Access Bank (South Africa) Ltd (hereinafter referred to as “Access Bank”), against the Company’s business rescue plan (hereinafter referred to as

¹ 71 of 2008.

“plan”), on the ground that the vote was inappropriate. The practitioners contend that, upon the setting aside of that vote, the plan falls to be regarded as having been adopted.

[2] The application is opposed by Access Bank. It is also opposed by Al Mabroor Agri (Pty) Ltd (in business rescue) (hereinafter referred to as “Al Mabroor”), which applied for leave to intervene, contending that it is a creditor of the Company in an amount of some R 23 000 000, whose claim the plan ignores altogether. Al Mabroor additionally brought an application in terms of rule 6(15) of the Uniform Rules of Court to strike out two annexures to the practitioners’ answering affidavit in the intervention. The practitioners, for their part, filed a status update affidavit after the main affidavits had closed and without the leave of the Court, to which both Access Bank and Al Mabroor objected.

[3] At the commencement of the hearing, this Court made three preliminary orders. This Court granted Al Mabroor leave to intervene; this Court admitted the practitioners’ status update affidavit; and this Court dismissed the application to strike out. This Court indicated that the reasons would be incorporated in this judgment so that the matter might be disposed of in a single judgment and not fragmented by separate interlocutory appeals. This Court deals with those matters under the heading “[t]he preliminary applications” below.

[4] The application raises, in addition to the merits of the section 153(7) enquiry, certain other aspects that were canvassed in argument. These will be dealt with where necessary.

[5] For the reasons that follow the application falls to be dismissed.

The parties and their representation

[6] The Company conducts a large-scale, diversified agricultural enterprise across some 31 500 hectares in the Colesberg and Bultfontein districts, comprising crop farming, livestock, wool, hunting, and eco-tourism operations. It was placed under business rescue by resolution of its directors on 27 September 2024, and Messrs

Werner Cawood and Dillon John Wessels were appointed as its joint business rescue practitioners on 7 October 2024. Their appointment is not in issue. Mr L K van der Merwe appeared for the Company.

[7] Access Bank is the Company's largest secured creditor, holding two continuing covering mortgage bonds over six of the Company's immovable properties. Mr D M Leathern SC appeared for it. Al Mabroor is a company itself in business rescue, under the supervision of joint practitioners; Mr J Vorster SC appeared for it, together with Mr G J Lotter. This Court is indebted to all counsel for their assistance, and in particular for the notes on argument handed up by Mr Leathern SC, which raised the construction point to which this Court shall come.

The preliminary applications

Leave to intervene

[8] Al Mabroor applied for leave to intervene as a party, contending that it is a creditor and an affected person with a direct and substantial interest in the relief sought. The practitioners opposed that application, contending that Al Mabroor's asserted rights are disputed and *sub judice* in other proceedings, and that a merely financial and contested interest does not suffice.

[9] The ordinary test for intervention requires an applicant to show a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest which may be prejudicially affected by the judgment, together with a *prima facie* case and where such an interest is shown, the Court has no discretion to refuse leave.²

[10] In this instance, however, it is not necessary to rest the matter on the common law alone, because the Act itself confers a right of participation. Section 145(1) of the Act provides:

"145. Participation by creditors

² *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC).

- (1) *Each creditor is entitled to---*
- (a) *notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;*
 - (b) *participate in any court proceedings arising during the business rescue proceedings;*
 - (c) *formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and*
 - (d) *informally participate in those proceedings by making proposals for a business rescue plan to the practitioner."*

[11] Section 131(3) of the Act makes comparable provision at the commencement stage: "Each affected person has a right to participate in the hearing of an application in terms of this section." In *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd* (hereinafter referred to as "*Timasani*"),³ Schippers JA stated the following about the relationship between the two provisions:

"Second, and consistent with the text, context and purpose of section 145, subsection (1)(b) confers on creditors a statutory right to participate in any legal proceedings that arise during the business rescue proceedings of a company. In this respect section 145(1)(b) stands on an equal footing with section 131(3) of the Act, in terms of which each affected person has a right to participate in an application to place a company in business rescue. In both cases the leave of the court to intervene in the proceedings is not required, but the court may need to regulate the procedure to be followed if the affected person or creditor wishes to file affidavits."

[12] It follows that if Al Mabroor is a creditor, it does not require the leave of this Court to participate at all. The only question would be the regulation of the procedure by which it does so. Whether it is a creditor is a question this Court will address more fully under the heading "[t]he intervening creditor and the treatment of a disputed claim." For present purposes it suffices to record the Court's view, formed on the papers, that Al Mabroor is at the least a person asserting a creditor's interest of a kind that the law recognises. It states further that it advanced the funds used to acquire the Bultfontein farms, which the Company admits, and that it purchased and owns some 6 400 sheep

³ *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA) at para 18.

acquired for approximately R 15.9 million, which it let to the Company under a sheep-lease agreement. The Company disputes the characterisation of the latter arrangement, contending that it constituted a *mutuum* (a loan for consumption, under which ownership passes and an equivalent must be restored) under which the Company became owner, leaving Al Mabroor with a right to the return of an equivalent flock. On either characterisation, Al Mabroor asserts either a proprietary interest in, or a substantial monetary claim against, the Company; and the plan proposes to realise the very Bultfontein property, and to trade with the very flock, to which those assertions relate.

[13] An intervening party is not required, at the intervention stage, to establish the disputed rights upon which it relies. It is enough that it advances allegations which, if proved, would sustain them. That threshold is comfortably met. This Court therefore granted leave to intervene. This Court made clear, and record, that in doing so this Court determined nothing as to the disputed rights between Al Mabroor and the Company, which remain for determination in the pending proceedings in the Northern Cape Division, Kimberley, and in the Free State Division, Bloemfontein.

The status update affidavit

[14] The practitioners filed a further affidavit, described as a status update affidavit, on 26 January 2026, after the exchange of the main affidavits and without the leave of the Court. The ordinary rule contemplates three sets of affidavits, and a further affidavit is admitted only with the leave of the Court, in the exercise of a discretion informed by the interests of justice.⁴

[15] This Court admitted the affidavit. The weight to be attached to it for this judgment, rests in this Courts view upon two express footings. The first was that its admission did not entail that the Court would entertain the new and substantive relief foreshadowed in it, namely an extension of the date for payment to Access Bank to December 2026, alternatively that an order that the practitioners' litigation costs be set off against Access Bank's distributions under the plan. That relief was not sought in

⁴ *James Brown & Hamer (Pty) Ltd v Simmons N.O.* 1963 (4) SA 656 (A) at 660D-H; and *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA).

the notice of motion, is in substance a variation of the plan, and does not arise for decision. The second was that Access Bank and Al Mabroor had been given a fair opportunity to deal with the affidavit's contents, they had in fact done so.

[16] This Court took this course because it seemed to this Court preferable to receive the material and assess it in the round than to exclude it upon a procedural objection. This Court adds that its admission does not assist the Company. The affidavit records that the costs of this and related litigation "have been funded from income generated through continued trading during business rescue, including funds which, under the business rescue plan, would otherwise have been available for distribution to Access Bank," that Access Bank has been paid nothing, and that distributions intended for Access Bank and the Land Bank are held in an interest-bearing account "until finalization of the outstanding litigation." It also describes the plan at one point as "the adopted business rescue plan," when the adoption of the plan is the very relief in issue.

The application to strike out

[17] Al Mabroor sought to strike out, in their entirety, annexures "DJ1" and "DJ2" to the practitioners' answering affidavit in the intervention, being Al Mabroor's answering affidavit in the Kimberley proceedings and its opposing affidavit in the Bloemfontein proceedings, as irrelevant, vexatious and an abuse.

[18] Rule 6(15) of the Uniform Rules of Court provides that the Court "may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client", and that "the court shall not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted". The requirement is accordingly two-fold, and it appears from the language of the rule itself: the matter must be scandalous, vexatious, or irrelevant, and the applicant must be prejudiced if it is not struck out. Neither leg is satisfied here. The annexures are relevant to the intervention, going directly to whether Al Mabroor's asserted rights are admitted or disputed and to the nature of the relationship between the parties. No prejudice can arise to Al Mabroor from being met with its own affidavits, deposed to in

litigation to which it is a party. The application was accordingly dismissed, the costs of it stand over for consideration with the costs of the application as a whole.

The common cause facts

[19] The facts below are common cause or are not seriously in dispute.

[20] The company is in business rescue and is financially distressed, Access Bank expressly does not dispute the latter. A plan was published on 14 March 2025 and was voted upon at the second meeting of creditors held on 28 March 2025. Access Bank is the Company's largest secured creditor. It holds two continuing covering mortgage bonds over six of the Company's immovable properties. Its total claim, as accepted by the practitioners, is R 25 703 841.81, comprising a Term Loan Facility claim of some R 20 037 615.76 and a Working Capital Facility claim of R 5 666 826.05.

[21] At the second meeting the plan secured 53% of the voting interests in favour and 47% against. It therefore failed to achieve the majority required by section 152(2)(a) of the Act. Access Bank, holding 32.82% of the interests voted, was the decisive dissident. The minutes record, under the heading "Not in favour," seven entries: the South African Revenue Service; Absa Bank / Ford Credit; Investec Bank; Merchant West; Pannar; BKB; and Access Bank (by proxy). Access Bank is therefore one of seven dissidents, and there are six others. This Court records two matters about that list so that there is no confusion. The first is that Access Bank's answering affidavit is consistent with the minutes: it deposes that "seven independent creditors, comprising 47% of the voting interests . . . voted against the Plan's adoption", and that the applicant "failed to join the other six independent creditors who voted against the Plan". The second is that Access Bank's heads of argument list only six creditors as having voted against, Access Bank, the South African Revenue Service, Absa Bank, Investec Bank, Merchant West, and Pannar, omitting BKB. That appears to be an inadvertence in the heads, the minutes are the primary record and they reflect seven. Nothing turns on it because the aggregate of 47% is common cause. This Court adds, for completeness, that "Absa Bank / Ford Credit" is recorded in the minutes as a single entry and was so treated at the meeting. The creditors recorded as voting in favour include NWK, Sasfin / African Bank, Glynn Burger, Kaynem Trust, and a number of

entities voting by proxy: Agrivos, Brakhoek Properties, De Vos Boerdery Trust, LDV Accountants, Muller Consier Inc, Nooitgedacht Accommodation, Omega Breeding Partnership, Omega Charcoal, Vets4all, Philip Wouter de Vos and Seacow Properties.

[22] Access Bank's evidence, which is not effectively controverted, is that of those voting in favour. Nine were non-independent creditors holding some 21.73% of the voting interests, being creditors controlled by the management of the Company; that six independent creditors holding 23.04% voted in favour (a figure which includes the post-commencement financier); and that seven independent creditors holding 47% voted against.

[23] It is further common cause that the Company has not paid Access Bank any amount since the commencement of the business rescue; that Access Bank proposed no amendments to the plan; that Al Mabroor was afforded no voting interest and did not vote; and that the plan makes no provision for Al Mabroor's claim.

The contentions of the parties

[24] There are before this Court four sets of heads of argument, together with the supplementary heads delivered by Access Bank in the intervention and notes on argument handed up at the hearing. This Court summarises the principal contentions, this Court returns to them in the analysis.

[25] Mr van der Merwe, on behalf of the Company, submitted that section 7(k) of the Act is the lens through which Chapter 6 must be read, and that creditors are not at large to vote upon self-interest or unrelated institutional considerations. Applying *FirstRand Bank Ltd v KJ Foods CC (In business rescue) (KJ Foods CC)*,⁵ a vote is inappropriate where it disregards the commercial merits of the plan, is exercised for an ulterior motive such as a decision to exit a market sector, prejudices other affected persons, or is predetermined. Access Bank suffers no prejudice: its secured Term Loan is repaid in full with its bonds preserved, and its Working Capital Facility in full over 48 months. It classified that facility as unsecured in its own proof of claim and

⁵ 2017 (5) SA 40 (SCA) at para 33 – 34, 79 – 80, 84 - 85.

cannot now resile from its filing. The *pro forma* account shows that liquidation would yield unsecured creditors approximately 55 cents in the rand and destroy some 50 jobs, whereas the plan repays all creditors in full from diversified revenues, supported by post-commencement finance and by default mechanisms culminating in the sale of the unencumbered Bultfontein property. Access Bank proposed no amendment under section 152(1)(d)(ii) of the Act and confirmed in advance that it would reject the plan. As to joinder, the relief is confined to Access Bank's vote; the other creditors' votes are not impugned; all affected persons were notified and could have intervened. Once the vote is set aside the plan commands over 80% support and is adopted.

[26] For Access Bank, Mr Leathern SC submitted that the application should be dismissed. The creditors aggrieved are not Access Bank alone but include the South African Revenue Service, Absa, Investec and Merchant West, whose votes would be nullified and who ought to have been joined. In Mr Leathern's notes on argument, he developed the submission that it is "the result of the vote," and not a single creditor's vote, that section 153 of the Act addresses. On the merits, the plan is "so vague and replete with general statements, that it could have been prepared in respect of any company ever in business rescue"; its comparison with liquidation consists of "generic and uninspiring conclusions" and the practitioners, who bear the onus of establishing a reasonable prospect in their founding papers, have not discharged it. Both bonds are continuing covering bonds securing all indebtedness "whether existent or future, regardless of its *causa*", so that the refusal to recognise the Working Capital Facility as secured "negates a right that Access Bank would retain in liquidation". On default the plan subjects Access Bank to a waterfall preferring the Bultfontein security holder and the post-commencement financier. Clause 2 of the plan permits the practitioners to continue the rescue indefinitely. In a winding-up both its claims are paid in full with a surplus, more quickly and with greater certainty. Mr Leathern, in his supplementary heads of argument, added that the practitioners' treatment of the intervening creditor conflicts with their duty to act fairly towards all stakeholders.

[27] Mr Vorster SC, with Mr Lotter, on behalf of Al Mabroor, submitted that section 145(1)(b) of the Act confers a statutory right to participate, so that leave is not required. The determination of who is a creditor is objective: section 128 of the Act does not ask whether the practitioner recognises the creditor, the *causa*, or a voting interest. It is

common cause that Al Mabroor advanced the funds for the purchase of the immovable property and of the sheep, and even upon the Company's own version, a *mutuum* obliging it to pay leasing fees and to return an equivalent flock, the plan provides neither for the rentals nor for the return of the sheep. Al Mabroor was never given the opportunity to vote, although its interest would have represented some 20% of the voting interests, and would have been cast against the plan. It relied upon paragraphs 35 to 40 of its founding affidavit, which the practitioners' answering affidavit does not traverse, with the consequence that those allegations stand to be taken as admitted.

[28] In reply, Mr van der Merwe urged me to apply *KJ Foods CC*.⁶ He submitted that the practitioners had discharged the onus and contended that Al Mabroor's claim being disputed and *sub judice*, the practitioners could not properly have adjudicated it.

The statutory framework

[29] Two of the issues turn upon the precise language of Chapter 6, and it is convenient to set out the material provisions at the outset. Others are quoted where they are applied.

[30] Section 7(k) states as one of the purposes of the Act "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". Section 128(1)(b)(iii) of the Act contemplates a plan which will either restore the Company to solvency or yield "a better return for the Company's creditors or shareholders than would result from the immediate liquidation of the company". Section 128(1)(a) of the Act defines an "affected person" as including "a shareholder or creditor of the Company"; a registered trade union representing employees; and unrepresented employees or their representatives. The word "creditor" is not defined, and this Court returns to its meaning hereunder.

⁶ *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para 31.

[31] Section 145(2) confers upon each creditor “the right to vote to amend, approve or reject a proposed business rescue plan”. The measure of that vote is prescribed by section 145(4) of the Act as follows:

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

[32] Section 145(5) of the Act obliges the practitioner to determine whether a creditor is independent; to request a suitably qualified person to appraise and value an interest contemplated in section 145(4)(b); and to give written notice of that determination, or of that appraisal and valuation, at least 15 business days before the meeting. Section 145(6) of the Act permits a person, within five business days of such a notice, to apply to court to review the determination that he is or she is not an independent creditor, or to “review, re-appraise and re-value that person’s voting interest, as determined in terms of subsection (5)(b)”. The reach of those provisions become relevant later hereinbelow.

[33] Section 150(2)(a) of the Act requires Part A of a plan to contain, among other things, “a complete list of all the material assets of the Company”, and—

“(ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims.”

[34] Part B must include the nature and duration of any moratorium, the extent to which the Company is to be released from its debts, “the property of the Company that is to be available to pay creditors’ claims”, and “the order of preference in which the proceeds of property will be applied to pay creditors”.

[35] Section 152(2) of the Act prescribes the majorities. A plan is approved on a preliminary basis if “(a) it was supported by the holders of more than 75% of the creditors’ voting interests that were voted; and (b) the votes in support of the proposed plan included at least 50% of the independent creditors’ voting interests, if any, that were voted.” A plan not so approved “is rejected, and may be considered further only in terms of section 153”. Section 152(4) of the Act provides that an adopted plan binds the Company and each of its creditors, “whether or not such a person—(a) was present at the meeting; (b) voted in favour of adoption of the plan; or (c) in the case of creditors, had proven their claims against the Company”.

[36] Section 153(1)(a) gives the practitioner, upon rejection, an election: to seek a vote of approval to prepare and publish a revised plan, or to “advise the meeting that the Company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate”. Only if the practitioner takes neither step does section 153(1)(b) open the door to an affected person, who may call for a revised plan, apply to Court on the same ground, or make a binding offer to purchase “the voting interests of one or more persons who opposed adoption”. Section 153(2) obliges the practitioner to adjourn the meeting; section 153(5) provides that if no person acts under section 153(1) the practitioner “must promptly file a notice of the termination of the business rescue proceedings”. Section 153(7) is the empowering provision:

“On an application contemplated in subsection (1)(a)(ii), or (1)(b)(i)(bb), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to --- (a) the interests represented by the person or persons who voted against the proposed business rescue plan; (b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and (c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.”

[37] Finally, section 140(3) provides that the practitioner “(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made

by, the court; [and] (b) has the responsibilities, duties and liabilities of a director of the Company, as set out in sections 75 to 77”, thus importing the duties in section 76(3) to act in good faith and for a proper purpose.

The test under section 153(7)

[38] The governing authority is *KJ Foods CC*. The majority judgment of Schoeman AJA holds that sections 153(1)(a)(ii) and 153(7) are inextricably linked and that the enquiry is a single enquiry. In *KJ Foods CC*, Schoeman AJA stated as follows:

“It is clear that section 153(1)(a)(ii) and section 153(1)(b)(i)(bb) are inextricably linked to section 153(7). On an application to set aside the result of a vote . . . the court is enjoined by section 153(7) to determine only whether it is reasonable and just to set aside the particular vote . . . To my mind this entails a single enquiry and value judgment.”⁷

[39] Furthermore, Schoeman AJA stated as follows:

“The determination that a vote was inappropriate is therefore a value judgment made after consideration of all the facts and circumstances . . . Taking all these factors into consideration, being the interests of Firstrand, the employees of KJ Foods and other creditors, it is indeed reasonable and just to set aside the vote . . .”⁸

[40] The minority judgment of Seriti JA preferred a two-stage approach, stating that “a court must first determine whether or not the vote was inappropriate and if so, invoke the provisions of section 153(7)”, and that “[a]ny vote which unduly undermines the achievement of the rescue of a financially distressed company will be inappropriate”.⁹ The majority approach binds this Court.

[41] Two features of the enquiry require emphasis at the outset. This is discussed below.

⁷ *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para 80.

⁸ *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para 84-85.

⁹ *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para 29 and 33.

[42] First, the perspective from which the vote is judged. The appropriateness of a creditor's vote falls to be assessed primarily by reference to the terms of the plan placed before the creditors, the information reasonably available to the creditor, the circumstances obtaining when the vote was cast, here, 28 March 2025, and the reasons for which the creditor voted as it did. It follows that events occurring after the vote cannot ordinarily render unreasonable a vote which was reasonable upon the information then available, nor retrospectively validate one which was not. A creditor is to be judged upon what was before it, not upon what emerged afterwards.

[43] That does not mean that later evidence is inadmissible or irrelevant. It may properly be considered where it explains or illuminates the reliability of projections contained in the plan; where it confirms or refutes a factual assumption upon which the plan depended; where it bears upon the weight or credibility of evidence advanced in the application; or where it goes to the present practicability of the relief sought. A distinction must accordingly be maintained between two questions: whether the creditor acted appropriately when it voted, which looks to the position then, and whether it is, at the date of judgment, reasonable and just for this Court to grant the statutory remedy, which is a question the Court answers upon the material before it. This Court returns to this under the heading "[t]he events since the vote."

[44] Second, the legislative preference for rescue presupposes a viable plan. The objects of Chapter 6 are not served by compelling creditors to accept a plan which is unsubstantiated or defective. In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*¹⁰ (hereinafter to be referred as "Oakdene"), Brand JA stated the follow with regards to the "reasonable prospect" requirement:

"...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 . . . 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

¹⁰ (Pty) Ltd 2013 (4) SA 539 (SCA) at para 29.

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.”

[45] The same judgment records the weight to be given to the attitude of the majority of creditors as follows:

“...As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide . . . rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of section 153. But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors’ decision unless their attitude was unreasonable . . .”¹¹

[46] The onus rests upon the practitioners. It is they who invoke section 153(7) of the Act; it is they who must satisfy the Court that it is reasonable and just to set the vote aside.

The mechanism of section 153(7) and what is set aside

[47] Mr Leathern, in his notes on argument, advanced a construction of section 153 of the Act which, if correct, would be dispositive. It is convenient to deal with it before turning to the merits, because it bears directly upon the non-joinder point.

The argument

¹¹ (Pty) Ltd 2013 (4) SA 539 (SCA) at para 38.

[48] The submission as I understand it is a textual one, and it is not without force. Section 153(1)(a)(ii) of the Act speaks of an application “to set aside [the result of the vote] by the [holders] of voting interests”; the noun is composite and the reference to holders is plural and undifferentiated. Section 153(1)(b)(i)(bb) of the Act is in the same terms. Section 153(7) of the Act empowers the court to set aside “[the vote] on a business rescue plan”, again a definite article attaching to a singular collective event. The factors in section 153(7)(a) to (c) of the Act are expressed in the plural throughout: “the person or persons who voted against”, “that person or those persons”. From this, Mr Leathern submitted, it follows that what falls to be set aside is not the vote of a single creditor but the composite result; and that, since only the creditors who voted against the plan can fairly represent to the Court what their interests are, all of them must be joined. He submitted that the application must fail on this basis alone.

The answer: KJ Foods CC at para 71

[49] In the Court’s view, the submission, so framed, cannot be sustained. This Court believes that in *KJ Foods CC*, Schoeman AJA addressed the very textual asymmetry upon which Mr Leathern relies. Schoeman AJA stated as follows:

“Whilst section 153(1)(a)(ii) makes provision for a company seeking to be placed under business rescue to apply to a court to set aside ‘the result of the vote’, section 153(7) confers on that court a discretion to order that ‘the vote on a business rescue plan be set aside’ if it is satisfied that it is reasonable and just to do so, having regard to the factors listed in subsection (7)(a) to (c). It is clear from a reading of those factors that the vote that may be set aside is not the entire vote on the business rescue plan, but only the vote exercised against the approval or adoption of the plan. The factors referred to apply only in respect of the person or persons ‘who voted against the proposed business rescue plan’. It follows that once the vote against the approval of the plan is set aside the result thereof, namely the rejection of the plan, will be nullified. The difference in the wording of subsection (1)(a)(ii) and (7) of section 153 is, therefore, of no real consequence.”¹²

¹² *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para 71.

[50] Three propositions follow from that passage, and they bind this Court. First, the object of the power conferred by section 153(7) of the Act is not the entire composite vote, comprising both the affirmative and the negative votes. Second, its object is the vote or votes exercised against the approval or adoption of the plan. Third, the textual difference between “the result of the vote” in section 153(1)(a)(ii) of the Act and “the vote” in section 153(7) of the Act has been held to be “of no real consequence”.

[51] It is, however, I believe necessary to be precise about how far that takes the matter. In *KJ Foods CC*, FirstRand Bank was the only creditor who voted against the plan, all the other creditors in attendance voted in favour. The setting aside of its vote therefore left the whole of the remaining voted interests supporting the plan, and adoption followed by operation of law. The question which arises here, whether, where several creditors have voted against a plan, a court may set aside the vote of one of them while leaving the others intact, and what then becomes of the statutory thresholds and of the remaining dissentients, simply did not arise for determination in that matter, and there the Court did not address it.

[52] Paragraph 71 of *KJ Foods CC* therefore answers, and answers conclusively, the proposition that the power operates upon the entire composite vote. It does not resolve the narrower question of selective removal of one among several negative votes, nor the recalculation of the section 152(2) of the Act thresholds after such a removal, nor the position of the dissentients whose votes survive, nor whether all dissentients must be joined where the practical effect of the relief would be to bind them to the plan. Although those questions remain open, it is not necessary to deal with them since the application falls on two very clear other grounds as will be dealt with below.

[53] The reasoning is, with respect, compelling on its own terms. The factors in section 153(7)(a) to (c) of the Act are directed exclusively at the dissentients: their interests, the provision made in the plan for “their” interests, and the return to “them” on a liquidation. The interests of the creditors who supported the plan appear nowhere in those factors. If the composite vote were the target of the power, a set of factors framed wholly around the negative voters would be inexplicable, and the Court would be required to set aside the affirmative votes of creditors who support the plan and who seek no relief at all. That cannot have been intended.

[54] This construction has been applied. In *Standard Bank of South Africa Ltd v Fransele Boerdery (Pty) Ltd*¹³ (hereinafter referred to as “*Fransele Boerdery*”), Hefer AJ, whilst citing *KJ Foods CC*, stated that “[t]he factors referred to apply only in respect of the person or persons who voted against the proposed business rescue plan.”

[55] This Court would add that the language of section 153(1)(b)(ii) of the Act supports the same conclusion. Where the legislature intended to permit individual dissentients to be singled out, it stated so: a binding offer may be made to purchase “the voting interests of one or more persons who opposed adoption of the business rescue plan”. The Act therefore plainly contemplates that a dissentient may be dealt with individually.

[56] The submission that section 153(7) of the Act operates upon the composite vote of all the holders of voting interests must accordingly be rejected. It is, however, only fair to Mr Leathern to say that there is a sound point buried within it, to which this Court returns to under the heading of non-joinder.

The consequence of an order under section 153(7)

[57] It is necessary, for what follows, to be clear about what an order under section 153(7) of the Act achieves. In *KJ Foods CC* the majority held as follows:

*“...In my view a businesslike interpretation is that the vote rejecting the business rescue plan having been set aside, it follows by operation of law that the business rescue plan would be considered to have been adopted, for, as stated above, no further voting is envisaged.”*¹⁴

[58] The Court further stated that “[t]herefore, once the result of the vote is set aside the business rescue plan is adopted, by the operation of law.”¹⁵ Seriti JA reached the same practical conclusion stating that “[t]he vote on the business rescue plan, which was set aside was substituted by the court order. The business rescue plan was

¹³ [2024] ZAFSHC 10 at para 11.

¹⁴ 2017 (5) SA 40 (SCA) at para 88.

¹⁵ 2017 (5) SA 40 (SCA) at para 89.

deemed approved and there was no need to refer the business rescue plan to the affected parties for adoption.”¹⁶

[59] That there is no re-vote was confirmed in *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd*¹⁷ (hereinafter referred to as “*Mashwayi Projects*”), Dippenaar AJA stated that “[t]he Act does not permit the remission of a plan back to a meeting for a new vote. It is open to the practitioner to proceed under section 153(1)(a)(i) of the Act to seek a vote of approval from the holders of voting interests to prepare and publish a revised plan.”

[60] This Court pauses to note that section 152(4) of the Act is not a deeming provision. It provides that a plan “that has been adopted is binding” it does not provide that a plan is adopted when a vote is set aside. The deemed-adoption consequence is a matter of interpretation, resting upon *KJ Foods CC*, and not upon the express words of section 152(4) of the Act.¹⁸

[61] The order made in *KJ Foods CC* itself is instructive as to form. The Court substituted for paragraph 1 of the order of the court below an order that “[i]n terms of the provisions of section 153(7) of the Companies Act 71 of 2008 the vote of the respondent against the adoption of the revised business rescue plan exercised on 2 December 2013 is set aside”¹⁹; and it set aside the further order declaring the plan adopted as superfluous, precisely because adoption follows by operation of law. It must, however, be borne in mind that FirstRand Bank was the sole dissentient in that matter, so that the form of the order does not discriminate between the two competing constructions. The authority on the point is established in *KJ Foods CC*.²⁰

What the courts have in fact ordered

[62] A survey of the reported decisions discloses a uniform practice, although this Court records at once that these are decisions of courts of first instance and that none

¹⁶ 2017 (5) SA 40 (SCA) at para 41.

¹⁷ *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd* 2025 (3) SA 441 (SCA) at para 39.

¹⁸ *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para 88-89.

¹⁹ 2017 (5) SA 40 (SCA) at para 91.

²⁰ *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* 2017 (5) SA 40 (SCA) at para 71.

of them determines the question now under consideration, they are evidence of how the power has been exercised, not authority resolving how it must be. In *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd* (hereinafter “*Copper Sunset*”),²¹ where two creditors had voted against the plan, both were cited as respondents and the order set aside “the result of the votes by the First and Second Respondents”. In *Collard v Jatara Connect (Pty) Ltd* (hereinafter referred to as “*Collard*”),²² where the dissentient was Edcon alone, Edcon was cited and its vote was declared inappropriate and set aside. In *Reiscor Two (Pty) Ltd t/a Bootleggers v Anheuser-Busch InBev Africa (Pty) Ltd* (hereinafter referred to as “*Reiscor Two*”),²³ where four creditors holding 65.36% had voted against, all four were cited as first to fourth respondents and the order set aside “[t]he votes of the first to fourth respondents.”

[63] Two observations follow. The first is that no reported decision has set aside “the result of the vote by the holders of voting interests” at large; in every instance the order has attached to the negative votes, singular where there was one dissentient, plural where there were several. The second, which is of more moment here, is that in every one of those matters every dissentient was before the Court. No court appears yet to have been asked to set aside the vote of one of several dissentients in the absence of the others. This appears a matter of practice rather than of decision, but it is a consistent practice, and it is not without significance.

Non-joinder

[64] Access Bank contended, as a preliminary point, that the six other independent creditors who voted against the plan ought to have been joined, and that their non-joinder is fatal. The practitioners answered that the relief sought is confined to Access Bank’s vote; that no relief is sought against the other creditors; that their votes are not impugned; and that all affected persons were notified of the plan, of the meeting and of this application, and could have intervened.

²¹ *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd* 2014 (6) SA 214 (LP).

²² *Collard v Jatara Connect (Pty) Ltd* 2018 (5) SA 238 (WCC).

²³ *Reiscor Two (Pty) Ltd t/a Bootleggers v Anheuser-Busch InBev Africa (Pty) Ltd* 2025 (1) SA 315 (GJ).

[65] The test is settled. In *Absa Bank Ltd v Naude N.O.* (hereinafter referred to as “*Naude*”)²⁴ the Supreme Court of Appeal stated as follows:

“The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.”

[66] That was itself a business rescue matter. The bank sought to overturn an adopted plan, the creditors who had voted for it were not joined, although they had received notice, and the non-joinder was held to be fatal and dispositive. The point is of some importance here; notice is not a substitute for joinder. The same conclusion was reached in *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* (hereinafter referred to as “*Kransfontein*”),²⁵ where the Court held that “the non-joinder of Corlink’s other creditors was fatal to the amended relief sought by the applicant”.

[67] The only decision which addresses joinder in an application under section 153(7) of the Act is *Reiscor Two*. Opperman J distinguished *Naude* and *Kransfontein* as follows:

*“...Creditors who voted to adopt a business rescue plan have a direct and substantial interest in an application to set it aside . . . Thus, the non-joinder of creditors who voted for the adoption of the business plan was fatal to the amended relief sought by the applicant. These cases are distinguishable. In the current matter, the plan was not approved, so there are no vested rights under the plan that could be affected prejudicially by the relief sought . . . Only the dissentient creditors were required to be joined, as has been done.”*²⁶

[68] That reasoning has two limbs, and they point in different directions in the present matter. The first disposes of any complaint about the non-joinder of the creditors who voted in favour of the plan: since the plan was rejected, they hold no vested rights under it. The second is the sentence “[o]nly the dissentient creditors were required to

²⁴ *Absa Bank Ltd v Naude N.O.* 2016 (6) SA 540 (SCA) at para 9.

²⁵ *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* [2017] ZASCA 131 (29 September 2017) at para 16.

²⁶ 2025 (1) SA 315 (GJ) at 59-60.

be joined, as has been done.” In *Reiscor Two* all four dissentients were before the Court. Here, six of seven are not.

[69] This is the sound point which underlies Mr Leathern’s construction argument, and it does not depend upon that argument succeeding. Its force is this. Because, on *KJ Foods CC*, the plan is adopted by operation of law upon the making of the order, and because there is no re-vote, an order setting aside Access Bank’s vote alone would carry the remaining six dissentients into a plan which they voted against, binding them under section 152(4) of the Act, without their negative votes having been adjudicated and without their having been heard upon the factors in section 153(7)(a) to (c) of the Act as those factors apply to them. Their interests, the provision made in the plan for their interests, and the return to them upon a liquidation may each differ materially from Access Bank’s. The South African Revenue Service is a statutory preferent creditor; Absa, Investec and BKB appear to hold their own security and their own commercial considerations. On the *Naude* test, which is a direct and substantial interest.

[70] Two matters must, however, be weighed against that conclusion. The first is that the relief sought is expressly confined to Access Bank’s vote, and that no order is sought against the other dissentients. That, however, is a matter of form. Because adoption follows by operation of law and no further vote is envisaged, the order sought would bind the absent dissentients notwithstanding that no relief is directed at them; and the test in *Naude* looks to whether a party may be prejudicially affected by the judgment, not to the terms in which the relief is cast. The second is that the other dissentients were notified, although, as *Naude* establishes, notice does not cure non-joinder.

[71] In my view, the application stands to fail on the grounds of non-joinder of all the dissentients, and can be dismissed on this ground alone. Even if I am wrong in this regard, the application also stands to fail on the merits, as will now be discussed.

Was the vote inappropriate?

The approach to disputed facts

[72] Before turning to the substance, a matter of approach requires attention, and it was not addressed by any party. This is an application for final relief brought on notice of motion. Where such relief is sought and a genuine dispute of fact arises on the affidavits, the matter falls to be decided upon the facts averred by the respondent together with those admitted by it, unless the respondent's version is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers. That is the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (hereinafter referred to as "*Plascon-Evans*"),²⁷ restated by Harms DP in *National Director of Public Prosecutions v Zuma* (hereinafter referred to as "*Zuma*")²⁸ as follows:

"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 designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers . . ."

[73] The significance of this in the present matter is considerable, because the two propositions upon which the Company's case rests, that Access Bank suffers no prejudice under the plan, and that the plan yields a better return than liquidation, are both squarely disputed.

The security classification

[74] The plan treats Access Bank's Term Loan Facility claim as secured, but its Working Capital Facility claim of R 5 666 826.05 as unsecured. Access Bank contends

²⁷ 1984 (3) SA 623 (A) at 634E-635C

²⁸ (2009) 2 SA 277 (SCA) at para 26

that both are secured, because the two bonds are continuing covering bonds. It relies upon the following provisions, which are not in dispute as to their terms. The First Bond records that it is passed “to secure the indebtedness of the Mortgagor to the Mortgagee arising from any cause of debt whatsoever”, and at clause 1.3 that it stands as:

“continuing covering security up to but not exceeding the maximum sum [R 22 000 000] and the additional sum [R 4 400 000], for and in respect of any indebtedness or obligation of whatsoever cause and nature, whether now existent or which may come into being in the future . . .”

[75] The Second Bond provides at clause 4, under the heading “CONTINUING COVERING BOND”:

“this bond shall be and remain of full force . . . as a continuing security and covering bond for each and every sum in which the Mortgagor may now or hereafter become indebted to the Bank from any cause whatsoever . . .”

[76] The Company’s answer is that Access Bank itself lodged the Working Capital Facility as an unsecured claim, and that the plan does no more than record Access Bank’s own classification; it says that a creditor cannot resile from its own proof of claim for tactical advantage.

[77] As I understand the law, a covering bond in the terms quoted secures all indebtedness falling within its terms, up to the maximum sum for which the bond stands as security, whatever the cause of the debt. On the face of the instruments, therefore, Access Bank has substance in its complaint. Two qualifications would require examination were it necessary to decide the point: the bond *maxima*, the Term Loan claim of some R 20 000 000 already absorbing the greater part of the R 22 000 000 capital sum; and the realisable value of the mortgaged properties. Neither has been explored in the papers.

[78] The company's answer, moreover, rests upon a factual premise which the papers do not establish. The proof of claim relied upon ("AA13") is a single combined certificate of balance in respect of "commercial loan and overdraft exposure" in the total sum of R 23 995 001.98 as at the date of commencement, not, as the answering affidavit asserts at paragraph 79.4, two separate claims. The document contains a series of tick-boxes identifying the nature of the claim, including "Covering mortgage bond" and "Unsecured". From CaseLines 004-155 it is clear that the "Covering mortgage bond" box is ticked while the "unsecured" box is not ticked.

[79] It follows that the security classification is a genuine and material dispute of fact, and one which cannot be resolved in the Company's favour on these papers. Access Bank's version, that both claims are secured by bonds expressed to cover all indebtedness from any cause, is not far-fetched or untenable; it is, on the face of the instruments, the more natural reading. On the *Plascon-Evans* approach, this Court must proceed upon it.

[80] That conclusion is of some consequence, because the Company's entire "no prejudice" case assumes that the Working Capital Facility is unsecured. If it is secured, the plan has stripped a secured creditor of security over some R R5 670 000 of its exposure, and the deprivation of security is, self-evidently, a matter which a creditor may legitimately take into account in deciding how to vote.

The comparative return

[81] Section 153(7)(c) of the Act requires the Court to have regard to "a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated". It is a mandatory consideration. On this, the parties' versions are irreconcilable.

[82] The Company's case, as developed in its heads of argument, is that in a liquidation, unsecured creditors would receive approximately 55 cents in the rand, and probably less, once employee claims are taken into account, whereas the plan provides for repayment in full of all creditors; and that the plan therefore delivers a materially superior outcome. In the replying affidavit it is contended that Access Bank

would recover approximately R20 040 000 against a claim of R 25 700 000 a shortfall exceeding R 4 000 000.

[83] Access Bank's case, drawn from the plan's own *pro forma* liquidation and distribution account (Annexure "D" to the plan), is that on an immediate liquidation the secured properties would realise, after the costs contemplated by section 89 of the Insolvency Act,²⁹ a total of R 25 970 285.10 available to meet its claims of R 25 703 841.81; with the consequence that both its claims would be paid in full and a surplus of R 266 470.33 would remain for the free residue. Access Bank further points out that the plan nowhere quantifies what unsecured creditors will in fact receive in cents in the rand, providing only for payment over 48 months commencing 31 October 2026.

[84] This Court makes no finding as to which of these computations is correct. It is unnecessary to do so, and on motion it would be impermissible. What matters is that Access Bank's version is drawn from the Company's own document and is not, on the papers, far-fetched or untenable. On the *Plascon-Evans* approach it must be accepted. It follows that the Company has not established the very proposition which section 153(7)(c) of the Act makes a mandatory consideration and upon which its case depends.

[85] There is a further difficulty. The Company's founding affidavit itself concedes, at paragraph 69, that in respect of its secured claim Access Bank "stands to receive the same in a liquidation scenario" as under the plan. That concession sits uncomfortably with the shortfall exceeding R 4 000 000 subsequently advanced in reply. An applicant seeking final relief cannot make its case in reply, still less in contradiction of its founding papers.

The reasons for the vote

[86] The Company characterises Access Bank's vote as predetermined, driven by an extraneous policy decision to withdraw from agricultural finance and unrelated to the merits of the plan. It points to the correspondence of 27 March 2025, in which Access

²⁹ 24 of 1936.

Bank confirmed that it would vote against the plan, that it had no interest in the continuation of the rescue and that it intended to realise its security and to Access Bank's failure to propose any amendment under section 152(1)(d)(ii) of the Act.

[87] It is contended that there is a policy decision in the background: Access Bank informed the Company in October 2023 that, unlike its predecessor Grobank, it "is not set up to support agriculture sector related financing", and afforded the Company 12 months within which to refinance. But it is a serious oversimplification to characterise the vote as resting on that alone. The reasons are set out at length in the answering affidavit at paragraphs 27 to 42, and they disclose a considered commercial assessment formed over some 18 months. In summary: the 2023 annual instalment was not paid when due; a proposal for staggered payments was accepted and not honoured; in December 2023 the Company reduced its own undertaking from R 906 392 to R 500 000 and gave an assurance that arrears would be settled by the end of February 2024, failing which wildlife would be sold at auction in March 2024, neither of which occurred; in January 2024 the Company sought R 3 000 000 from Standard Bank to reduce its indebtedness; from 29 February 2024 the Working Capital Facility permanently exceeded its limit and no further payments were received; at a site visit in July 2024 further undertakings were given as to a Standard Bank refinance and the proceeds of a lamb delivery; and by 9 August 2024 the arrears remained. The deponent records at paragraph 40:

"By the end of August 2024, the Respondent had become frustrated by the Company continuously missing deadlines and the management's failure to comply with undertakings the Company had given to the Respondent. By this stage, the Respondent had provided the Company with extensive indulgences and any credibility of the Company, and its management, had been eroded in the Respondent's mind."

[88] A creditor which, upon that history, holding security which it says the plan impairs, and facing a plan under which, on the version the Court is obliged to accept, it fares no better than upon a liquidation, votes against the plan does not act inappropriately. In the view of this Court, its vote reflects a rational commercial assessment of its own position. That a creditor may legitimately make such an assessment is inherent in the

scheme of Chapter 6, the right to vote conferred by section 145(2) of the Act would be illusory if a creditor could exercise it only in favour.

[89] Nor does the failure to propose amendments carry the weight the Company attaches to it. Section 152(1)(d)(ii) of the Act confers a right, it does not impose a duty. And the minutes record that no creditor present suggested any amendment, not merely Access Bank. Access Bank's explanation, that it had lost faith in the Company's management and regarded further engagement as futile, is not on these papers an unreasonable one.

The composition of the vote

[90] A further consideration weighs heavily with this Court. The plan was rejected not by Access Bank alone, but by seven independent creditors holding 47% of the interests voted, being, as recorded in the minutes, the South African Revenue Service, Absa Bank / Ford Credit, Investec Bank, Merchant West, Pannar, BKB and Access Bank itself, of whom three are secured. These are substantial, arm's-length institutions with no interest save the recovery of what is owed to them. Access Bank observes, correctly, that "[i]t is telling that six other independent creditors, including two secured creditors, also voted against the Plan approval".

[91] The majority in favour, by contrast, was carried substantially by creditors connected to the Company. Of the 53% in favour, some 21.73% was held by nine non-independent creditors "controlled by the management of the Company". The minutes bear this out: among those voting in favour, by proxy, were the De Vos Boerdery Trust, Philip Wouter de Vos, Agrivos, Brakhoek Properties and Seacow Properties. The last two being the entities whose own business rescues the practitioners later described as "interrelated" with, and "operationally aligned and coordinated" with, that of the company.

[92] The Act itself marks the distinction as material. Section 152(2)(b) of the Act requires, as a second and cumulative condition of approval, that the votes in support include "at least 50% of the independent creditors' voting interests, if any, that were voted"; and "independent creditor" is defined in section 128(1)(g) of the Act as a

creditor who is “not related to the company, a director, or the practitioner”. That requirement exists precisely to prevent a plan being carried by a majority assembled from connected parties. Section 145(5)(a) of the Act obliges the practitioner to determine whether a creditor is independent.

[93] The courts have shown themselves willing to scrutinise the composition of a vote. In *Nedbank Ltd v Barrs Pharmaceuticals (Pty) Ltd* (hereinafter referred to as “*Barrs*”),³⁰ Holderness J set aside a plan and the vote adopting it where the decisive vote of a post-commencement financier had been recorded at R 80 000 000 although only R 500 000 had in fact been advanced. Holderness J stated that “[t]he purported majority by which the plan was adopted was achieved through irregularly attributed and artificially inflated votes”.³¹ That was in my view, the mirror image of the present case; but it demonstrates that the manner in which voting interests are constituted is a matter with which a Court is properly concerned.

[94] It does not follow that the non-independent votes here were improperly cast, and this Court makes no such finding. Nothing suggests that they were not genuine claims, and connected creditors are entitled to vote. What follows is more modest but, in the exercise of the value judgment required by *KJ Foods CC*, important. To set aside the vote of the largest secured independent creditor, in order to impose upon the general body a plan which the independent creditors rejected by a substantial margin and which owed its majority to insider support, is a materially stronger thing than was done in *KJ Foods CC*. There, the removal of the single dominant dissentient gave effect to the wishes of the overwhelming majority of the remaining creditors. Here, it would override them.

Reasonable prospect and the sufficiency of the plan

[95] Access Bank contends that the plan is unsubstantiated, generic, and open-ended, and that the practitioners have not established a reasonable prospect that it can be implemented as claimed. It complains that clause 2 permits the practitioners to continue the rescue until they are satisfied that there is no risk of default, so that the

³⁰ *Nedbank Ltd v Barrs Pharmaceuticals (Pty) Ltd* [2026] ZAWCHC 205 at para 114.

³¹ [2026] ZAWCHC 205 at para 114.

rescue could be perpetuated indefinitely; that the expected duration is at least five years; and that the plan asserts conclusions rather than establishing them. It invokes *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* (hereinafter referred to as “*Swissborough*”)³² where the Court stated as follows:

“Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met.”

[96] The standard of compliance required of a plan is that of substantial compliance. In *Commissioner of South African Revenue Services v Beginsele N.O.* (hereinafter referred to as “*Beginsele*”),³³ Fourie J held that:

“A perusal of section 150 (2) of the Act shows that the legislature has prescribed the content of a proposed business rescue plan in general terms. The content can, by its very nature, not be exactly and precisely circumscribed, as it would differ from case to case . . . It follows, in my view, that, upon a proper construction of section 150 (2), substantial compliance with the requirements of the section will suffice. This would, in my view, mean that, where sufficient information, along the lines envisaged by section 150 (2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected, there would have been substantial compliance.”

[97] That test was recently applied in *Tamela Mezzanine Debt Fund I Partnership v KT Wash Detergents (Pty) Ltd* (hereinafter referred to as “*KT Wash*”),³⁴ a decision of

³² *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-H.

³³ *Commissioner of South African Revenue Services v Beginsele N.O.* 2013 (1) SA 307 (WCC) at para 38.

³⁴ [2026] 1 All SA 215 (GJ).

Pullinger AJ which was not cited to this Court, but which is directly on point. Pullinger AJ stated as follows:

“I find support for this conclusion in section 150(2) of the Act which stipulates that a business rescue plan must contain all the information reasonably required to facilitate Affected Persons decision-making in relation to whether or not the proposed plan ought to be accepted or rejected.”³⁵ (My emphasis)

[98] Furthermore, the Court adopted *Beginsel* and stated that “the acid test is whether there is ‘sufficient information, along the lines envisaged by section 150(2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected’.”³⁶ In that matter the practitioners had negotiated a sale of the business to an entity related to the applicant creditor for R 123 100 000 , against assets valued in a desktop valuation at some R 750 000 000, without disclosing how the price had been arrived at. The Court refused to set aside the creditors’ rejection, stating that:

“...To my mind, an independent valuation of Wash’s business was required. The BRP’s cannot be criticised for seeking out a suitor to purchase this business through an expedited sale. It is commendable that they have achieved this. But, the creditors cannot be left in the dark as to how the sale price was determined...”³⁷

[99] To similar effect is *Neethling v Louis Group (SA) (Pty) Ltd* (hereinafter referred to as “*Neethling*”),³⁸ a decision of Saller AJ, likewise not cited to this Court. There, a plan depended entirely upon the projected revenues of a subsidiary which was not itself in business rescue and whose directors, family members of the company’s directors, refused to disclose audited financial statements which the practitioner could not compel. The independent creditors, holding some 24% of the claims, unanimously

³⁵ *Tamela Mezzanine Debt Fund I Partnership v KT Wash Detergents (Pty) Ltd* [2026] 1 All SA 215 (GJ) at para 169.

³⁶ *Tamela Mezzanine Debt Fund I Partnership v KT Wash Detergents (Pty) Ltd* [2026] 1 All SA 215 (GJ) at para 171.

³⁷ *Tamela Mezzanine Debt Fund I Partnership v KT Wash Detergents (Pty) Ltd* [2026] 1 All SA 215 (GJ) at para 173.

³⁸ [2026] ZAWCHC 245.

rejected the plan. The practitioner's application under section 153(7) of the Act was refused. The Court stated that it "would want to be satisfied of a clear and persuasive case made out of SSW's revenue prospects."³⁹ The Court further noted the creditors' characterisation of the projections as "*hockey-stick*" forecasts,⁴⁰ and concluded at as follows:

*"I am not satisfied that the second respondent has shown on an objective enquiry of all the facts on record that the independent creditors' votes to reject the business rescue proposal for LGSA were inappropriate."*⁴¹

[100] The business rescue was converted to a provisional liquidation. The parallels with the present matter, a plan resting upon projections; creditors sceptical of information sourced from those connected to management; a minority of independent creditors whose rejection was nevertheless held to be reasonable, are close.

[101] This Court does not find it necessary to decide whether this plan complies with section 150(2) of the Act, or whether a reasonable prospect has been established. It is enough to say that these were matters upon which the creditors were entitled to form their own view, and that the view which the independent creditors formed cannot be said to be an unreasonable one. That is, this Court believes, the relevant question.

The intervening creditor and the treatment of a disputed claim

[102] This Court turns to the question which has troubled this Court most, and upon which the parties' argument was of necessity limited, the point having emerged fully only through Al Mabroor's intervention.

What the plan says

³⁹ *Neethling v Louis Group (SA) (Pty) Ltd* [2026] ZAWCHC 245 at para 84.

⁴⁰ *Neethling v Louis Group (SA) (Pty) Ltd* [2026] ZAWCHC 245 at para 78.

⁴¹ *Neethling v Louis Group (SA) (Pty) Ltd* [2026] ZAWCHC 245 at para 109.

[103] It is common cause that the practitioners knew of Al Mabroor's claim before the plan was published. They had, on 3 February 2025, consented under section 133 to the continuation of the Kimberley litigation. The claim is substantial: on Al Mabroor's version it exceeds R 23 000 000, comprising the funds advanced for the acquisition of the Bultfontein farms (some R 7 250 000 to R 8 000 000) and the 6 400 sheep acquired for approximately R 15 900 000. As I read the papers, the Company admits that Al Mabroor advanced the funds used to acquire the Bultfontein farms.

[104] Notwithstanding this, the plan accords Al Mabroor no voting interest, includes it in no list of creditors, and makes no provision whatever for its claim. Its sole engagement with the matter is at clause 10.1.2, under the heading of pending litigation, where the practitioners record their consent to the continuation of the Kimberley proceedings and states:

"10.1.2.2 The BRPs could not adjudicate the claim received as the basis of the claim remains sub judice. The court should first determine the validity of the claim before same can be considered for inclusion in the business rescue plan."

[105] Mr Vorster submitted that this will not do, that Al Mabroor is on any view an affected person, and that having been given no voting interest it was excluded from a decision which directly concerns the assets it claims. Mr Leathern put it more strongly, submitting in his notes on argument that the practitioners "have adopted an attitude towards the Intervening Creditor which certainly conflicts with their duties to do what is fair regarding all stakeholders." He made the additional point, which is a telling one, that even on the Company's own version, that the sheep arrangement was a lease under which rentals are payable and an equivalent flock returnable, "the BRPs do not provide for payment of rentals on the lease on which it relies in the business rescue plan nor for the return of the sheep."

Is a disputed claimant a "creditor"?

[106] The Act does not define "creditor". In *Mashwayi Projects* the Supreme Court of Appeal addressed the meaning of the word in Chapter 6, stating that:

*“The absence of a specific definition of ‘creditor’ is an indication that the Legislature did not contemplate a specific meaning other than the ordinary grammatical meaning of the word; that is a person or entity to whom an unpaid debt is due. Unless the Act has classified creditors and given them different or unequal rights, there is no basis to import, via interpretation, any such different or unequal rights . . .”*⁴²

[107] The Court cautioned against importing insolvency concepts, stating that “[t]he context of a *concurso creditorum* does not apply to business rescue proceedings”.⁴³ However, the Court further added that:

*“Even in the liquidation context, the word ‘creditor’ is to be given its normal grammatical meaning. In Ex Parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd, it was held ‘the word in the section is probably limited to persons having pecuniary claims, whatever the nature of their source may be.’ In Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd and Others, it was concluded that ‘a creditor includes a contingent or prospective creditor’ . . .”*⁴⁴

[108] The decisions there referred to are *Ex parte Kaplan N.N.O.: In re Robin Consolidated Industries Ltd*⁴⁵ and *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd*⁴⁶. The width of the notion of “creditor” in our company law is longstanding. Section 346(1)(b) of the previous Companies Act⁴⁷ (hereinafter to be referred to as the “1973 Act”), which remains in force for the winding-up of insolvent companies by virtue of item 9 of Schedule 5 to the 2008 Act, provides that an application for the winding-up of a company may be made:

“(b) by one or more of its creditors (including contingent or prospective creditors); . . .”

⁴² *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd* 2025 (3) SA 441 (SCA) at para 21.

⁴³ *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd* 2025 (3) SA 441 (SCA) at paras 22-23.

⁴⁴ *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd* 2025 (3) SA 441 (SCA) at para 24.

⁴⁵ 1987 (3) SA 413 (W) at 428B.

⁴⁶ 1999 (3) SA 480 (W) at 489D-G.

⁴⁷ Act 61 of 1973.

[109] The contrast with section 345(1)(a) of the 1973 Act, which confines the statutory demand mechanism to “a creditor . . . to whom the company is indebted in a sum not less than one hundred rand then due”, shows that the legislature has long distinguished between the two, and has long treated the contingent or prospective creditor as a creditor for the purpose of participating in a company’s affairs when it is in distress.

[110] At first instance the position under Chapter 6 is, however, contested. In *Rogal Holdings (Pty) Ltd v Victor Turnkey Projects (Pty) Ltd* (hereinafter referred to as “*Rogal Holdings*”),⁴⁸ Van der Schyff J stated as follows:

“[E]ven if I accept that a dispute exists regarding the first respondent’s liability to compensate the applicant for damages, and that the first respondent might have a counter claim against the applicant, the applicant made out a case that a cause of action exists and that it has a claim that should be tried by a court of law. In this sense, the applicant is a creditor. It is not only creditors who have proven claims against the debtor that are to be regarded as affected parties. The [Act] does not require that the creditor must have a liquidated claim before being recognised as a creditor for purposes of Chapter 6 . . . that party holds a direct and substantial interest in the business rescue proceedings and is an affected party, irrespective as to whether it acquired any voting interests.”

[111] The learned Judge described the applicant as “a creditor without any voting rights”,⁴⁹ creditor status being thereby decoupled from voting interest.

[112] A different view was taken in *Brand v Morgan Creek Boerdery (Pty) Ltd* (hereinafter referred to as “*Brand*”),⁵⁰ a reportable judgment of Morrissey AJ. Adopting the *vinculum juris* (legal tie) test drawn from *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd*,⁵¹ the Court held that:

“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

⁴⁸ [2022] ZAGPPHC 167 (28 March 2022) at para 34.

⁴⁹ *Rogal Holdings (Pty) Ltd v Victor Turnkey Projects (Pty) Ltd* [2022] ZAGPPHC 167 (28 March 2022) at para 38.

⁵⁰ 2026 (3) SA 171 (WCC) at para 86.

⁵¹ *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) at 528C-D.

a broader interpretation, the ordinary grammatical meaning of the word ‘creditor’ is ‘a person or entity to whom an unpaid debt is due’ . . . As by definition nothing is due to a contingent creditor, it falls beyond the ordinary meaning of the word.”

[113] Significantly for present purposes, the learned Acting Judge further stated that:

“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 . . . 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 . . .”⁵²

[114] This Court needs not, and does not, resolve the tension between *Rogal Holdings* and *Brand*. It suffices to observe that the reasoning in *Brand* is double-edged, and that on either view the practitioners’ course is difficult to defend. If Al Mabroor is a creditor, the plan was obliged to deal with it, and it was entitled to a voting interest. If it is not a creditor because its claim is disputed, then on the reasoning in *Brand* it is not bound by the plan, with the consequence that a plan proposing to realise the Bultfontein property and to trade with the flock was placed before creditors on a footing which left the person asserting rights in those very assets wholly outside the process, while holding out those assets as the security for the plan’s performance.

A decision between the same practitioners and this respondent

[115] At the hearing this Court’s attention was drawn to a judgment which bears directly upon this question. It is *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd (in business rescue)* (hereinafter referred to as “*Seacow*”)⁵³. Its significance lies in this: the second and third respondents in that matter were Messrs Werner Cawood and Dillon John Wessels, the practitioners in the present matter, and the applicant was Access Bank. Seacow Properties is one of the entities which voted in

⁵² *Brand v Morgan Creek Boerdery (Pty) Ltd and Others* 2026 (3) SA 171 (WCC) at para 92.

⁵³ unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026).

favour of the present plan by proxy, and one of the rescues which the practitioners describe as interrelated with this one. Seacow's indebtedness to Access Bank arose from a limited guarantee and an unlimited suretyship which it executed for the indebtedness of the Company. Seacow was placed in business rescue by resolution taken on 27 September 2024, the same day as the Company's, and Messrs Cawood and Wessels were appointed its practitioners.

[116] The issue there was whether Access Bank was a creditor of Seacow. The practitioners contended that it was not: that its exposure "arose solely from instruments relating to the indebtedness of De Vos Landgoed, not Seacow," and that "[a]ny alleged claim was at best contingent and disputed".⁵⁴ Upon that footing they removed the bank from the mailing list of affected persons and did not answer its attorneys' correspondence over a period of months.

[117] The learned Deputy Judge President rejected the contention. She did so by applying *Rogal Holdings*, quoting at paragraph 32 the very passage from paragraph 34 of that judgment which this Court have set out above, and holding that "the bank is owed a debt and unquestionably qualifies as a creditor of Seacow".⁵⁵ The Deputy Judge President stated that:

*"The removal of the bank from the business rescue proceedings on the basis that it is not a creditor, when all the indications are that it is, provides an adequate basis for the lifting of the moratorium . . . The bank's unceremonious exclusion from the business rescue proceedings was, in my view, unreasonable."*⁵⁶

[118] Furthermore, the Deputy Judge President stated as follows:

"The decision of the BRPs to exclude the Bank from further participation in the business rescue proceedings was, in my view, unwarranted." And at para 62 added that "it did

⁵⁴ *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd (in business rescue)* unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026) at para 58.

⁵⁵ *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd (in business rescue)* unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026) at para 35.

⁵⁶ *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd (in business rescue)* unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026) at para 54.

not matter that the BRPs did not consider the bank a creditor or affected person. At the very least, they ought to have responded to the bank's attorneys' letters or informed the bank that it had been removed from the list of affected persons."⁵⁷

[119] Three things follow, and this Court takes them into account with care.

[120] First, the judgment is persuasive, on facts closely analogous, and involving the same practitioners, that a claim which a practitioner regards as contingent and disputed may nonetheless be a creditor's claim, and that the exclusion of such a claimant from the process is unreasonable. It resolves, at least persuasively and in a business rescue context, the tension between *Rogal Holdings* and *Brand* in favour of the former.

[121] Second, it discloses that the approach taken to *Al Mabroor* in this matter was not an isolated judgment call but reflects a settled view held by these practitioners as to who qualifies as a creditor. That view has now been held, by another Court, to be wrong.

[122] Third, and importantly for the applicant, the judgment records that "[T]he BRPs have treated the bank as a creditor in the business rescue of De Vos Landgoed itself. The bank's claim was admitted in that process, and the bank is reflected as a creditor in the De Vos Landgoed business rescue plan."⁵⁸ The practitioners were therefore perfectly capable of admitting a claim, and of listing a creditor, when they were minded to do so.

[123] This Court records, in fairness, that Phatshoane DJP declined to remove the practitioners under section 139(2) of the Act, holding that the conduct complained of did not, "without more", establish incompetence, a failure to perform their statutory duties, a failure to exercise the requisite degree of care, or a lack of independence;⁵⁹ and that the failure to respond to correspondence, while demonstrating "some lack of

⁵⁷ *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd* (in business rescue) unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026) at para 61.

⁵⁸ *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd* (in business rescue) unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026) at para 40.

⁵⁹ *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd* (in business rescue) unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026) at para 61.

courtesy”, was “not of such a nature or degree as to warrant the removal of the BRPs”.⁶⁰ This Court returns to that aspect when it deals with costs.

What were the practitioners obliged to do?

[124] The practitioners’ answer is that they “could not adjudicate” the claim because it was *sub judice*. The question is whether that is a sufficient answer. This Court’s view it is not, but it is necessary to identify with care the basis upon which that conclusion rests, because the Act is less complete on this subject than might be supposed.

[125] This Court begins with what the Act does not provide. Section 145(5) of the Act obliges the practitioner to do three things: to determine whether a creditor is independent (paragraph (a)); to request a suitably qualified person to appraise and value an interest contemplated in section 145(4)(b) of the Act, that is, the interest of a concurrent creditor who would be subordinated in a liquidation (paragraph (b)); and to give written notice of that determination, or of that appraisal and valuation, at least 15 business days before the meeting (paragraph (c)). Section 145(6) of the Act, correspondingly, permits a person to apply to Court to review the practitioner’s determination that he is or is not an independent creditor, or to review, re-appraise and re-value a voting interest determined under section 145(5)(b) of the Act.

[126] It follows that neither provision, upon its terms, creates a procedure for determining whether a person whose claim is disputed is a creditor at all, nor for the outright rejection of an asserted claim, nor for the quantification of an ordinary concurrent claim under section 145(4)(a) of the Act. The mechanism of determination, notice and review for which those subsections provide is directed to independence and to the appraisal of a subordinated interest. It would be wrong of me to hold that the practitioners breached section 145(5) of the Act by failing to determine Al Mabroor’s claim, or that they foreclosed a review under section 145(6) which Al Mabroor would otherwise have enjoyed. I accordingly make no such finding.

⁶⁰ *Access Bank (South Africa) Ltd v Seacow Properties (Pty) Ltd (in business rescue)* unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No 2025-232376 (22 May 2026) at para 62.

[127] That the Act is incomplete in this respect is not a matter of inference. It was expressly identified in *Bushveld Vametco Holdings (Pty) Ltd v SPR Vanchem (Pty) Ltd* (hereinafter referred to as “*Bushveld Vametco*”),⁶¹ a judgment of Cooke AJ, where practitioners had rejected an asserted claim of some R 165 000 000 and the claimant sought to interdict the section 151 of the Act meeting until its claim and voting interest had been determined. The learned Acting Judge stated that:

“While a business rescue practitioner is permitted by section 147(1)(a)(ii) to ‘receive proof of claims by creditors’, the 2008 Act is silent on who must determine them or how. There is neither a process nor procedure for claims to be proved or determined, as there is under section 366 of the Companies Act 61 of 1973, or section 44 of the Insolvency Act 24 of 1936.”

[128] This Court respectfully agrees. But the recognition of a *lacuna* is not the creation of a procedure, and *Bushveld Vametco* does not convert sections 145(5) and 145(6) of the Act into a comprehensive scheme for the adjudication of claims. What that judgment does establish, and what this Court accepts as persuasive, is that the absence of a procedure does not leave the practitioner at large. Cooke AJ stated as follows:

*“...[t]he evident legislative intention is that an early step in the rescue of a company is to empower the appointed business rescue practitioner to ascertain creditors’ claims on a preliminary basis. In this position of power, a business rescue practitioner is bound by the duties imposed under the 2008 Act to act faithfully and, when conducting the initial investigation, recognise amounts owed by the company and confer a voting interest on the holders of legitimate claims.”*⁶²

[129] The Court identified the mischief which arises where that is not done: “[a]pproval of a business rescue plan may have far-reaching consequences. It is often of particular concern that the content of an approved plan will bind creditors who were

⁶¹ [2026] ZAGPJHC 590 (7 May 2026) at para 30.

⁶² *Bushveld Vametco Holdings (Pty) Ltd v SPR Vanchem (Pty) Ltd* [2026] ZAGPJHC 590 (7 May 2026) at para 33.

perhaps unduly excluded from exercising their voting interest against it.”⁶³ It is right to record that the interdict in that matter was nonetheless refused, and refused for a reason which is instructive here: the practitioners, recognising that the Act supplied no mechanism, had themselves proposed one, a fast-track arbitration before a retired Judge, to be completed within six weeks, and it was the claimant who declined it.

[130] The obligations which, in this Court’s judgment, did rest upon these practitioners derive not from section 145(5) of the Act but from three other sources, and they are modest enough.

[131] The first is the practitioner’s investigative and managerial function. Section 140(1) of the Act confers upon the practitioner full management control of the company and the power to investigate its affairs, section 141(1) of the Act obliges the practitioner, as soon as practicable after appointment, to “investigate the company’s affairs, business, property, and financial situation”, and section 147(1)(a)(ii) of the Act permits the practitioner to receive proof of claims by creditors. I believe that a practitioner who knows of a substantial asserted claim, and who has consented under section 133 of the Act to the litigation in which it is being determined, cannot discharge that investigative function by declining to form any view about it at all.

[132] The second is the practitioner’s duties of conduct. Section 140(3)(b) of the Act invests the practitioner with the responsibilities, duties and liabilities of a director as set out in sections 75 to 77, and thus with the duties in section 76(3) of the Act to act in good faith and for a proper purpose. To those must be added the requirements of independence and impartiality to which this Court addresses below.

[133] The third, and the most important, is the content of the plan. Section 150(2) of the Act prescribes what a plan must contain, and this Court deals with it separately below.

[134] Taken together, those provisions required of the practitioners a good deal less than a final adjudication of Al Mabroor’s claim, which they could not lawfully have

⁶³ *Bushveld Vametco Holdings (Pty) Ltd v SPR Vanchem (Pty) Ltd* [2026] ZAGPJHC 590 (7 May 2026) at para 50.

undertaken, but a good deal more than silence. At a minimum they were required to investigate and consider the claim in good faith; to form and record a reasoned view as to how it should be treated for the purposes of the business rescue; to disclose in the plan the existence, nature and disputed status of the claim, and its potential effect; to disclose the competing assertions of ownership of, or rights in, the Bultfontein property and the flock; to explain what the pending litigation might mean for the assets and the projections upon which the plan depended; and to consider whether some provisional, contingent or practical mechanism might be adopted for dealing with the claim, without purporting finally to determine it. The practitioners in *Bushveld Vametco* did precisely the last of these. These practitioners did none of them. They recorded that the matter was *sub judice* and that a Court should decide it first, while at the same time proposing to realise the very asset over which the claim is asserted.

[135] This Court should record that the law in this area is unsettled and that the practitioners are not without an argument. The full Court's position in *Volkar N.O. v Big Sky Trading 219 CC* (hereinafter referred to as "*Volkar*"),⁶⁴ is, as *Bushveld Vametco* records at paragraph 42, to be settled by the Supreme Court of Appeal; and there is authority the other way in *Janson v Ebundu (Pty) Ltd (in business rescue)* (hereinafter referred to as "*Janson*"),⁶⁵ where a claimant whose claim had not been recognised failed, the Court holding that recognition before the adoption of the plan "was an absolute necessity". This Court has taken that into account. But none of it touches the narrow proposition upon which this Court rests: that a practitioner who knows of a substantial claim affecting the assets upon which his plan depends must disclose it and address it in the plan, whatever view he takes of its merits.

Section 150(2): the completeness of the plan

[136] The omission has a further dimension, which concerns the content of the plan itself. Section 150(2)(a)(ii) of the Act requires Part A of a plan to contain "a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent

⁶⁴ [2024] ZAKZPHC 9; 2025 (3) SA 667 (KZP), being the judgment of the court of first instance. The full court judgment, Case No AR484/24, is referred to in *Bushveld Vametco* above n 61 at para 42.

⁶⁵ *Janson v Ebundu (Pty) Ltd (in business rescue)* [2025] ZAMPMBHC 31.

and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims". Section 150(2)(a)(i) of the Act requires "a complete list of all the material assets of the company". Part B must state "the property of the company that is to be available to pay creditors' claims" and "the order of preference in which the proceeds of property will be applied".

[137] It is instructive that the very words of section 150(2)(a)(ii) of the Act presuppose the difficulty. The requirement of "an indication of which of the creditors have proved their claims" is, as Cooke AJ observed in *Bushveld Vametco* and stated that "an acknowledgement that the circumstance that has eventuated in this case may well arise",⁶⁶ that is, that a plan may be voted upon while some asserted claims remain unproved. But the statutory response to that circumstance is disclosure: the creditor is listed, and an indication is given that its claim is unproved. The statutory response is not omission.

[138] The standard of compliance is substantial compliance, as *Beginsel* establishes and as this Court has set out above. Applying it, a list of creditors from which a known claimant asserting some R 23 000 000 has been excluded altogether is difficult to describe as "complete", and a plan which proposes to realise the Bultfontein property as the ultimate security for its own performance, without disclosing that a third party asserts that it funded the acquisition of that property and claims rights in it, does not provide "sufficient information . . . to enable interested parties to take an informed decision". The same may be said of the flock: on the Company's own version it holds the sheep under a lease obliging it to pay rentals and to return an equivalent flock, yet the plan makes provision for neither.

[139] This Court has reached that conclusion without deciding the merits of Al Mabroor's claim, which are not before this Court. The deficiency lies not in the practitioners' view of the claim, they were entitled to take a view, and may ultimately be vindicated, but in the fact that the plan discloses neither the claim nor its potential effect upon the very assets which the plan holds out as its security.

⁶⁶ *Bushveld Vametco Holdings (Pty) Ltd v SPR Vanchem (Pty) Ltd* [2026] ZAGPJHC 590 (7 May 2026) (*Bushveld Vametco*) at para 36-37.

The duties of the practitioners

[140] It was submitted in argument that the practitioners' conduct falls to be criticised by reference to their status as officers of the Court under section 140(3)(a) of the Act. This Court approaches that submission with care, because the expression has been the subject of authoritative caution. In *Knoop N.N.O. v Gupta (Tayob Intervening)* (hereinafter referred to as "*Knoop*")⁶⁷ Wallis JA stated as follows:

"In any event, I do not think that describing a BRP as an officer of the court adds anything to their duties or responsibilities. The expression 'officer of the court' is most commonly used to refer to advocates or attorneys . . . To say that someone is an officer of the court conveys little practical meaning. It 'is a vague term without legal content'. At most it conveys that a fairly high standard of personal integrity is called for from the person so described. But that flows in any event from the duty of good faith . . ."

[141] The learned Judge of Appeal further held that section 140(3)(a) of the Act has no application to a voluntary business rescue. The present rescue commenced by resolution of the directors under section 129 of the Act and is therefore a voluntary one. This Court does not, accordingly, rest anything upon the "officer of the court" label.

[142] The same judgment, however, states the practitioner's duties in terms which are directly apposite. Wallis JA held that a practitioner must be independent, must "carry out their duties without partiality", must not be dictated to by directors, shareholders or any third party, and must "at all times exercise an independent judgment taking into account the potentially conflicting interests of different affected parties".⁶⁸ Furthermore, describing the facts of *Kariba*, Wallis JA recorded that the practitioner there had ignored the objections of the principal creditor, had relied upon information supplied by the shareholders and upon his own unsubstantiated assessment, and had produced a plan which "fell 'woefully short' of compliance with the requirements of section 150 of the Act and did not provide information from which

⁶⁷ 2021 (3) SA 88 (SCA) at para 33.

⁶⁸ *Knoop N.N.O. v Gupta (Tayob Intervening)* 2021 (3) SA 88 (SCA) at para 23.

an assessment of reasonable prospects of the business rescue succeeding could be made”.⁶⁹

[143] That, in my respectful view, is the correct frame. It does not depend upon a contested label. It rests upon section 140(3)(b) of the Act, which invests the practitioner with “the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77”, and thus with the duties of good faith and proper purpose in section 76(3) of the Act; and upon the practitioner’s obligation to hold the balance between affected persons whose interests may conflict.⁷⁰

[144] Measured against that standard, the treatment of Al Mabroor’s claim is not satisfactory. A practitioner who knows of a substantial asserted claim, who has consented to the litigation in which it is being determined, who proposes to realise the very assets which the claim concerns, and who then publishes a plan which accords the claimant no voting interest, includes it in no list of creditors, makes no provision for its claim, and does not even make provision for the rentals and the return of the flock which are due on the Company’s own version of the arrangement, has not held the balance between affected persons. He has, at the least, exposed the plan to the criticism that it was framed from the Company’s standpoint rather than independently.

[145] This Court does not make a finding of impropriety against Messrs Cawood and Wessels. No such relief was sought, they were not separately represented on that issue, and considerations of fairness preclude it. Nor is it necessary. What this Court does find is that the plan which was placed before the creditors on 28 March 2025 was, in this respect, materially deficient; and that this deficiency bears directly upon the question this Court has to decide.

The consequence for this application

[146] The deficiency does not, on the papers before this Court, found an order setting aside the plan or the meeting at which it was considered. No such relief is sought.

⁶⁹ Knoop N.N.O. v Gupta (Tayob Intervening) 2021 (3) SA 88 (SCA) at para 25.

⁷⁰ Diener N.O. v Minister of Justice 2018 (2) SA 399 (SCA) at para 35 and, on appeal, Diener N.O. v Minister of Justice and Correctional Services 2019 (4) SA 374 (CC).

There is no counter-application by Access Bank or by Al Mabroor for the setting aside of the plan, the meeting or the process, and it would not be competent for me to grant such relief of my own accord. Al Mabroor's notice of motion seeks leave to intervene, costs, and the dismissal of the main application, it seeks nothing more.

[147] The significance of the point is therefore not that it grounds a free-standing order, but that it bears upon the exercise of the value judgment which section 153(7) of the Act requires. Section 153(7)(b) of the Act directs the Court to have regard to "the provision, if any, made in the proposed business rescue plan with respect to the interests" of the dissentients. A plan which omits a known and substantial claimant, and which earmarks for realisation the very assets that claimant asserts rights in, is a plan about which a creditor may reasonably harbour misgivings, the more so where, as Access Bank complains, that creditor was asked to accept that the Bultfontein property, unencumbered and valued at some R 21 300 000, stands as the ultimate security for the plan's performance. Access Bank was entitled to weigh that in deciding how to vote.

The events since the vote

[148] Prior to argument and by a not published on caselines, this Court raised with counsel whether the practitioners ought to be directed to file a further affidavit accounting for the income generated by the Company since the commencement of the business rescue, its application, the remuneration drawn by the practitioners, the costs of this and the related litigation, and the amounts distributed to or held for each creditor. Having reflected, this Court has decided that no such direction is necessary.

[149] This Court states that for two reasons. The first is that the further and alternative relief foreshadowed in the status update affidavit, the extension of the date for payment and the set-off of litigation costs, does not arise for decision, so that the principal purpose such an account would have served falls away. The second is that the material already before this Court is sufficient for the determination of the questions which do arise. A direction of the kind this Court contemplated would have occasioned delay and expense without altering the outcome, and this Court should not make one for its own sake.

[150] It does not follow that the material concerning the period since the vote is to be disregarded. It is relevant, within the limits this Court has described under the heading “[t]he statutory framework”, in two respects.

[151] First, it bears upon the reliability of the plan’s projections. The practitioners rely upon the Company’s continued trading to demonstrate that the plan “has not remained theoretical, but has been implemented in practice”. The monthly reports annexed to the status update affidavit do record substantial income across the 2025 season from soya, lucerne, game, hunting, wool, livestock, and lodge operations. But they record turnover by category; they do not reconcile receipts against payments, and they disclose neither the remuneration drawn by the practitioners nor the sums applied to litigation. Evidence of that kind can confirm or refute an assumption upon which a plan rests. This material does neither with any precision, and it therefore does little to answer the criticism, made by Access Bank at the time of the vote, that the plan’s projections were not substantiated.

[152] Second, it bears upon the weight of the applicant’s own case. The practitioners depose that the costs of this and the related Brakhoek and Seacow litigation “have been funded from income generated through continued trading during business rescue, including funds which, under the business rescue plan, would otherwise have been available for distribution to Access Bank”; that Access Bank has been paid nothing since the commencement of the rescue; and that distributions intended for it and for the Land Bank are held pending the outcome of this litigation. Those are admissions, and they are relevant to whether it is reasonable and just, at this date, to compel Access Bank to submit to the plan.

[153] This Court must, however, be careful about the use to which that material is put, and makes two things plain. The first is that none of it is used to judge Access Bank’s vote with hindsight. Access Bank did not know, on 28 March 2025, how the Company would trade or how the practitioners would apply its income, its vote is judged upon what was before it then, and it needs no assistance from what came later. The second is that the later material does not cure the deficiencies in the plan which was placed before the creditors. A plan is voted upon as published. Evidence that a

company has since traded profitably cannot supply the substantiation which the plan itself lacked, nor make good its failure to disclose and address the claim dealt with under the heading “[t]he intervening creditor and the treatment of a disputed claim” above. At most the subsequent material tends to confirm concerns which the dissenting creditors entertained at the time, it does not create them, and it does not answer them.

The purpose of Chapter 6

[154] This Court adds a word about the purpose which section 153(7) of the Act serves. Business rescue exists to rehabilitate viable companies and to secure for creditors a better return than liquidation would yield; it does not exist to postpone the day of reckoning, nor to compel creditors whose patience is exhausted to fund a continued experiment. The Supreme Court of Appeal has said that the legislation is not “to be abused by a company with no prospects of being rescued but mainly to avoid a winding-up or to obtain some respite from creditors”, and that a reasonable prospect “must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough”.⁷¹ This Court makes no finding that this application or this rescue constitutes an abuse, and would not entertain such a submission upon these papers. This Court refers to the principle only because the discretion under section 153(7) of the Act exists to give effect to the objects of Chapter 6, and those objects are not advanced by overriding the reasoned rejection, by an independent body of creditors, of a plan whose prospects are unsubstantiated and whose content is materially deficient.

Conclusion

[155] Standing back and making the single value judgment which *KJ Foods CC* requires and having regard to the three factors which section 153(7) of the Act makes mandatory, this Court is not satisfied that it is reasonable and just to set aside Access Bank’s vote.

⁷¹ *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services* 2024 (1) SA 400 (SCA) at paras 26 and 35. See also *Van Staden N.N.O. v Pro-Wiz (Pty) Ltd* 2019 (4) SA 532 (SCA).

[156] As to section 153(7)(a) of the Act, the interests represented by the dissentient, Access Bank is the Company's largest secured creditor, holding covering bonds over six properties, whose indulgences over some 18 months were exhausted by a succession of unmet undertakings. As to section 153(7)(b) of the Act, the provision made in the plan for those interests, the plan strips the Working Capital Facility of the secured character which, on the face of the bonds, it bears; it defers enforcement over a period of five years or more, upon terms which permit the practitioners to determine when the rescue ends; and it subordinates Access Bank's recourse, in the event of default, to a waterfall which prefers the holder of security over the Bultfontein property and the post-commencement financier. As to section 153(7)(c) of the Act, the estimated return upon liquidation, the Company has not established that Access Bank fares better under the plan; on the version which this Court is obliged to accept, drawn from the Company's own account, it fares at least as well upon a liquidation.

[157] To those matters must be added that the plan was rejected by seven independent creditors and carried, so far as it was carried at all, substantially by connected votes, that its prospects are unsubstantiated in the founding papers, and that it passes over in a single sentence a known claim of some R 23 000 000 in respect of the very assets upon whose realisation it depends. A vote against such a plan is not, in this Court's judgment, an inappropriate vote. It is the exercise by a creditor of a right which the Act confers, upon grounds which the Act recognises as material.

[158] The application must therefore be dismissed.

Costs

[159] Costs follow the result. Access Bank and Al Mabroor have each succeeded and are entitled to their costs, including the costs of the intervention and of the applicant's opposition to it. Both seek a punitive award, and Mr Leathern submitted that the practitioners' conduct "justifies a special order for costs". This Court has concluded that costs should be awarded on the scale as between attorney and own client. Because that is the most stringent scale known to our practice, This Court must explain why.

[160] A punitive award is not lightly made, and the highest scale less so. It must be justified by identified conduct and not by disapproval at large. This Court makes no finding that the applicant or the practitioners acted fraudulently or dishonestly, or that this application is an abuse of process; and this Court does not regard the mere bringing of an unsuccessful application under section 153(7) of the Act as attracting any punitive consequence. The section confers a right to approach the Court, and an applicant who fails is ordinarily liable for party and party costs and no more.

[161] What takes this matter beyond the ordinary is the accumulation of features in the conduct of the litigation, each of which appears from the papers. The application was advanced upon founding papers which did not establish the propositions on which it depended. The founding affidavit conceded at paragraph 69 that Access Bank “stands to receive the same in a liquidation scenario” as under the plan, and the contrary case was advanced only in reply. A further affidavit was filed without leave which sought, in substance, relief not contained in the notice of motion, an extension of the date for payment, alternatively a set-off of the practitioners’ litigation costs against the very distributions owed to Access Bank. The applicant persisted in seeking to impose upon dissenting creditors a plan which was materially deficient. When the party whose claim had been passed over sought to be heard, its participation was opposed. And, most tellingly, the litigation was on the applicant’s own version, funded from income which, on the practitioners’ own evidence, “would otherwise have been available for distribution to Access Bank”, while Access Bank received nothing at all. A creditor was in effect required to finance, out of moneys owed to it, an application whose object was to set aside its own vote.

[162] The cumulative effect was to put both respondents to very considerable expense over some 16 months, through three interlocutory disputes and four sets of heads of argument. An award on the attorney and client scale would leave them materially out of pocket for having resisted an application of that character. This is one of the rare matters in which the fullest indemnity our practice allows is the just order.

[163] The award will extend to the costs of the main application; the costs of the application for leave to intervene and of the opposition to it; the costs of and

occasioned by the further affidavits, including the qualifying costs of dealing with the status update affidavit; the reserved costs; and the costs occasioned by the postponement. Al Mabroor employed two counsels, one of them senior; in a matter of this complexity that was reasonable, and those costs are allowed.

The position of the practitioners

[164] One further matter should be recorded, although it does not affect the order this Court makes. The costs of this application will be borne by the Company, and so ultimately by the general body of creditors, the very persons in whose interests the business rescue is conducted, and who have already been deprived of distributions in order to fund the litigation.

[165] It was open to the Court to consider whether those costs should instead be borne by the practitioners *de bonis propriis*. Such an order is competent against a business rescue practitioner. Section 140(3)(b) of the Act invests the practitioner with the duties and liabilities of a director, and section 140(3)(c)(ii) of the Act renders a practitioner liable for “any act or omission amounting to gross negligence”. In *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*⁷² the Supreme Court of Appeal ordered a practitioner to pay a creditor’s costs personally, holding that a practitioner “was expected to act objectively and impartially”, that this “was lacking in the extreme”, and that his “grossly improper conduct was deliberate”. The general test requires a want of *bona fides*, or negligence, or unreasonableness in the conduct of the litigation.

[166] This Court decided not to embark upon that enquiry. First, no such relief was sought by any party. Second, and decisively, no personal costs order may be made against a person who has not been given notice of the risk and an opportunity to answer it, the practitioners have deposed to affidavits in these proceedings, but they did so in support of the Company’s case and not to meet a suggestion of personal liability. To embark upon the enquiry would require an order calling upon them to show cause, further affidavits and a further hearing, in a matter already 16 months old and

⁷² 2015 (5) SA 192 (SCA) at paras 35 and 38.

in which the substantive relief has failed. Third, the threshold is a high one, and there is authority, in matters concerning these very practitioners, in which courts have declined to make such an order upon conduct not far removed from that complained of here.⁷³

[167] This Court therefore makes no finding whatever against Messrs Cawood and Wessels personally, and none is to be inferred. This Court records only this, and puts it no higher. A business rescue practitioner is not the representative of the company's management. He is required to exercise an independent judgment, taking into account the potentially conflicting interests of the different affected parties, and to hold the balance between them. Where a plan passes over a known and substantial claim affecting the very assets upon which its performance depends; where the claimant's attempt to be heard is opposed; and where the litigation is financed from moneys owed to the creditor against whom it is directed, the practitioners should not assume that the consequences will always fall upon the estate. Had the question been raised and properly ventilated, it would have required serious consideration. This Court hopes that the practitioners take note of this stern warning.

Order

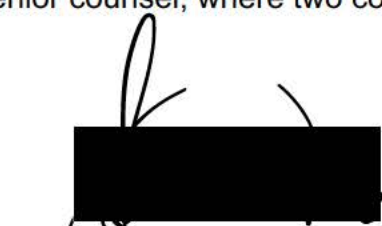
[168] In the result, this Court makes the following order:

1. Al Mabroor Agri (Pty) Ltd (in business rescue) is granted leave to intervene in this application as the intervening party.
2. The status update affidavit of De Vos Landgoed (Pty) Ltd (in business rescue) dated 26 January 2026 is admitted, and the further and alternative relief foreshadowed in that affidavit is not entertained.
3. The application of Al Mabroor Agri (Pty) Ltd (in business rescue) to strike out in terms of rule 6(15) of the Uniform Rules of Court is dismissed.

⁷³ *Ex parte: Target Shelf 284 CC; Commissioner, South African Revenue Service v Cawood N.O.* [2015] ZAGPPHC 740 (*Target Shelf*) at paras 76-8; and *Seacow* above n 53 at para 65. On the threshold, see *Cawood N.O. v Murray N.O.* 2024 (6) SA 222 (GP) at paras 58 and 62-63.

4. The application of De Vos Landgoed (Pty) Ltd (in business rescue) in terms of section 153(7) of the Companies Act 71 of 2008 to set aside the vote of Access Bank (South Africa) Ltd against the business rescue plan published on 14 March 2025 is dismissed.

5. De Vos Landgoed (Pty) Ltd (in business rescue) is ordered to pay the costs of Access Bank (South Africa) Ltd and of Al Mabroor Agri (Pty) Ltd (in business rescue). Such costs are to include the costs of the main application, the costs of the application for leave to intervene and the costs occasioned by the opposition to it, the costs of and occasioned by the further affidavits, including the costs of dealing with the status update affidavit, the reserved costs and the costs occasioned by the previous postponement, all upon the scale as between attorney and own client, and to include the costs consequent upon the employment of two counsel, including senior counsel, where two counsel were so employed.


ACTING JUDGE HERSHENSOHN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **20 AUGUST 2026**.

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Date of hearing: 27 July 2026
Date of judgment: 20 August 2026