**REPUBLIC OF SOUTH AFRICA**

**NORTH GAUTENG HIGH COURT**
**PRETORIA**

19/12/2014

**CASE NO: 70637/13**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19-12-2014 p.p Motawajele
DATE SIGNATURE

In the matter between:

| | |
|---|---|
| **ABSA BANK LIMITED** | Applicant |
| and | |
| **GOLDEN DIVIDEND 339 (PTY) LTD** | First Respondent |
| **ETIENNE NAUDE N.O.** | Second Respondent |
| **COMPANIES AND INTELLECTUAL PROPERTY COMMISSION** | Third Respondent |

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**JUDGMENT**

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**LAZARUS AJ:**

**Introduction**

1. ABSA Bank Ltd ("the bank") is a creditor of Golden Dividend 339 (Pty) Ltd ("the company"), which has been placed in business rescue. The bank has applied to terminate the business rescue proceedings and place the company in liquidation.

2. The second respondent is Etienne Naude ("Naude") who has been appointed as the business rescue practitioner of the company. Naude has also opposed this application together with the company.

3. In this judgment I shall refer to the company and Naude collectively as "*the respondents*".

**Background**

4. As at 7 July 2013, the company was indebted to the bank in an amount of approximately R6 million arising from a loan agreement concluded between the bank and the company in April 2006. As security for the loan a first mortgage bond was registered over the company's immovable property. Notwithstanding the service on the company of a letter in terms of s 345 of the Company's Act 61 of 1973 on 25 July 2013 the company failed to pay or secure or compound the amount owing by it.

5. On 27 August 2013 the company's board of directors passed a resolution placing the company in voluntary business rescue proceedings on the basis that the company was financially distressed. Pursuant thereto and on 2 September 2013 Naude was appointed as business rescue practitioner for the company.

6. On 4 October 2013 Naude published a business rescue plan. In addition to reflecting the company's indebtedness to the bank, the plan reflected ITV Capital (Pty) ("ITV") as a creditor of the company in the amount of R30 million as a debenture holder. The bank is suspicious of whether ITV is a truly independent creditor but this application is not concerned with whether or not ITV is a bona fide independent creditor and I have not been asked to make any determination in this regard.

7. A meeting was held on 8 October 2013 to discuss the business rescue plan. After acknowledging that inadequate notice of the meeting had been provided to affected persons, Naude advised that the meeting would not take place. Naude then requested that the period within which the business rescue plan be published be extended and ITV's representative agreed to the granting of an extension. Naude advised that the meeting would take place on 22 November 2013. Naude withdrew the business rescue plan published on 4 October 2013 and advised that a new plan would be published by 11 November 2013.

8. The rescheduled business rescue meeting took place on 22 November 2013 notwithstanding the bank's representative's request that the meeting be postponed pending determination of this application, which had been launched the previous day on 21 November 2013. ITV's representative was also present at the meeting.

9. During the discussion of the business rescue plan the bank's representative argued that the plan could not be adopted as it did not comply with the requirements of the Companies Act 71 of 2008 ("the Act") in numerous respects including Naude's proposed remuneration and the certificate as contemplated in s 150(5) of the Act. In the course of the discussion, Naude indicated that he would amend the plan to address certain issues raised by the bank's representative and would in addition provide a new certificate.

10. Following the discussion of the plan, the proposed amendments were then discussed. ITV's representative moved for the amendments but the bank's representative would not second them. The meeting was adjourned for 30 minutes for Naude to revise the plan. At the resumption of the meeting, Naude handed out amended pages of the plan together with a new certificate. The amended plan was put to the vote. Although the bank voted against, Naude announced the adoption of the amended plan with some 89% of voting rights in favour.

**The relief sought**

11 In its amended notice of motion, the bank seeks an order in the following terms:

> 1. *That leave be granted to the applicant in terms of section 133(1)(b) of the Companies Act, 71 of 2008 to institute this application against the first respondent:*
>
> 2. *Declaring that:*
>
> 2.1 *the business rescue plan published by the second respondent on 11 November 2013 ("the plan") is unlawful and invalid because it was not published within the time period stipulated in terms of section 150(5) of the Act; and/or*
>
> 2.2 *the plan does not comply with the requirements of section 150(2) to (4) of the Act and that the plan is therefore unlawful and invalid; and/or*
>
> 2.3 *the purported adoption of the plan at the meeting held on 22 November 2013 in terms of section 151 read with section 152(2) of the Act is unlawful and invalid.*
>
> 3. *That the resolution taken by the board of directors of the first respondent on 27 August 2013, placing the company under supervision and in business rescue, be set aside in terms of section 130(1)(a)(ii), alternatively section 130(5)(a)(ii);*
>
> 4. *Declaring that the first respondent's business rescue proceedings have terminated;*
>
> 5. *Declaring that the agreement dated 18 September 2013 relating to the second respondent's remuneration is unlawful and invalid in that:*
>
> 5.1 *it was not approved at any meetings as contemplated in terms of section 143(3) of the Act: and*
>
> 5.2 *the agreement does not relate to remuneration to be calculated on the basis of a contingency as referred to in section 143(2)(a) or (b) of the Act.*

6. *That the first respondent be placed in liquidation in the hands of the Master;*

7. *Directing that the costs of this application be costs in the first respondent's liquidation, alternatively that any party or parties opposing this application, jointly and severally, be directed to pay the costs of the application;*

8. *Further and/or alternative relief.*

12. I shall deal with the relief sought under the following headings:

12.1. The publication of the business rescue plan and in particular whether the plan was published outside the time limits prescribed in terms of s 150(5) of the Act;

12.2. The contents of the business rescue plan and in particular whether the plan complies with the requirements of s 150(2) – (4) of the Act;

12.3. The adoption of the business rescue plan and in particular whether the plan was adopted in accordance with the requirements prescribed in terms of s 151 read with s 152(2) of the Act.

12.4. The resolution of 27 August 2013 placing the company under supervision and in business rescue and in particular whether the resolution falls to be set aside on the ground that there is no reasonable prospect for rescuing the company, alternatively, if, having regard to all the evidence, it is otherwise just and equitable

to do so as contemplated in s 130(1)(a)(ii) and s 130(5)(a)(ii) respectively;

12.5. The agreement relating to Naude's remuneration and in particular whether the agreement complies with the requirements prescribed in s 143 of the Act.

13. At the commencement of the hearing of the matter, counsel for the respondents requested that their contention, that the failure of the bank to join the company's creditors as parties to this application constitutes a material non-joinder, be dealt with separately from the merits of the matter. I declined this request as I was of the view that it would be more convenient for the whole matter to be heard together and for the joinder issue to be dealt with as part of my judgment in the matter as a whole. I will accordingly deal with this issue first.

**Was it necessary to join all creditors?**

14. The bank notified the company's creditors of this application by email but did not join the creditors as parties to the application. The respondents' allege that the failure to join the creditors constitutes a material non-joinder and the application should be dismissed on this basis.

15. The respondents contend that the effect of an order declaring that the business rescue plan is unlawful and invalid is that it would undo a plan for

which the majority of creditors voted and in terms of which all the creditors are bound and would require all creditors who have been paid pursuant to the plan to repay such amounts to the company. The respondents thus contend that such creditors would be prejudiced if such an order was granted and accordingly they have a direct and substantial interest in the relief sought by the bank. Consequently, the respondents contend, such creditors ought to have been joined as parties in the application.

16. Relying on the *locus classicus* on joinder of necessity, *Amalgamated Engineering Union v Minister of Labour*[1], the respondents argue that the fact that notice to the company's creditors was provided in accordance with the relevant provisions of the Act does not mean that creditors that have a direct and substantial interest in the proceedings need not be joined. Notice of the proceedings, they contend, is not a substitute for joinder and accordingly the court should not entertain the matter until all persons who have an interest in its outcome have been joined.

17. In support of their argument, the respondents rely on the judgement of Ismail J in *Absa bank Ltd v EJ Naude N.O and Others*[2] *(unreported North Gauteng High Court Johannesburg case number 66088/2012)* in which the learned Judge expressed the view that in an application which seeks to set aside a business rescue plan the applicant ought to have joined the company's creditors.

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[1] 1949 (3) SA 637 (A) at 649 and 659 – 660.
[2] Unreported North Gauteng High Court case number 66088/2012, presently on appeal

18. Although similar, that case is distinguishable from the present in that no notice of the application appears to have been given to creditors in that case. Indeed the issue of joinder was raised in the context of the applicants' failure to give creditors notice[3] and in that context joinder would have remedied the failure to give notice to creditors in accordance with the Act.

19. To the extent that Ismail J intended to find that, notwithstanding compliance with the notification provisions of the Act, it is nevertheless necessary to join creditors in an application such as the present, such finding seems incongruous with Chapter 6 of the Act when read as a whole.

20. In terms of s 130(1) of the Act, any time after the adoption of a board resolution commencing business rescue proceedings until a business rescue plan is adopted, an affected party may apply to court for an order, *inter alia*, to set aside the resolution.

21. Section 130(3) requires an applicant seeking such relief to -

> *"(a) serve a copy of the application on the company and the Commission; and*
>
> *(b) notify each affected person of the application in the prescribed manner."*

[3] At paragraph [24].

22. Section 130(4) provides that

> *"Each affected person has a right to participate in the hearing of an application in terms of this section."*

23. Participation by creditors is specifically provided for in s 145. ss (1) of which provides as follows -

> *(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.*

24. In interpreting these provisions in Chapter 6 of the Act, I am mindful of the dicta of Wallis JA in *Natal Joint Municipality Pension Fund v Endumeni Municipality* that "*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*".[4]

25. As regards the language of the provision itself, paragraphs (a) and (b) of s 130(3) distinguish between the applicant's duty to 'serve' the application

[4] 2012 (4) SA 593 (SCA) at 604.

on the company and the Commission and to 'notify' affected persons of the application. The section plainly does not require that affected persons (defined in s 128(1)(a) to include creditors) be joined as parties in the application.

26. Notification must be 'in the prescribed manner'. The Act and Companies Regulations, 2011, published under GN R351 in GG 34239 of 26 April 2011 provide specifically how notification is to be given to affected persons. Joinder is not required.

27. By virtue of s 130(4), affected persons are entitled as of right to participate in the hearing of an application in terms of s 130. I rely in this regard on the judgment of Rogers AJ in *Cape Point Vineyards v Pinnacle Point Group Ltd and Another (advantage Projects Managers (Pty) Ltd Intervening)*[5], which although dealt with s 131(2) and (3) is similarly applicable to s 130(3) and (4) by virtue of the identical wording of the respective sections.

28. An interpretation that joinder of creditors is necessary, notwithstanding compliance with the notification provisions of the Act and regulations, would render s 130(4) superfluous because if creditors were required to be joined there would be no purpose in expressly providing them with the right to participate in the proceedings.

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[5] 2011 (5) SA 600 (WCC) at 606, applied in Engen Petroleum Ltd v Multi Waste (Pty) Ltd 2012 (5) SA 596 (GSJ) and AG Petzakis International Holdings (Ltd) v Petzakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another (Intervening) 2012 (5) SA 515 (GSJ)

29. To regard the provisions of s 130(4) as having been inserted into the Act *per incuriam* is contrary to the well-approved canon of construction that a statute should be construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.[6] I must therefore assume that the Legislature deemed it sufficient for affected parties to be notified of such proceedings and did not deem it necessary for such parties to be joined.

30. Wallis JA states further in *Joint Municipality Pension Fund* that "*A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document*".[7] In *Cape Point Vineyards*, Rogers AJ raises the spectre of thousands of affected persons having to be given notice of an application to place a company under supervision and to commence business rescue proceedings in the case of a large public company.[8] Rogers AJ questions the appropriateness of the requirement in regulation 124 of the Companies Regulations that the full application must be delivered to affected parties. To require, in addition to notice, the joinder of all affected parties to an application brought in terms of s 130(1) is even more inappropriate and would lead to insensible and unbusinesslike results.

31. I am accordingly satisfied that it was not necessary for the company's creditors to be joined as parties in this application.

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[6] Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd 1993 (4) SA 110 (A) at 116
[7] At 604, paragraph [18].
[8] At 604 – 605, paragraphs [15] to [16].

**The publication of the business rescue plan**

32. It is common cause that the meeting of 8 October 2013 was invalid because the meeting was called without the requisite notice having been given in terms of s 151(2) of the Act.

33. At that meeting, ITV as the majority creditor purportedly granted permission in terms of s 150(5)(b) of the Act for the business rescue plan to be published outside of the time limits prescribed by the Act. The question is whether the permission was validly given.

34 More particularly the question is whether the majority creditor (or a majority of creditors together) can act in accordance with 150(5)(b) outside of a meeting of creditors. If a meeting of creditors is required and that meeting is invalid it follows that any resolution taken at that meeting will also be invalid. However if a meeting of creditors is not required then the extension of the time to publish the plan given by ITV would be valid and the plan would have been published within the extended time frame given at the 8 October meeting.

35. Section 150(5)(b) provides as follows:

> *(5) The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by -*

*(a) ...*

*(b) the holders of a majority of the creditors' voting interests.*

36. According to the respondents the fact that the business rescue plan could not be considered at the 8 October meeting (because of improper notice) does not mean that the majority creditor could not give an extension in terms of s 150(5)(b).

37. In contending that a valid meeting of creditors was required, the bank relies on *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*.[9] In that matter Gorven J stated as follows:

> *[29] This brings me to the manner in which an extension can be allowed by creditors under s 150(5)(b). As already mentioned, business rescue proceedings contain strict parameters. The business rescue practitioner is vested with certain rights, powers and obligations. Section 145(1)(a) gives each creditor a right to notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings. Formal meetings of creditors and other affected persons are provided for and envisaged for each step. Section 151(3) makes special provision that the meeting, which is required to be convened within 10 days after publication of the plan for its consideration, may be adjourned from time to time. This provision does not lend credence to a submission that the legislature envisaged an informal approach to extending the time period.*
>
> *[30] There is also no mechanism given in the Act to determine the views of affected persons, other than by a vote at a meeting. How would creditors become aware of whether the majority had allowed an extension? Each step of business rescue proceedings is geared to promote certainty as to the status of the proceedings. Certainty would not be achieved by construing a lack of response to the practitioner as a positive*

[9] 2014 (1) SA 103 (KZN) at 116, paragraphs [29] – [32].

> *agreement to adjourn. The views of affected persons could not be independently established, as is the case at a meeting. Affected persons would have to rely on the practitioner as to the outcome of the request because any response would be directed to him or her alone. This is not subject to independent verification or challenge. The contents of a phone call or face-to-face communication, for example, would not be verifiable unless recorded by some mechanism.*
>
> *[31] ...*
>
> *[32] It is my view, on a conspectus of the structure of business rescue proceedings, that a meeting must be convened and a vote taken in order for it to be said that a majority of creditors 'allowed' an extension of time. This was not done. No extension was therefore allowed by creditors as envisaged in s 150(5)(b). This means that the business rescue proceedings came to an end after the 25-day period elapsed. If this is not the case, this application can and should bring them to an end by setting aside the resolution on the just-and-equitable ground.*

38. I am in respectful disagreement with Gorven J on this issue. As stated by the learned judge, formal meetings of creditors and other affected persons are expressly provided for and envisaged for each step of the business rescue proceedings. Section 150(5)(b), however, does not expressly require a meeting to be held to extend the time periods for the publication of a business rescue plan. There is no formality other than that the extension be allowed by "*the holders of a majority of the creditors' voting interests*".

39. The Court's mandate is to interpret and apply legislation not to rewrite it. As cautioned by Wallis JA in *Natal Joint Municipality Pension Fund*[10] "*Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words*

[1] *Supra* at 604

*actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation*". In my respectful view, Gorven J's interpretation of s 15(5)(b) does precisely that; it crosses the divide between interpretation and legislation and substitutes the words actually used with what is regarded by the learned judge as a more reasonable, sensible and businesslike interpretation.

40. In the present matter, it is not disputed that ITV as the holder of a majority of the creditors' voting interests granted permission for the business rescue plan to be published outside of the time limits prescribed by the Act. It is also not disputed that the meeting at which extension was given was an invalid meeting.

41. Since, in my view, a meeting is not required for an extension to be valid, the allowing of an extension is not invalid simply because it was given at a meeting that was invalid for other purposes of the Act.

42. I therefore find that the time periods for the publication of the business rescue plan were validly extended.

**The contents of the business rescue plan**

43. In terms of s 150(2) of the Act, the business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan. The section requires a

plan to be divided into three parts (background, proposals, assumptions and conditions) and specifies the minimum information required for each part, by listing information that must "*at least*" be included

44. In *Commissioner, South African Revenue Service v Begrinsel NO and Others*[1] Fourie J commented on these minimum requirements as follows:

> *"A perusal of s 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 since it would differ from case to case, depending on the peculiar circumstances in which the distressed company finds itself. It follows, in my view, that upon a proper construction of s 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 s 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".*

45. Having regard to adopted plan before me, I am not satisfied that there has been even substantial compliance with the requirements of s 150(2) of the Act. While not exhaustive, I list below the main respects in which the adopted plan falls short of the minimum requirements set out in the section:

[1] 2013 (1) SA 307 (WCC) at 317, paragraph [38].

Section 150(2)(b)(iv)

45.1. This section requires the plan to include a list of property "*that is to be available to pay creditors' claims*". The available property is listed in the plan as follows:

| | | |
|---|---|---|
| *1. Movable assets: -* | *Equipment* | *R 41.150* |
| *2. Immovable assets: -* | *Erven 963 and 964. Paulshof Ext 50. Sandton* | |
| | | *R 22,000,000.00* |

45.2. The bank quite rightly complains that the plan fails to state whether the property will be available to pay claims. The respondents' response is that "*the property would be rented out*". I presume by "*the property*" the respondents mean the immovable property. As regards the equipment, it remains unclear whether the equipment will be sold to pay creditors or used to carry on the business.

45.3 The business rescue plan is a 10-year plan that envisages the company continuing trading. By stating that the property is to be rented out, the immovable property will not be available any time soon to pay any claims as the company intends to keep using the property.

45.4. The plan provides no detail as to the prospects of renting out the immovable property. Since the source of the company's distress is the low occupancy of the property, one would have expected the plan to address this fundamental issue.

Section 150(2)(c)(i)

45.5. This section requires the plan to include a statement of the conditions that must be satisfied for the plan to come into operation and be fully implemented.

45.6. The projected income and expenses attached to the plan project that the annual rental received in 2014 will increase from R 1 825 589 to R 1 916 868 in 2015 and to R 2 012 712 in 2016. This is an annual increase of 5%. The plan provides no information as to the conditions necessary to achieve this increase in rental, such as bond rates not going up more than a certain percentage or continued occupancy by an anchor tenant etc. Such details are required by s 150(2)(c)(i) and are necessary for the creditors to decide whether the plan has prospects for success.

45.7 The plan shows that the debts of the company are more than double its assets. Even if I accept the projected income estimates, there is clearly insufficient income to make much progress in

paying off the huge debts over the next 10 years - and that is assuming things go well.

Section 150(2)(a)(iii)

45.8. This section requires the plan to specify the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation.

45.9. The plan states that preferent and concurrent creditors will receive a proposed dividend of 100% under business rescue but will only receive a proposed dividend of 40% under liquidation. While 40% appears reasonable under liquidation the plan provides no basis for the estimation that the proposed dividend under business rescue will be 100%.

45.10 The plan proposes that the bank be paid R 801 043 per annum, leaving R 1 088 938, R 594734 and R 1 370 513 left after the bank's payment is deducted from net income for 2014, 2015 and 2016 respectively. Averaging the three years and multiplying by ten (the proposed lifespan of the plan), leaves only R 10 180 616 in total for the next ten years, available to pay creditors that are currently owed R 46 245 578 (being the balance after deducting the bank's loan).

45.11 The bank's contention that the projected net income shows that "*there is no prospect of paying all of the creditor's claims*" is well founded. Significantly, the respondents' do not dispute this, but simply say that the bank is confused and is labouring under the incorrect impression that the figures relate to cash flow. I have considered the cash flow calculations and am of the view that they do not help the situation at all. The annual amount of R 40 115 to pay "*o/s creditors*" will not make a dent in the amount owed. Cash flow does not address the problem of where sufficient future income is going to come from to pay creditors. In my opinion the bank is not confused at all when it looks at income.

46. In the light of these deficiencies, I am of the view that the business rescue plan adopted on 22 November 2013 does not comply with the requirements set out in s 150(2) of the Act.

**The adoption of the business rescue plan**

47. Section 152 of the Act provides for the consideration and adoption of a business rescue plan. Sections 151(1) and (2) provide as follows:

> *(1) At a meeting convened in terms of section 151, the practitioner must-*
>
> *(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;*

50. I have already dealt with the bank's first objection. In my view the time period for the publication of the plan was validly extended. As regards the bank's second objection, it appears correct that since the plan was not "*seconded by holders of creditors' voting interests*" it could not have been validly amended in terms of s 152(d)(i).

51. The remaining issue is whether it was permissible for Naude to adjourn the meeting in order to revise the plan and for the revised plan to have been put to the vote once the meeting was reconvened. Section 152(d)(ii) provides expressly for a business rescue practitioner to be directed to adjourn a meeting in order to revise a plan for further consideration. Insofar as s 152(e) requires a practitioner to call for a vote for preliminary approval of the proposed plan "*unless the meeting has first been adjourned in accordance with paragraph (d)(ii)*", it is my view that this section does not prohibit the practitioner from calling for a vote for preliminary approval of the proposed (amended) plan after an adjourned meeting has been reconvened.

52. I am accordingly of the view that, from a procedural perspective, the business rescue plan was validly adopted. My reservation stems from my conclusion that substantively the plan does not comply with the requirements of s 150(2) of the Act. Assuming I am correct in this regard, the question that then arises is whether it is permissible for the bank to challenge the adoption of the plan.

> (b) *inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;*
> (c) *provide an opportunity for the employees' representatives to address the meeting;*
> (d) *invite discussion, and entertain and conduct a vote, on any motions to-*
>  (i) *amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or*
>  (ii) *direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and*
> (e) *call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).*
>
> *(2) In a vote called in terms of subsection (1) (e), the proposed business rescue plan will be 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.*

48. The bank contends that the adoption of the business rescue plan on 22 November 2013 was invalid, firstly, because it was published out of time and consequently could not have been validly adopted, secondly, because it was not amended in terms of s 152(d)(i) because it was not "*seconded by holders of creditors' voting interests*", and thirdly, since it was not properly amended it could not be approved in terms of s 152(e).

49. The respondents' contend that when the bank refused to second the proposed amendments to the plan, ITV invoked the provisions of s 152(d)(ii), whereafter the amended plan was validly adopted

53. This issue was addressed by Kathree-Setloane J in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others*[12] were the learned judge said the following:

> *Returning to the question of whether it is permissible for the Bank to challenge the adoption of the plan, it is clear from a reading of ch 6 of the Act that it does not provide a remedy to an affected person to challenge the approval and adoption of a proposed business rescue plan, regardless of whether such approval and adoption are preliminary or final. The adoption of a business rescue plan in terms of s 152 of the Act is pivotal to the business rescue process. Once adopted, the practitioner is required to manage and conduct the affairs of the company in accordance with the plan. The practitioner is responsible for the implementation of the business rescue plan; this task is not left to some other authority. Nor, for that matter, is there any need for court approval of the business rescue plan. Accordingly, once adopted or approved in terms of s 152 of the Act, a business rescue plan forms the foundation of the business rescue proceedings to which all the affected persons are bound. It is binding on the company, on each creditor and on every holder of securities of the company, whether or not that person was present at the meeting, voted in favour of adoption of the plan or, in the case of creditors, had proven their claims against the company. What occurs is a process of 'cramdown' in terms of which creditors are forced to accept a business rescue plan, even against their wishes — thus enabling the business rescue to proceed, despite objections by disgruntled creditors. It is with this object in mind that the legislature saw fit not to provide a disgruntled party with a judicial remedy to seek to set aside the adoption of a business rescue plan. It is, therefore, not open to any 'affected person', after the plan has been adopted, to seek to set it aside. Nor is it permissible for an 'affected person' to seek to set aside the proceedings of the second meeting of creditors in terms of which a business plan is adopted.*

54. The African Banking Corporation case is distinguishable from the present in two important respects. Firstly, in that matter the applicant initiated proceedings after the adoption of the business rescue plan whereas in the

[12] 2013 (6) SA 471 (GNP) at 494, paragraph [59].

present matter proceedings were launched before the plan was adopted. Secondly, in that matter the applicant's principal complaint with the business rescue plan was that by virtue of the payment proposal in the plan it would be left considerably worse off than it would be upon the liquidation of the company. In the present matter, the principal complaint is that the business rescue plan not only does not comply with the substantive requirements of the Act but it also does not demonstrate that there is a reasonable prospect for saving the company.

55. While Kathree-Setloane J's findings may be apposite in the case of a "*disgruntled party*" seeking to challenge the adoption of a plan that does not suit it in proceedings launched after the plan was adopted, they do not seem appropriate in circumstances where the complaint is that the plan does not comply with the substantive requirements of the Act and does not demonstrate that there is a reasonable prospect for saving the company. For the Act to prescribe the minimum information that must be included in a business rescue plan and not to provide a remedy in respect of a plan that does not meet the requirements of the Act, seems to me to result in an 'insensible' and 'unbusinesslike' result. In light of the view I take of the bank's challenge to the resolution placing the company under supervision and in business rescue, which I deal with below, it is however unnecessary for me to make a finding in this regard.

**The resolution placing the company under supervision and in business rescue**

56. The bank seeks the setting aside of the resolution on the basis that there is no reasonable prospect for rescuing the company, alternatively, if, having regard to all the evidence, it is otherwise just and equitable to do so as contemplated in s 130(1)(a)(ii) and s 130(5)(a)(ii) respectively

57. Insofar as s 130(1)(a) (and by reference s 130(5)(a)) requires that such an application be brought after the adoption of the resolution placing the company under supervision and in business rescue and before the adoption of the business rescue plan, the present application satisfies this requirement.

58. In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*[13] the Court had occasion to consider the meaning of the words "reasonable prospect" albeit in the context of s 131(4) of the Act. At paragraph [24] Eloff AJ states as follows:

> *"While every case must be considered on its own merits. it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis, unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, ie by substituting one debt for another without there being light at the end of a not too lengthy tunnel. is unlikely*

[13] 2012 (2) SA 423 (WCC)

*to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of:*

*[24.1] The likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business:*

*[24.2] the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available.*

*[24.3] the availability of any other necessary resource, such as raw materials and human capital;*

*[24.4] the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success."*

59. In considering whether the bank has demonstrated that there is no reasonable prospect for rescuing the company in the present matter, it is useful to look at the requirement for business rescue applications in general but with the added information of the business rescue plan itself.

60. On 27 August 2013 Dr Adam (the sole director of the company) deposed to an affidavit supporting business rescue (annexed to the founding papers) in which he says

> "3. *I have decided to make an application for business rescue of this company for the following reasons:*
>
> - *I have identified that the above company is financially distressed as a result of low occupancy of the property*
> - *I also firmly believe that this company has a good probability of being rescued for the following reasons:*

- *The Holding Company has indicated its ongoing financial support for this company.*
- *I believe that with the restructuring of the debt of the company, the company is viable and sustainable over a long term period."*

61. Notwithstanding Dr Adam's acknowledgment that the cause of the company's distress is the low occupancy of its immovable property, save for stating that the property will be rented out, the business rescue plan, as mentioned above, does not provide any detail as to the likelihood of the property being rented out or what rental is likely to be received.

62. The commercial rationale for the plan is that the company will get paid R37 000 a month as a result of the restructuring of the debenture payment held by ITV. This was conceded by the respondents' counsel during the hearing of the matter to be the "*nub of the plan*". As mentioned above, however, even if the projected income estimates are accepted, there is insufficient income to make much progress in paying off the debts of the company (which are more than double its assets) over the next 10 years.

63. These facts together with the significant substantive shortcomings of the plan set out above do not inspire any confidence in me that business in the future will be conducted differently from how it was in the past and accordingly, that there is a reasonable prospect for rescuing the company.

64. Prompted by Eloff AJ in *Southern Palace Investments*[14] I have carefully scrutinised the plan so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy. I am not satisfied that it does. On the contrary, it appears to be a superficial attempt to tick the necessary boxes while providing as little information as possible to address the company's problems and to develop real solutions.

65. I am accordingly of the view that the bank is entitled to an order setting aside the resolution placing the company under supervision and in business rescue on the basis that there is no reasonable prospect for rescuing the company.

**The business rescue practitioner's remuneration**

66. According to the bank, Naude's remuneration is based on the rate applicable to large companies whereas the company in question is a small company. The bank contends that no agreement was reached between the company and Naude providing for further remuneration as contemplated in s 143(2) read with s 143(3) of the Act.

67 The respondents rely on the agreement reached at the meeting of 22 November 2012. The bank argues, however, that no agreement relating to Naude's remuneration could have been concluded at that meeting as

[14] *Supra* at paragraph [3].

there was no notice calling for such an agreement on remuneration as contemplated in s 143(3)(a).

68. Sections 143(2) and (3) provide, in relevant part, as follows:

> *(2) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to-*
>
> *(a) remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to-*
>
> *(b) ...*
>
> *(3) Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by-*
>
> *(a) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145 (4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and*
>
> *(b) ..."*

69. Unlike permission to extend the time-period of the plan in s 150(5) of the Act, s 143(3) specifically requires an agreement for further remuneration to be approved "*at a meeting called for the purpose of considering the proposed agreement*". Having regard to the notice and agenda for the meeting of 22 November 2013, it is evident that the meeting was not called for this purpose.

70. Absent compliance with the requirements of the Act, I find that the agreement relating to Naude's remuneration is invalid.

**Conclusion and Order**

71. Section 132(2)(a) of the Act provides as follows:

> *"(2) Business rescue proceedings end when-*
>
> *(a) the court –*
>
> *(i) sets aside the resolution or order that began those proceedings; or*
>
> *(ii) has converted the proceedings to liquidation proceedings;*

72. I have concluded above, that I am satisfied that the bank is entitled to an order setting aside the resolution placing the company under supervision and in business rescue on the basis that there is no reasonable prospect for rescuing the company. It follows from s 132(2)(a) that business rescue proceedings have accordingly terminated.

73. It is common cause that should I have reached this conclusion, the bank is entitled to an order placing the company in liquidation.

74. In the result I make the following order:

74.1. The applicant is granted leave, in terms of section 133(1)(b) of the Companies Act 71 of 2008 ("the Act"), to commence and proceed with this application against the first respondent.

74.2. The resolution taken by the board of directors of the first respondent on 27 August 2013, placing the company under supervision and in business rescue, is set aside in terms of section 130(1)(a)(ii) of the Act.

74.3. The first respondent's business rescue proceedings have terminated.

74.4. The first respondent is placed in final liquidation with effect from 21 November 2013.

74.5. The agreement dated 18 September 2013 relating to the second respondent's remuneration is declared invalid.

74.6. The costs, including those consequent upon the employment of two counsel, are to be paid jointly by the first and second respondents.

**P LAZARUS**
**ACTING JUDGE OF**
**THE HIGH COURT**

CASE NUMBER: 70637/13
HEARD ON: 14 - 15 AUGUST 2014

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DATE OF JUDGMENT: 17 DECEMBER 2014