REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....	2021/4/20
SIGNATURE	DATE

APPEAL CASE NO: A5076/2018

CASE NUMBER: 407461/2015

In the matter between:

THEODOR WILHELM VAN DEN HEEVER N.O.	**First Appellant**
GERT LOURENS STEYN DE WET N.O.	**Second Appellant**
LUKE BERNARD SAFFY N.O.	**Third Appellant**
SELWYN TRACKMAN N.O.	**Fourth Appellant**
SUMAIYA ABDUL GAFFAR KHAMMISSA N.O.	**Fifth Appellant**
JACOLIEN FRIEDA JANSEN VAN RENSBURG N.O.	**Sixth Appellant**
and	
JACOBUS MICHIEL VAN TONDER	**Respondent**

JUDGMENT

WINDELL J (MIA J and MDALANA-MAYISELA J concurring)

INTRODUCTION

[1] On 12 September 2014, the respondent was appointed the business rescue practitioner to rescue a group of companies. He was unable to do so. The group of companies were finally liquidated on 25 November 2014, following the rejection of the respondent's business rescue plans. One of those companies was Boabab Holdings (Pty) Limited ("Boabab").

[2] The appellants are the joint liquidators of the group of companies. They instituted a claim against the respondent in his personal capacity in the sum of R24, 228,315.61 for an alleged loss suffered by Boabab, whilst the respondent was carrying out the performances and functions of a business rescue practitioner. The court *a quo* (Modiba J sitting as court of first instance) dismissed the claim with costs.

[3] The group of companies, (hereinafter referred to as "the companies" or "the Group") consisted of the IFC Group (Pty) Ltd ("IFC Group"); Kalahari Mining Logistics (Pty) Ltd ("Kalahari"); Independent Freight Carriers (Pty) Ltd ("IFC"); IFC Development (Pty) Ltd ("Development"); IFC Logistics (Pty) Ltd ("IFC Logistics"); and Boabab. The companies operated as mining logistics solution providers. In essence, they provided the transportation of bulk commodities from mines in various parts of the country to the harbour in Port Elizabeth[1] for onward export. Each of the six companies within the Group, provided a specific function. They operated together and were interdependent.[2] In order to render services to the mines the companies required contracts with Transnet to rail the bulk commodities; trucks to move the commodities via road; leases of various sidings along the rail network and warehousing facilities to

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[1] Port Elizabeth was renamed Gqeberha on 23 February 2021.
[2] A schematic was prepared by the respondent describing the companies and the way they functioned.

store the bulk commodities from time to time; equipment to assist in shunting the commodities from the mines to the wagons on the rail or trucks; and hundreds of employees located at various areas including at the mines, sidings, and the harbour. There was not one company in the Group that had all of the aforementioned assets or employees. Each company provided certain services and performed certain functions for the Group to operate as a whole. Thus, for example, employees were by and large employed by IFC Logistics whereas the assets were owned by IFC Development. IFC in turn held the contract with Transnet to rail the commodities along Transnet's rail infrastructure.

[4] In the case of Boabab it employed 101 people; had six lease agreements and held a contract with Kudumane Manganese Resources (Pty) Ltd ("Kudumane"), a mine in the Northern Cape, to transport commodities from the mine to the harbour in Port Elizabeth. Traditionally, the Group's trading company was Kalahari. From 2013 onward that changed, and Boabab became the trading company within the Group. This stemmed from the Group's expansion into the manganese logistics business. It was resolved to house the Group's assets and contracts in separate companies. The Kudumane contract was one of the largest contracts serviced by the Group, and serves as a good example of how the Group operated. Whilst Boabab was the party who concluded the contract, it had no rail agreements and no trucks, and could therefore not service the Kudumane contract without all of the other companies in the Group providing assets and/or services. So, whilst Boabab was the only company that invoiced Kudumane, and as the other companies did not invoice Kudumane or Boabab, the monies so received were used to pay the expenses of all of the companies.

[5] The Group's financial difficulties started approximately twelve months preceding the business rescue. Transnet had previously allowed the Group twenty-four trains per week to move manganese from the mines to the harbours and that was reduced to one train per week. The companies were reliant on rail transport and because Transnet reduced the Group's loads, it was forced to adjust its business strategy and become increasingly reliant on road transport. The consequence of this change was a massive capital expenditure programme in circumstances where the Group was already experiencing cash flow pressure due to the rail service delivery failure. The Group had to purchase trucks, trailers and containers on installment sale agreements. This resulted in the Group being indebted to several financiers, including FirstRand Bank. Several industrial strikes by drivers also hampered the Group's ability to operate profitably. The above notwithstanding, the revenue generated by the Group increased after the re-structure, which is evident from the financial statements of the Group.

[6] As a consequence of the foregoing, Mr Driscoll, a director of the companies and the person who ran the companies, engaged with a potential third party investor, being Vancor Participants SA and the Efferton Group ("Efferton"), in an attempt to re-capitalise the Group so as to fully implement the expansion programme and change in strategy, which was to place more reliance on road transport. In May 2014, a sale agreement was concluded between Mr Driscoll and Efferton. Efferton took control of the Group, including its bank accounts and management. The Group's financial director, Mr Bryan Scannell left the Group's employ and Efferton commenced with its own management. In about August 2014, Efferton pulled out of the sale, leaving the companies in a worse financial position than they had been, prior to the sale. More importantly, the previous administration had no accounting or books or software accounting for what transpired during Efferton's tenure in charge of the Group.

[7] Shortly after Efferton pulled out of the sale, the respondent was contacted in relation to assuming the responsibilities of a business rescue practitioner. He has a B.Proc degree and is a senior business rescue practitioner. He was appointed, along with his company, Eripio Business Rescue Consultants, to attend to the business rescue. On 12 September 2014, the Group went into voluntary business rescue.

[8] When the respondent was initially approached he was under the impression that there was only one company involved in the business rescue, only to find that there were six companies that had to be rescued. Notwithstanding the fact that there were six companies, he was of the view that the companies could continue to be profitable if they scaled down, made use of Kudumane's rail allocation, or if they used trucks or a combination thereof. The respondent testified during the trial that, although each company initially had a separate business plan, the business rescue plan for Boabab could not be considered independently and had to be considered together with the consolidated business plan for the companies because of the interdependency of the companies and how they operated. He was also of the view that the moratorium contemplated in section 133 of the Act would ensure that Transnet had to continue providing services. He took legal advice in this regard from an attorney, Mr Van Deventer, as well as counsel. The respondent testified that he was provided with financial documents that were incomplete, but nevertheless endeavoured to distill the true financial position of the companies from these documents. He stated that he was not supported by the previous directors of the Group, save for the financial manager, Mr Bryan Scannell and, to a lesser extent, by Mr Driscoll, the only remaining director of the Group, through e-mail correspondence.

THE ISSUE

[9] This appeal centers on the respondent's use of Boabab's funds to discharge the debts of the Group. It was established during the evidence of the respondent that R24 228 315. 61 was collected from Kudumane and Black Magic Logistics, both debtors of Boabab, during business rescue. Boabab operated an Investec Bank account. However, subsequent to business rescue, Mr Driscoll instructed Kudumane to utilise a bank account operated by African Mining Logistics ("AML") held with Standard Bank. Monies were accordingly deposited into this bank account. The respondent applied these funds to extinguish obligations of the companies in the Group (hereinafter referred to as "the disposal"), whilst knowing that Boabab had ceded all its book debts to, *inter alia*, Lombard Insurance ("Lombard").[3] A balance sheet, handed in during the trial, set out the amounts received by the Group and the amounts paid out in respect of each of the companies. For example, R400 000.00 was paid to Fidelity Security for security for the leased premises, and approximately R4 000 000.00 was paid in relation to salaries for all the companies. The funds were also used to pay for cell phone accounts and internet in respect of all the companies, including Boabab. The respondent testified that all of the payments were made in order to service the Kudumane contract. He believed that Boabab's funds ought to be used to pay immediate operating expenses of the Group until such time as the business rescue plans were approved, after which further investigations could be conducted. He testified that without the payments, Boabab would have been unable to continue trading. He denied that the amounts paid by Boabab in respect of the other companies' expenses constituted loans, but were rather payments for services rendered.

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[3] There was also a cession of book debts in favour of FirstRand Bank.

[10] The disposal, so the appellants alleged, was effected without compliance with section 45 and section 134 of the Act, and was in breach of the respondent's fiduciary duties to Boabab in terms of section 76(3) of the Act. As a result of the contraventions, so it was alleged, Boabab had suffered a loss of R24 228 315.61 and the respondent should be held liable for the loss in terms of section 218(2), alternatively section 77(2)(b)(ii) of the Act.

[11] The respondent denied liability, but pleaded that in the event of the court finding that he is liable to Boabab for any loss, that he acted in good faith in the course of the exercise of the powers and performance of his functions as a business rescue practitioner and was thus excused from liability in terms of section 140(3)(c)(i) of the Act. The respondent further pleaded that if it is found that he breached his fiduciary duties that he acted honestly and reasonably and should therefore be excused from any liability in terms of section 77(9) of the Act.

[12] The court *a quo* dismissed the claim against the respondent with costs. Modiba J found that there was no factual basis to find that that the respondent advanced loans to companies associated with Boabab and therefore did not contravene section 45 of the Act. She, however, found that the respondent contravened section 134 of the Act as he "*did not obtain Lombard's consent as required by section 134 .....when he utilised Boabab's book debts to pay expenses incurred by the other companies to service contracts in Boabab*". He was therefore liable in terms of section 77(2)(b)(ii) of the Act, but his liability was excluded in terms of section 77(9) of the Act. She further found that the respondent was not additionally excused in terms of section 140(3)(c)(i) of the Act, as the defence available in terms of this section was excluded by section 140(3)(b). In respect of the allegation that the respondent breached his fiduciary

duties, the court *a quo* found that "*to the extent that the transactions that he* (the respondent) *made using the ceded assets relate to expenses incurred by the other five companies to service contracts located in Boabab, they were made in good faith, for a proper purpose and in the interests of Boabab.*" In addition, she found that the appellants had not established any loss by Boabab and that section 218(2) was impermissibly used by the appellants to attempt to circumvent the indemnity a business rescue practitioner enjoys under the provisions of section 77(9).

THE CLAIM

[13] The claim in the court *a quo* was divided into four separate and distinct claims, each seemingly pleaded in the alternative and for the same amount of money. The appellants' heads of argument are less clear but appear, following the appellant's notice of appeal, to pursue all four claims. It is agreed between the parties that sections 45, 77, 134, 140 and 218 of the Act therefore find application in this appeal as a result of the pleadings and evidence in this matter. A convenient place to start for purposes of the present matter is section 140 of the Act.

General duties and powers of a business rescue practitioner

[14] In order to enable the business rescue practitioner to prepare a business plan, the Act provides the company (and the business rescue practitioner) with several rights and safeguards. One of those rights relate to a moratorium against legal proceedings as provided for in section 133 of the Act, and another is the right to suspend the rights of any creditors under any agreements, as set out in section 136 of the Act. One of the safeguards available to business rescue practitioners is that provided for under section 140(3) of the Act. Section 140 of the Act states as follows:

"General powers and duties of practitioners

140 (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter-

(a) has full management control of the company in substitution for its board and pre-existing management;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

(c) may-

(i) remove from office any person who forms part of the pre-existing management of the company; or

(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and

(d) is responsible to-

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.

(1A) .....

(2) .....

(3) During a company's business rescue proceedings, 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;

(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and

(c) other than as contemplated in paragraph (b)-

(i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.

(4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.

[15] In terms of section 140(1)(a) a business rescue practitioner has full management control of the company in substitution for its board and pre-existing management. Section 137(2), however, provides that the directors of a company under business rescue must continue to exercise the "functions" of a director, subject to the authority of the practitioner and have a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so.[4] If the board of a company during business rescue proceedings, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.[5] A business practitioner alone determines the manner in which he (or she) will carry out his function. The business rescue practitioner has free rein to adopt any management, oversight, and control functions which he thinks appropriate to the carrying out of his

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[4] Section 137(2)(a) and (b).
[5] Section 137(4).

duties under the Act. [6] If the business rescue practitioner abuses the office he can be removed by the court on application by an interested person.[7]

[16] It is common cause that when the companies went into business rescue there was only one director of the Group left, namely Mr Driscoll, and he was in Dubai. There is no evidence to suggest that the respondent formally delegated any of his powers or functions to Mr Driscoll, or that Mr Driscoll participated in any of the decisions complained of. The respondent took over the day to day management of the Group and was saddled with the same duties, responsibilities and liabilities of a director of the Group. It is important to note that the respondent did not become a director: he took full management control of the company in substitution for its board. He did so in the performance of his duties as a business rescue practitioner.[8]

[17] Section 140(3)(b) states that a business rescue practitioner has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77, and section 140(3)(c) states that the business rescue practitioner, *"other than as contemplated"* in section 140(3)(b):

> (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but,
>
> (ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.[9]

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[6] See *Klopper NO v Ragavan* 2018 JDR 1258 (GJ).
[7] Section 139.
[8] See in this regard *Knoop and Another NNO v Gupta (Tayob Intervening)* (116/2020) [2020] ZASCA 163; [2021] 1 All SA 726 (SCA) (9 December 2020) at [34]
[9] Section 140(3)(c).

[18] The court *a quo* found that section 140(3)(c) is not applicable because of the words "*other than as contemplated in paragraph (b)*". The learned Judge found that section 140(3)(b) excludes the defence in section 140(3)(c) where a business rescue practitioner has breached his fiduciary duties as the *"ex officio director of the company."*

[19] In interpreting section 140(3) the court must attribute meaning to the words used in the legislation, having regard to the context provided, by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[10] In *City of Tshwane Metropolitan v Blair Atholl Homeowners Association,*[11] the SCA reiterated that a restrictive consideration of words without regard to context has to be avoided and the words have to be interpreted sensibly and not have an unbusiness-like result. These factors have to be considered *"holistically, akin to the unitary approach".*[12]

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18].
[11] [2019] 1 ALL SA 291 (SCA) at [61] to [68].
[12] At par [61].

[20] Was it the intention of the legislature to differentiate between a business rescue practitioner being liable as *ex officio* director of the company on the one hand and being liable as business rescue practitioner in the performance and exercise of his duties on the other hand? To answer this question this court needs to examine what is meant by the "duties, responsibilities and liabilities" of a director in section 75 to 77 of the Act and determine if it differ from that of a business rescue practitioner. Section 75 states that a director (practitioner) must disclose any financial interest in the company.[13] Section 76(3) states that a director (practitioner) must exercise its functions; (a) in good faith and for a proper purpose; (b) in the best interests of the company; and (c) with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director; and having the general knowledge, skill and experience of that director. Section 77(2) provides that a director (practitioner) may be held liable, in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director (practitioner) of a duty contemplated in section 75, 76(2)[14]or 76(3)(a) or (b); or in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of: (i) a duty contemplated

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[13] See in this regard *Knoop* supra at [35]

[14] Section 76(2): A director of a company must- *(a)* not use the position of director, or any information obtained while acting in the capacity of a director- (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or (ii) to knowingly cause harm to the company or a subsidiary of the company; and *(b)* communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-(i) reasonably believes that the information is- *(aa)* immaterial to the company; or *(bb)* generally available to the public, or known to the other directors; or (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

in section 76 (3)(c); (ii) any provision of this Act not otherwise mentioned in this section; or, (iii) any provision of the company's Memorandum of Incorporation.

[21] The legislature intended for the business rescue practitioner to have protection as he comes into a financially distressed company, clearly facing difficulties, with no board and often with no assistance at all. The words *"other than"* (used in section 140(3)(c)) is defined in the Oxford Dictionary to mean "apart from" or "differently from". Taking into consideration the context of Chapter 6 and specifically the intention of the legislature to afford the business rescue practitioner tailor made protection when he performs his duties as a business rescue practitioner, the words "other than" in section 140(3)(c), are in my view intended to mean that apart from the liabilities which a business practitioner may incur in terms of section 77, the business rescue practitioner will also be liable if he fails to perform his duties as business rescue practitioner in the circumstances set out in 140(3)(c)(ii) of the Act. The duties of a business rescue practitioner would for instance include the failure to convene meetings or to develop or implement the business rescue plan, or a failure to report to the creditors and other affected parties. That is why provision is made in section 139 of the Act to remove a business rescue practitioner if he neglects his **duties as a business rescue practitioner** or where he fails to deal with matters requiring attention in a regular and timeous fashion. (Emphasis added).

[22] Therefore, the business rescue practitioner will not be liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of a business rescue practitioner, except if the act or omission amounts to gross negligence. But such protection does not apply to the liabilities the business

practitioner may incur in terms of section 77, including the protection the court may afford to the business practitioner in terms of section 77(9).

[23] Section 77(9) provides that in any proceedings against a director (practitioner), other than for wilful misconduct or wilful breach of trust, the court may relieve the director (practitioner), either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that- (a) the director (practitioner) is or may be liable, but has acted honestly and reasonably; or (b) having regard to all the circumstances of the case, including those connected with the appointment of the director (practitioner), it would be fair to excuse the director (practitioner).

[24] The appellants contended before the court *a quo*, and before this court, that the respondent was not entitled to rely on section 77(9) because, although the section was mentioned in the plea, the facts in support of the defence was not pleaded. The appellants contend that, as a consequence, there was non-compliance with Rule 18(4) of the Uniform Rules of Court, and the defence ought to fail.

[25] The court *a quo* correctly found that this argument was unsubstantiated. In *Improfed (Pty) Limited v National Transport Commission,*[15] the Appellate Division, (as it then was) held that the whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed. The issues were clearly pleaded by the respondent. Evidence in support thereof need not have been pleaded.

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[15] 1993 (3) SA 94A at 107C – E.

[26] But, the appellants' contention must also fail for another reason. The respondent led extensive evidence on what he did during his tenor as a business rescue practitioner. Not only was evidence led in this regard, but he was also examined in an attempt to illustrate that he did not act reasonably and without negligence. In the circumstances the appellant's reliance on Rule 18 has no merit. The respondent was entitled to rely upon the provisions of section 77(9) of the Act.

[27] With these principles in mind it is this court's task to evaluate the evidence and to establish whether the court *a quo* erred in dismissing the claim against the respondent.

The section 134 claim

[28] While a company is subject to business rescue proceedings, it may dispose of property in the following circumstances: in the normal course of its business;[16] in a *bona fide* transaction at arm's length and for fair value;[17] or if it is undertaken as part of a business rescue plan.[18] Section 134(3) further regulates the position where property disposed of by the company is held by a creditor as security for its claim, or has a title interest over the property. The section stipulates that if a company under business rescue proceedings wishes to dispose of any such property, the company must, *inter alia*, obtain the prior consent of the creditor.

[29] Lombard had security over and title interest in all Boabab's book debts. The respondent was aware of this. It is common cause that he did not seek Lombard's consent before he disposed of the book debts. He also did not make payment to Lombard in order to discharge Boabab's indebtedness to Lombard. It is further

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[16] Section 134(1)(a)(i).
[17] Section 134 (1)(a)(ii).
[18] Section 134(1)(a)(iii).

common cause that the disposal was not in the ordinary course of Boabab's business and not in terms of a *bona fide* arm's length transaction or for fair value.

[30] The circumstances prevailing at the time of the disposal were the following: On 22 September 2014, Mr Pratt of Fasken Martineau Attorneys (instructed by Lombard) wrote to the respondent demanding an amount of R8,700,000.00 (which would increase to R10,400,000.00 at the end of the month) and informed the respondent that all present and future book debts had been ceded and constituted Lombard's outright collateral security. Mr Pratt further informed the respondent that because of the cession of book debts he needed to obtain written consent from Lombard in terms of section 134 of the Act, before he disposed of any book debts. On 26 September 2014, a certain Mr Kanarek responded to Lombard on behalf of the Group and requested Lombard to wait before enforcing its rights as "its claim was premature". In the interim, the respondent called for the first meeting of creditors which was held on 6 October 2014. At the meeting he told the creditors that he was of the opinion that the companies were rescuable.

[31] On 6 October 2014, Mr Pratt wrote another letter in which the respondent was, *inter alia,* reminded of his obligations under section 134, and wherein he was specifically referred to the judgment of *Kritzinger & Another v Standard Bank of South Africa* [19] in which the Free State High Court held that a cession of book debts was a cession *in securitatem debiti* and not an outright cession; that section 134 was therefore applicable to book debts; and that he had to obtain Lombard's consent

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[19] (3034/2013) [2013] ZAFSHC 215 (19 September 2013).

before disposal of any funds. The respondent testified that he did not, at the time, read the *Kritzinger* judgment, but handed it to Mr Van Deventer, his attorney, who advised him of the judgment's import and impact.

[32] On 7 October 2014, the respondent received a letter from Werksmans Attorneys. In the letter a demand was made on behalf of FirstRand Bank to pay over the book debts of the Group to FirstRand Bank by virtue of the cessions executed by the Group in favour of the Bank. On 10 November 2014, Lombard launched an urgent application for, amongst others, an order that the respondent account to it for the book debts collected by him since his appointment. An agreement was, however, reached between the parties, and Lombard abandoned its claim to the monies paid by trade debtors of the Group, but retained the right to obtain the accounting. The respondent testified that he was still of the view that he was entitled to utilise the funds that had been deposited into AML's bank account by Boabab's trade debtors because of the wording of the cessions and the impact of the moratorium against the enforcement of rights by creditors under business rescue. As set out above, the respondent obtained legal advice regarding the cessions from his attorney Mr van Deventer and which advice was endorsed by both senior and junior counsel (the timing of this advice is not common cause).

[33] On 25 November 2014, Werksmans Attorneys brought a liquidation application on behalf of FirstRand Bank. On the same day, the respondent published the business rescue plans that indicated the respondent's view that the Group was rescuable. The respondent accordingly opposed the liquidation application but, subsequent to filing an answering affidavit, Transnet sought leave to intervene in support of the liquidation of the Group. On 10 December 2014, there was an order issued out of the High Court

placing the Group and all its constituent companies into liquidation. The appellants were appointed as joint liquidators of the companies. They later convened an inquiry into IFC Logistics and subpoenaed the respondent and various other persons to give documents and evidence.

[34] The respondent submits that section 134 of the Act has no application to a cession of book debts, because such a cession does not constitute "property" as contemplated in the section, and the use of the funds by the respondent did not represent a "disposal" of such property. The respondent contends that cession of book debts, and in particular a cession *in securitatem debiti*, is irreconcilable with the use of the words "*disposal*" and "*sale proceeds*" in section 134(3)(a) and (b) of the Act. It is contended that the words "*sale proceeds attributable to that property*", can only imply two things: the first is that disposal is used in the context of a property that is sold; and the second is that it is not used in the context of defraying operating expenses or even advancing a loan, for there are no proceeds of a loan that may be given to the security holder. The respondent further contends that the legislature refers to "*the company*" in section 134(1)(a) and (b) of the Act, whereas in section 134(1)(c) of the Act, the legislature speaks separately of the "*practitioner*". As section 134(1)(c) contemplates the "*company*" securing the written permission of the practitioner in respect of the "*company*" wishing to dispose of property, it is arguable that section 134 as a whole is intended to regulate the circumstances where the company as opposed to the practitioner wants to effect a disposal of the company's assets.

[35] As a starting point it is important to keep in mind that the purpose of business rescue is to throw a lifeline to a company in financial distress in order to help keep it afloat in a manner that balances the rights and interests of **all relevant stakeholders**

(emphasis added).[20] Meskin[21] states that various mechanisms have been built into the system in order to ensure that the development and implementation of the plan takes place in a fair and equitable basis in regard to all stakeholders. The purpose of section 134 is to strike a balance between the interests of the company and third parties, and to specifically protect secured creditors from any potential prejudice that may flow from the actions taken by the company (or the business rescue practitioner) during the course of its business rescue proceedings.[22] In order to enable the business rescue practitioner to prepare a business plan, the Act provides the business rescue practitioner with several rights and safeguards. As stated, one of those rights relate to the right to suspend the rights of any creditors under any agreements, as set out in section 136 of the Act. It is, however, noteworthy that if a business recue practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purposes of section 134.

[36] The first issue that needs to be considered is the use of the words "*the company*" in section 134(1)(a) and (b) of the Act, whereas in section 134(1)(c) of the Act, the legislature speaks separately of the "*practitioner*". Does this mean, as contended by the respondent, that section 134 as a whole is intended to regulate the circumstances where the company as opposed to the practitioner wants to effect a disposal of the company's assets?

[37] When the Group was placed under business rescue the respondent took over the management control of the companies in substitution of the board. The word *"company"* in the context of section 134(1) therefore refers to the directors (if they are

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[20] Section 7(k)
[21] Section 128
[22] See *Diener NO v Minister of Justice and Correctional Services and Others* [2018] ZACC 48

still involved in any management function of the company) and, if they are no longer involved, as in the present matter, it refers to the business rescue practitioner ex officio director of the company. In terms of section 134(1)(a)(i) the *"company"* may dispose of property in the ordinary course of business, seemingly without the business rescue practitioner's consent. If, however, property is disposed of in a "*bona fide* transaction at arm's length" (section 134(1)(a)(ii)) the transaction must be approved in advance and in writing by the practitioner. Reference to the practitioner in this subsection clearly contemplates a situation where the directors are still involved in the company and have either been given a management function by the practitioner or where they are exercising the "functions' of directors.

[38] The second issue raised by the respondent is the interpretation of section 134(3) and the meaning of the word "property" and "sale proceeds". In the *Kritzinger* matter, the court held that the book debts of a company could not be treated as the property of the company any longer. This is so because the company ceded the book debts in favour of the bank to secure, *inter alia*, overdraft and other banking facilities. The court, however, still found that section 134 was applicable and stated as follows:

> *"The law is settled. Where a creditor holds security over a debtor's property, in this instance the company's debtors, the practitioner cannot dispose or use such incumbent property without the secured creditor's consent unless he first discharges the debtor's debt in favour of the creditor (Section 134(3)). In this instance the business rescue practitioner has done neither. Instead he has drastically subverted the secured creditor's security".*

[39] In *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd,*[23] Van der Linde J relied upon the finding in the *Kritzinger* judgment to come to the conclusion that whenever book debts arose they belonged to the cessionary, and may not be disposed of in terms of section 134(3) of the Act without the cessionary's consent.

[40] Counsel for the respondent, Advocate Chohan SC, contends that the dictum in *Kritzinger* (quoted above) is incorrect because a company's debtors do not constitute the company's property. It is the right to claim the debt owing that constitutes an asset of the company but where that right has been ceded, it no longer resides with the company and section 134(1) is not applicable. Adv Chohan SC further submits that the *BP Southern* judgment was handed down in relation to an application to set aside business rescue proceedings and the question of book debts was considered only insofar as the creditor's position was concerned. The conclusion by Van der Linde J, so it was argued, was therefore *obiter.*

[41] The conclusion of Van der Linde J, in *BP Southern* was, in my view, not merely an *obiter* statement. In paragraph 42 to 47 of the judgment the learned Judge specifically dealt with the status of the book debts in the context of section 134 of the Act and held:

> *"[46] No further obligation on the part of the cedent exists or is required to be performed become subjected to the rights of the cessionary, including, for instance, to recover the debt from the debtor. Even the reversionary right was ceded to the creditor in this agreement. That being so, there was no obligation of the first respondent arising from the cession of book debts that was capable*

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[23] 2016 JDR 2258 (GJ)

of being suspended, certainly not as regards the right of the cessionary to enforce the debts, albeit that they arose only in business rescue, and to allocate the proceeds towards the cedent's indebtedness to the cessionary.

[47] In consequence, whenever the first respondent's book debts arise, now or in the future, they belong to the applicant, at least to the extent of the first respondent's indebtedness to the applicant. They may not be "disposed of" without the applicant's consent, as provided in s 134(3)(a)".

[42] I agree with the reasoning and conclusion in both the *Kritzinger* and *BP Southern* matters, and I intend on following it. I am of the view that the cession of book debts constitute property for the purposes of section 134 of the Act. I say so for the following reasons set out more fully here below.

[43] The respondent admitted in his plea that Lombard had security over and title interest in Boabab's book debts. Section 134(3) states that if the company, during business rescue proceedings, wishes to dispose of any property over which another person has any security or title interest, the company must obtain prior consent. Firstly, the legislature did not state that it must be the "company's property" that is disposed of in section 134, but **any property** over which another person has a title interest or security. If a sensible meaning is given to the words "any property", it would therefore cover the current scenario and include the cession of book debts. Any other interpretation will leave a creditor in a similar position without any protection. The respondent contends that to make cession of book debts subject to section 134 would not make business sense, because most companies in financial distress have cession of book debts, and the possibility of creditors agreeing to the use of book debts is slim, which will ultimately result in the failure of the business rescue. It is, unfortunately, not

that simple. There are many companies that are successfully rescued, despite having ceded their book debts. It is, however, an aspect that must be weighed in considering whether the business rescue has prospects of success, and whether there is recourse to short-term capital. But, as stated by Van der Linde J in *BP Southern*:

> *"[80] Where a company is distressed, it is not always the solution to deny principal creditors — without whose preparedness, to have extended working capital in the first place, the business would not have existed at all — the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts are not prepared to enforce commercial securities, investment, the essential precursor to employment opportunities, will seek other pastures."*

[44] Secondly, as far as the "disposal" is concerned, it is not only the actual, physical disposal of property that is covered by this section.[24] If the legislature intended to only cater for the "selling" of property, it would have said so. The legislature, in my view, purposefully used the word "dispose" which, according to Collins dictionary means "to deal with or settle", "to give", "sell" or "transfer to another". On a proper reading of section 134 it is clear that the word "dispose", is not limited to the selling of property.[25]

[45] In *African Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & Others,*[26] Leach JA remarked that many of the provisions of the Act relating to business rescue, were shoddily drafted and have given rise to considerable uncertainty. The use of the words "sale proceeds" in section 134(3) is, in my view, one

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[24] Henochsberg on the Companies Act, Meskin, vol 1, at page 134.
[25] It is noteworthy that Van der Linde J in *BP Southern*, in dealing with the disposal of book debts, put the words "disposal of" in inverted commas.
[26] 2015 (5) SA 192 (SCA)

of those provisions and there is a need for it to be examined closer. In *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO,*[27] a decision of the Supreme Court of Appeal ("SCA") which also deals with business rescue proceedings, Wallis JA pointed out that:

> "*When a problem such as the present one arises the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. In doing so certain well-established principles of construction apply. The first is that the court will endeavour to give a meaning to every word and every section in the statute and not lightly construe any provision as having no practical effect. The second and most relevant for present purposes is that if the provisions of the statute that appear to conflict with one another are capable of being reconciled then they should be reconciled.....*"

[46] Section 134(3)(a) states that prior consent must be obtained, **unless** the proceeds would be sufficient to fully discharge the indebtedness. When it is accepted that the word "dispose" used in section 134 does not only contemplate the physical selling of property, but also the transfer of funds to another, there can be no "proceeds" or "sale proceeds" that can be paid over to the creditor. In that instance the company must provide "*security for the amount of those proceeds, to the reasonable satisfaction of that other person*" as contemplated in section 134(3)(b)(ii) of the Act. From a reading of the section as a whole, it was the intention of the legislature that the rights of the creditor will only be terminated on payment or the provision of other security. Neither have been complied with. It is therefore clear, in my view, that the respondent

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[27] *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) at [27]

breached the provisions of section 134 by disposing of the book debts without obtaining the prior consent of Lombard.

[47] Section 77(2)(b)(ii) of the Act provides that a director of a company (practitioner) may be held liable in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of any provision of this Act not otherwise mentioned in section 77. The court may, however, other than for wilful misconduct or wilful breach of trust, relieve the director (practitioner) in terms of section 77(9) from such liability if it appears to the court that the business practitioner may be liable, but has acted honestly and reasonably or, having regard to all the circumstances of the case it would be fair to excuse the business practitioner.

[48] Before I turn to section 77(9), it is apt at this stage, to briefly deal with the applicability of section 218 of the Act in the present matter. The appellants relied on section 218(2) of the Act in support of their claim against the respondent. The court *a quo* found that their reliance on this section was inappropriate and was an attempt to circumvent the indemnity a business rescue practitioner enjoys in terms of section 77(9).

[49] Section 218(2) states as follows:

> *"(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.*
>
> *(3) The provisions of this section do not affect the right to any remedy that a person may otherwise have."*

[50] In *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis and Others,*[28] Molopa-Sethosa J found that the appellants could not rely on section 218(2) of the Act for their reflective loss claim. The court reasoned as follows:

> *"Where a statute expressly and specifically creates liability for the breach of a section, then a general section in the same statute cannot be invoked to establish a co-ordinate liability; see Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 603. This is the result of the generalia specialibus non derogant maxim in terms of which general provisions do not derogate from special provisions."*[29]

[51] On appeal, the SCA,[30] quoted the court *a quo* with approval and stated, with reference to, *inter alia*, section 77(2)(b), that these provisions of the Act make it clear that the legislature decided where liability should lie for conduct by directors in contravention of certain sections of the Act and who could recover the resultant loss.

[52] The court *a quo* in the present matter found that the appellants' reliance on section 218(2) of the Act to claim damages from the respondent was inappropriate and misguided. I am in agreement with the finding of the court *a quo*. Section 218 of the Act is a general section that must submit to the specific section that caters for the wrongdoings of a director (and a business rescue practitioner). The legislature

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[28] 2019 (4) SA 569 (GP) (31 August 2018).
[29] At [30].
[30] *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others 2020 (5) SA 419 (SCA)* at [50].

provided for the manner in which a business rescue practitioner would be liable in terms of the Act. That is, *inter alia*, section 77 and 140(3) of the Act.

[53] I now turn back to section 77(9) of the Act. Section 77(9) of the Act bears resemblance to section 248(1) of the Companies Act, 1973 ("the 1973 Companies Act"), which reads:

> ***"Relief of directors and others by Court in certain cases***
>
> *If in any proceedings for negligence, default, breach of duty or breach of trust against any director, officer or auditor of a company it appears to the Court that the person concerned is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit".*

[54] Whereas section 77(9) allows a director to be relieved from liability either because he acted honestly and reasonably or if it would be fair to excuse the director,[31] section 248(1) of the 1973 Companies Act required both that the director has acted honestly and reasonably **and** that he ought to be fairly excused having regard to the circumstances.

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[31] *(a)* the director is or may be liable, but has acted honestly and reasonably; or
(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.

[55] In *Ex Parte Lebowa Development Corporation Ltd,*[32] the court provided guidance on the interpretation and application of section 248(1) of the 1973 Companies Act. In this matter the creditor requested the court to order a meeting of creditors to consider a proposal of judicial management and cession of the creditors' claims. Section 248 was not directly invoked (as the question of personal liability had not yet arisen) but the court considered its application in circumstances of fraud and negligence giving rise to liability. The court held that the requirement that the director acted honestly excludes the possibility of a director being relieved of liability for fraudulent conduct; and with reference to English authority, it held that section 248 cannot operate to relieve a director of liability to a third party – the section applies only to claims against the director by the company (or its liquidator).

[56] Section 248 of the 1973 Companies Act was substantially the same as section 448 of the 1948 United Kingdom (UK) Companies Act and section 727 of the 1985 UK Companies Act. The successor in the 2006 UK Companies Act is section 1157(1) which reads as follows:

> "*(1) If in proceedings for negligence, default, breach of duty or breach of trust against—*
>
> *(a) an officer of a company, or*
>
> *(b) a person employed by a company as auditor (whether he is or is not an officer of the company),*

[32] 1989 (3) SA 71 (T)

> *it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.*"

[57] Reasonableness is a factual enquiry. In *Re Pro4Sport Ltd (in liquidation),*[33] the court found that there was no breach of duties by a director and even if there had been, it would be appropriate to grant the relief under section 1157. In coming to this conclusion the court held that the question of whether the director acted honestly is subjective, and the question whether he acted reasonably was objective. The court held that the director bears the *onus* of proof to satisfy the court that he acted honestly, reasonably and should be excused from liability in the circumstances. Only once honesty and reasonableness have been proved does the court need to consider whether it would be fair to excuse the director from liability.

[58] In the present matter the previous practices of the company have a bearing when assessing the respondent's conduct.[34] The respondent's evidence in relation to the disposal of the book debts was uncontested. The respondent testified that when he took over the management of the Group, he realized that all six companies had always operated together and were completely interdependent on each other. Although Boabab had the Kudumane contract, it had been unable to service the contract in the

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[33] [2015] EWHC 2540 (CH) (also reported as *Hedger v Adams*)
[34] In *In Re* Duomatic Ltd [1969] 1 All ER 161 the Court (Chancery Division), the court held that the previous practices of the company had a bearing when assessing whether the conduct of a director was reasonable in the circumstances.

past without the other companies. As discussed earlier, each of the six companies within the Group, provided a specific function and there was not one company in the Group that had all of the assets or employees to service the Kudumane contract. Boabab invoiced Kudumane, but the monies so received were used to pay the expenses of all of the companies. The respondent made the decision to proceed in the same way the companies operated in the past, namely by using Boabab's funds to pay the expenses of the other companies, and in so doing, serviced the Kudumane contract. He was of the *bona fide* belief that Boabab's funds ought to be used to pay immediate operating expenses of the Group until such time as the business rescue plans were approved, after which further investigations could be conducted. He testified that without the payments, Boabab would have been unable to continue trading. This would have been detrimental to Boabab as well as the other companies.

[59] All of the foregoing must further be evaluated against the backdrop of the purpose of a business rescue and the chaotic position the respondent found himself in when he took over the management of the companies. Firstly, with regards to the purpose: business rescue proceedings are aimed at rehabilitating companies in distress. The Act provides for this through the appointment of a business rescue practitioner, who must be registered in accordance with and meet the requirements set out in section 138 of the Act. It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition.[35] Legislative recognition of this is reflected in the relatively short time periods which are provided for in the Act for

[35] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) at [10].

the implementation of such proceedings[36]. Leach JA elucidated this aspect in *African Corporation:*[37]

> "*As its very name suggests, the purpose of a business rescue plan is to throw a lifeline to a company in financial distress in order to help keep it afloat in a manner that balances the rights and interests of all relevant stakeholders. The process involves the preparation of a rescue plan designed either to assist the company's return to solvency or, should that goal be impossible, to provide a better return for creditors and shareholders than would be the case were the company to be immediately wound up. This plan is considered at a meeting of creditors and other holders of 'a voting interest' as defined in s 128(1)(j) of the Act at which inter alia representatives of the employees of the company are entitled to express their views. Should the plan be approved by those having a voting interest, the formal process comes to an end and the plan becomes binding. But if it is not approved, various options become available under s 153 of the Act, including an affected person acquiring the voting interest of a person opposed to the plan.*

[60] Secondly, the respondent was appointed as business rescue practitioner for six companies with 400 creditors across the Group. He had no, or little assistance from the director and previous directors of the Group. In about August 2014, when Efferton pulled out of the sale, there was no accounting or books or software accounting for what transpired during Efferton's tenure in charge of the Group. The financial

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[36] Section 132(3)
[37] 2015 (5) SA 192 (SCA)

documents that were available was incomplete. He testified that there was an enormous amount of paperwork generated daily (on average 600 pages) and that there were between 50 and 100 telephone calls a day, which included five of the biggest law firms in Johannesburg. He stated that all of this was discussed with Mr Van Deventer, his attorney, on a regular basis and the business rescue team worked up to 14 hours a day, including Saturday and half of Sunday. He testified that he did not ignore the letters which were sent by Fasken Martineau and Werksmans Attorneys, but that he did not have the time available to send detailed letters. He considered his telephone calls with Mr Pratt to be sufficient. He stated that he also had a consultation with Mr Pratt on 30 September 2014, during which he informed Mr Pratt that he was using the income for the continuation of the business rescue and that there were several other cessions which he had received, not in relation to Lombard. He also informed Mr Pratt that he did not agree that Lombard was entitled to claim all the monies paid from Kudumane on the strength of a cession. The respondent testified that although he did not read the *Kritzinger* judgment himself, he handed it to Mr van Deventer, who advised him that it was not applicable to a cession of book debts.

[61] On a conspectus of the evidence presented, it cannot be said that the respondent committed wilful misconduct or that he acted in willful breach of trust. The respondent was reasonable, honest and *bona fide* in his attempts to rescue the companies, as was his mandate. He could not treat Boabab and the remaining companies as separate entities for the reasons set out above. For one to function, the remaining companies had to function. It would be counterintuitive to the role of the business rescue practitioner to stop trading where he determined the company/companies could be rescued. He is excused from any liability in terms of section 77(9) of the Act. In the alternative, he ought to be excused on the basis of the principles of fairness. A

business rescue practitioner, such as the respondent, ought not to be held personally liable under the circumstances.

The fiduciary duties claims

[62] The second and fourth claims against the respondent are similar in that they both allege a breach of the respondent's fiduciary duties to Boabab and therefore allege that he is liable to the appellants. In addition, the appellants allege that the respondent was negligent. The appellants allege further that at the time of making the disposal, the respondent knew the companies were financially distressed and a business rescue plan had neither been proposed nor approved in relation to any of the companies. Consequently, the respondent was in breach of the respondent's fiduciary duties to Boabab and/or a breach of section 76(3) of the Act.[38] In their response to the respondent's request for further particulars, the appellants, in addition, alleged that the respondent was reckless in effecting the disposal as: the company was financially distressed and/or insolvent; the disposal amounted to an undue preference; there was no certainty that the business rescue plans would be approved; Transnet already refused to provide services to the Group; the respondent was aware that the debtors' book had been ceded to creditors; and the Companies were financially distressed and/or insolvent. The appellants contend that upon realizing that Boabab was not rescuable, the respondent had an obligation to inform all innocent parties and stop the business rescue.

[63] Section 76(3) of the Act states that a director must exercise the powers and perform the functions of director:

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[38] The section does not exclude the common law duties.

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person:

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

[64] Section 76(4) states that a director will have satisfied the obligations of subsection (3)(b) and (c) if: the director has taken reasonably diligent steps to become informed about the matter; and the director made a decision... and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company.[39] The director is entitled to rely on one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided; legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters within the particular person's professional or expert competence.

[65] Henochsberg[40] in the commentary on section 76(3) of the Act states as follows:[41]

"The common law position is that a director has to act bona fide and in the best interests of the company. This is the fundamental duty which qualifies the exercise of any powers which the directors in fact have . . . . The duties to act bona fide and in the best interests of the company are now entrenched in

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[39] Section 76(4)(a)(i) and (iii).
[40] At page 298(8).
[41] In *Hlumisa Investment Holdings supra,* the SCA cited the commentary on section 76(3) with approval.

the Act . . . . With regard to the duty to act in the best interests of the company and who the beneficiary of a director's duty is, the common law position is as follows: At common law directors owe fiduciary duties to the company . . . . Such duties are owed even by non-executive directors . . . . Where, therefore, a director acts in breach of a fiduciary duty he may, depending on the circumstances, also act in breach of his duty of care, skill and diligence . . . It is accepted that when considering the best interest of the company the directors should take a long-term view, but not necessarily in preference to the short-term benefits...."

[66] The duty of "good faith and for a proper purpose" and the duty to act for the benefit or best interests of the company are two separate duties. The "proper purpose" duty entails in the first instance that the director must not exceed the limitations of his own authority and must not exceed the limitations of the company. In the second instance a director must exercise the duties only for the purpose for which they were conferred and not for an "improper" purpose.[42] In respect of the duty of care, skill and diligence an objective test is applied to determine what the reasonable director would have done in the same situation as well as a subjective test which takes into account the general knowledge, skill and experience of the specific director.

[67] Should the respondent have realized that Boabab was not rescuable, and was there an obligation to inform all innocent parties and stop the business rescue? Consideration should be given to what transpired in *Commissioner for the South African Revenue Service v Beginsel and Rennie NNO and Others.*[43] In that case the

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[42] Henochsberg at page 298(9).
[43] 2013 (1) SA 307 (WCC).

business rescue practitioners concluded that there was no longer any reasonable prospect for rescuing the company they were appointed to supervise. Instead of informing the court and all affected persons of this fact and applying to court for an order discontinuing the business rescue proceedings in terms of section 141(2)(a), the business rescue practitioners proposed a plan in terms of which the assets of the company would be sold and in so doing demonstrated that a better return to creditors as a whole would be obtained than would be the case if the company was immediately liquidated. In terms of the proposed business rescue plan, which was later adopted by the majority of creditors as required by the Act, the claim by the South African Revenue Service (SARS) was treated as unsecured and would consequently only receive a concurrent dividend in terms of the plan. However, if the company were to be placed in liquidation, the SARS claim would be treated as preferent under section 99 of the Insolvency Act and would probably be paid in full. As a result, SARS argued that there was an obligation on the part of the business rescue practitioners to apply to have the company wound up when they realised it was no longer possible to rescue the company. Fourie J came to the conclusion that the secondary objective of business rescue, namely, to ensure a better return for the company's creditors than would be the case if the company was to be liquidated, would be achieved in this case, especially considering the additional costs that would result if the company were to be placed in liquidation. Consequently, the court ordered that the business rescue practitioners did not have to apply for the liquidation of the company in terms of section 141(2)(a).

[68] By parity of reasoning, the respondent was engaged from 12 September 2014 to November 2014 with attempting to rescue six companies. He took strides in reducing their workforce, their wage bills and other expenses. He entered into negotiations with

Transnet to resume rail transportation and whilst admittedly, he initially met with resistance, he was *bona fide* of the view that with Mr Driscoll gone, the way was open to resume constructive dialogue and, ultimately, a beneficial rail concession. The suggestion by the appellants that the respondent ought immediately to have advocated for the liquidation of the Group is to adopt retrospectively an armchair approach devoid of the realities of business rescue. This is, as submitted by the respondent, not surprising because there is likely always to be tension between a business rescue practitioner who is trying to save a company and a liquidator who is responsible for the winding up of the company.

[69] During the short time he was in control of the Group, the respondent dramatically reduced the number of employees by retrenching the entire work force of 650 and re-hiring 150 employees. As a consequence of the foregoing, the salary bill went from R7 million to between R3 million and R3.5 million. Assets, in the form of leased properties, were reduced from 17 to 5 or 6, and trucks and trailers, which were not strictly required for the service of the contracts, were returned to the banks which held security over those vehicles. The respondent always acted pursuant to legal advice, including that of an attorney, a junior and a senior counsel.

[70] In respect of the allegation that the respondent breached his fiduciary duties, the learned Judge found that "*to the extent that the transactions that he* (the respondent) *made using the ceded assets relate to expenses incurred by the other five companies to service contracts located in Boabab, they were made in good faith, for a proper purpose and in the interests of Boabab.* The court *a quo* also found that the respondent's conduct is "*what a reasonable director, acting with care, skill and diligence would do in the circumstances to ensure that there is still business.*"

[71] I am in agreement with the court *a quo's* finding. As alluded to above, the respondent genuinely held the belief that he could trade the companies out of business rescue. He took reasonably diligent steps to become informed about the cession and had a rational basis for believing that the funds should be used to pay for the debts of the Group. He had a *bona fide* believe that it was in the best interests of the company. Had he not utilised the amounts received from Boabab's debtors to pay Group expenses, including those of Boabab, Boabab would not have been able to trade and satisfy its obligations under the Kudumane contract and thus generate further revenue. The Group including Boabab would have perished and as the business rescue practitioner, his aim was to save them from such peril. In the circumstances, he was not reckless nor was he negligent. He acted reasonable, in good faith and in the best interest of the company.

[72] In any event, the respondent is excused from any liability in terms of section 77(9) of the Act.

The Section 45 claim

[73] As stated previously, it is common cause that the respondent applied Boabab's funds to extinguish obligations of IFC Group and/or Kalahari and/or IFC and/or Development and/or Logistics.

[74] Section 45 reads as follows:

"45 Loans or other financial assistance to directors

(1) In this section, ***'financial assistance'****-*

(a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but

(b) does not include-

(i) .....

(ii).....

(iii).....

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).

[75] The appellants alleged that the disposal constituted "financial assistance" to an "inter-related company", as provided for in section 45 of the Act and that the respondent contravened section 45 because he failed to consider and comply with the requirements of section 45. The requirements include, *inter alia*, a special resolution of the shareholders, which must be adopted within two years preceding the financial assistance; ensuring that the company will satisfy the solvency and liquidity test immediately after providing the financial assistance; and that the terms under which the financial assistance is provided are fair and reasonable to the company.[44] In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

[76] The respondent conceded that he did not attempt a solvency or liquidity test and that the company did not pass a special resolution as required by section 45(3)(a)(ii)

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[44] Section 45(3)(a) and (b).

and 45(3)(b) of Act. The respondent, however, submitted that there was no need to comply with the requirements as section 45 of the Act is of no application to proceedings under business rescue, and even if it was applicable, it was limited to the provision of financial assistance to a director, which in the present instance, did not occur. The respondent further contended that if it is found that section 45 was applicable, he is in any event excused from liability in terms of section 77(9) of the Act, because he acted honestly and reasonably, alternatively, it would be fair for him to be excused. I will deal with each of these submissions under separate headings hereunder.

Is section 45 limited to a director/prescribed officer?

[77] Section 45 (2) provides that '*the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company,* ***or to a related or inter-related company or corporation,*** *or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).*" (Emphasis added). It follows accordingly, and on an ordinary grammatical reading of section 45(2), that although section 45 of the Act is titled *"Loans or other financial assistance to directors"*, it is clearly not limited to directors. It also includes financial assistance to related or inter-related companies. It is common cause on the pleadings that Group, Kalahari, IFC, Development and IFC Logistics are related, or interrelated companies of Boabab as defined in the Act.

Is section 45 applicable to companies under business rescue?

[78] The respondent submits that the provisions of section 45 of the Act are at odds with the ambit and purview of Chapter 6, and is only applicable to those companies that are not under business rescue. It is submitted that this is so for the following

reasons: firstly, when a company is under business rescue, it is always financially distressed, else it would not be under business rescue, *ergo* section 45 is inappropriate and inapplicable; secondly, the object of the section is redundant in relation to companies under business rescue, because Chapter 6 has its own safeguards regarding disposals made by the company during business rescue; thirdly, the respondent is deemed to have the responsibilities of a director of the distressed company, but he is not a director. Although the financially distressed company's directors remain directors, they do not have management control and can take no resolution regarding financial assistance.

[79] I disagree. Financial assistance, in terms of section 45(1),*"includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation"* . The use of the word 'includes' in section 45(1)*(a)* is wide-ranging and indicates that the types of transactions referred to are not an exhaustive list of what constitutes financial assistance. If the list was intended to be exhaustive, the legislature would have said so. Financial assistance therefore includes, but is not limited to, the lending of money, guaranteeing a loan or other obligation, and securing any debt or obligation.

[80] Whilst a company is under business rescue a situation might arise where it is asked to provide 'financial assistance" to a director or to an interrelated company. Section 45 is not excluded by Chapter 6 and when such a situation arises, there has to be compliance with the requirements set out in section 45.[45]

[81] The provision of financial assistance or any agreement in respect of such assistance, is void to the extent that such financial assistance is contrary to Section

[45] See Henochsberg at page 510(3) where the author discusses the application of section 46 and section 48 in respect of a company under business rescue.

45 of the Act or any provision of the Memorandum of Incorporation of the company. The consequence is that the directors of the company may be held personally liable for any loss, damage, or costs sustained by the company as a consequence of any breach by the director in terms of section 77(2)(ii) of the Act.

Did the respondent provide "financial assistance"?

[82] The appellants' case in relation to section 45 is predicated on journal entries between the companies that reflect inter-company loans between them. The appellants, in order to succeed, had to demonstrate that when the respondent utilised the funds received by him to discharge the Group's obligations, he rendered financial assistance to the other companies in the Group.

[83] The respondent testified that when he took over the management of the Group, he soon realized that all six companies operated together and were completely interdependant on each other. Although Boabab had the Kudumane contract, it was unable to service the contract without the other companies. As discussed earlier, each of the six companies within the Group, provided a specific function and there was not one company in the Group that had all of the assets or employees to service the Kudumane contract. Boabab invoiced Kudumane, but the monies so received were used to pay the expenses of all of the companies. The respondent further testified that without the payments, Boabab would have been unable to continue trading. He denied that the amounts paid by Boabab in respect of the other companies' expenses constituted loans, but were rather payments for services rendered.

[84] There is no evidence to gainsay the respondent's testimony. In the matter of *Treasurer-General v Lippert*,[46] Smith J held that a court should look to what a transaction is intended to be, and really is, rather than to what it is described as being. Paying the expenses of the other companies is not "financial assistance" as contemplated in section 45. But, even if it was, I am of the view that the respondent should be excused in terms of section 77(9) as he acted honestly and reasonably, alternatively it would be fair to do so.

THE LOSS

[85] The court *a quo* found that the appellants had not established any loss by Boabab. The appellants do not attempt to deal with this considerable hurdle in their heads of argument.

[86] The appellants claim the sum of R24, 228,315.61 from the respondent on the basis that this is the amount representing Boabab's loss. It is, however, evident on the common cause facts that Boabab did not suffer a loss of R24, 228,315.61. The appellants simply adopt the figure that represents the actual receipt by the respondent of proceeds of the book debts as the loss suffered by Boabab. This, as correctly pointed out by counsel for the respondent, is an erroneous assumption. The appellants, firstly, failed to consider the fact that as a result of the respondent's use of those funds, sales in an amount of approximately R18 million were generated post business rescue. Secondly, it ignores the fact that Lombard's claim was for approximately R18 million and that it received a distribution of approximately R14 million from the liquidators leaving a deficit of only R4 million. Thirdly, it ignores the

[46] (1880) ISC 291 (per Smith J)

fact that some of the expenses paid by the respondent were directly those of Boabab and should be accounted for. Fourthly, it fails to consider that the respondent had utilised some of the monies received by him before he even received any demands from Lombard or FirstRand Bank. These monies, should likewise be discounted. Lastly, despite the fact that the respondent requested further particularity from the appellants as to why Boabab's funds were irrecoverable and what steps were taken to recover Boabab's funds, there was no evidence that the amounts utilised by the respondent were irrecoverable.

[87] The appellants had not established that the funds were irrecoverable or that they have attempted to recover Boabab's funds. On this basis alone, the appellants have failed to make out a case.

CONCLUSION

[88] The respondent is not liable to the appellants and the appellants' appeal should be dismissed with costs, inclusive of the costs occasioned by the employment of two counsel.

[89] In the result the following order is made:

> "The appeal is dismissed with costs of two counsel, which includes the costs of senior counsel."

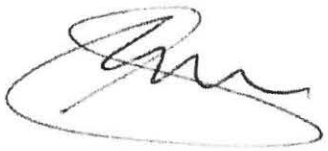
L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

I agree.



S.C. MIA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

I agree.

M.M.P. MDALANA-MAYISELA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement 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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 April 2021.

APPEARANCES

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Attorneys for the appellants:	De Vries Incorporated
Counsel for the respondents:	Advocate M.A. Chohan SC
	Advocate L.J. Choate
Attorneys for the respondents:	Webber Wentzel
Date of hearing:	30 November 2020
Date of judgment:	20 April 2021