IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

28/10/2016 .....
DATE SIGNATURE

Case Number: 1046/15

28/10/2016

In the matter between:

ABSA BANK LIMITED	Applicant
and	
MAROTEX(PTY)LTD	First Respondent
W K CAWOOD N.O	Second Respondent
J C BEER N.O	Third Respondent
THE BODY CORPORATION OF HARMONY VILLAGE	Fourth Respondent
RUTH ROSE MAKIWANE	Fifth Respondent
MVUYO MVELASE NDZIBA	Sixth Respondent
LINDELWA NOBANTU NDZIBA	Seventh Respondent
DEBORAH LOVELL HARDING	Eighth Respondent

Coram: HUGHES J

JUDGMENT

HUGHES J:

Introduction

[1] On 21 October 2013, the first respondent, a real estate investment and development company, Marotex (Pty) Ltd, applied to the Companies and Intellectual Property Commission (CIPC) to be placed under business rescue. The financial woes of the first respondent arose when a judgment of this court, in favour of an estate agent, Ms Natalie Smit (Ms Smit), was granted against the first respondent in the amount of R141 319.20.

[2] The first respondent was in the business of acquiring vacant land for the rezoning and development thereof or its resale. During the course of its business it failed to satisfy the judgment obtained by Ms Smit which eventually led to her obtaining an attachment of all the companies' vacant stands and two townhouses. The result being, the first respondent had to seize trading, as Ms Smit refused to uplift the attachment. Consequently this culminated in the company being under financial distress. The first respondent was placed under business rescue, as stated above, and on 24 October 2013 the second and third respondents were appointed as joint business rescue practitioners. The applicant in these proceedings is a major creditor who holds more than 75% of the creditors voting interest.

[3] The second and third respondents as the business rescue practitioners take issue with the *locus standi* of those representing the first respondent. In essence they champion that they are the only ones who may represent or instruct representation for the first respondent in terms of the business rescue process. In addition they support the applicant's application to have the first respondent wound up.

[4] The fourth respondent is the body corporation of the first respondent's development, whilst the fifth to eight respondent are shareholders and sureties of the first respondent and have been joined as interested parties in these proceedings.

Relief Sought

[5] In the main application the applicant seeks that the business rescue proceedings of the first respondent be terminated and converted to winding-up or liquidation proceedings.

[6] The first and fifth to seventh respondents filed a counter-application seeking a declaratory that the adopted amended business rescue plan be declared binding on all the parties, that the applicant be directed to comply with paragraph 11 (b) of the adopted amended business rescue plan which seeks the applicant to consent to nil release figures in order to release stands on immovable property covered by the applicant. They further seek the removal and replacement of the business rescue practitioners as they have failed to perform their fiduciary duties and as such this is indicative of them not being *bona fide* in representing the interests of the stakeholders. The latter is premised on the business rescue practitioners being held liable for fruitless and wasted expenditure in the business rescue proceedings and it is sought that they pay costs on a *de bonis propriis* basis.

[7] Mention needs to be made of the fact that the second and third respondent also filed a counter- application which stands as an opposing affidavit answering to the main application. In this counter-application the business rescue practitioners sought the adoption of paragraph 8 of the business rescue plan that enables the sale of the property of the first respondent by public auction within three months of this order and failing which the winding up of the first respondent in terms of section 141(2) (a) (ii) of the Companies Act 71 of 2008 (the Act) with costs in the liquidation, alternatively the business rescue.

[8] At the commencement of these proceedings the business rescue practitioners abandoned the relief sought to sell the first respondent's property by public auction and persisted with the alternative relief to wind up the first respondent.

Suretyship

[9] The fifth to eighth respondents are shareholders and stood surety for the first respondent. Their suretyship is security by way of bonds held over properties they own in favour of the applicant and as this is common cause I do not propose to set out all the properties bonded as security in favour of the applicant save to say the applicant's standard mortgage terms and conditions were applicable to these bonds.

[10] As shareholders and creditors these respondents have been joined in these proceedings as interested parties albeit that they were joined during the course of these proceedings and not at the inception.

Adoption of the Business Rescue Plan

[11] The adoption of the business rescue plan was a lengthily process as the first meeting of creditors took place on 6 November 2013 whilst the business rescue plan was only published on 7 February 2014. After the second meeting was held on 20 February 2014 an amended business rescue plan was submitted on 3 March 2014 for the applicant's consideration. On 17 March 2014 the applicant submitted feedback which resulted in a further amended business rescue plan being forwarded on 1 April 2014 for the applicant's consideration and feedback. Eventually, on 24 April 2014 a plan satisfactory to the applicant was submitted and on 5 May 2014 a meeting of all creditors was held to which the applicant did not attend. However, by proxy vote on the part of the applicant, all the creditors agreed upon the adoption of the business rescue plan.

[12] The applicant contends that the adoption of the business rescue plan was premised on the fact that the first respondent had given the assurance that the appeal against the judgment granted in favour of Ms Smit would seriously be pursued in order to uplift the attachment on the first respondent's properties. In addition, the applicant sought comfort in the fact that the first respondent had represented that an amount of R716 621.06 was being held in trust with Neuhoff Attorneys. The aforesaid amount would be an encouraging factor for Ms Smit to

release the attachment knowing that the undertaking to settle her debt, if the appeal fails, would be fulfilled.

Locus Standi of those representing the First Respondent

[13] The business rescue practitioners contend that the first point of departure in this application is the determination of the *locus standi* of the erstwhile management who have taken it upon themselves to represent the first respondent. This, even in the face of the appointment of the business rescue practitioners who have been placed in control of the first respondent by virtue of the business rescue proceedings.

[14] In the first respondent's answering affidavit, deposed to by the seventh respondent, she states that she derives her authority to depose to the affidavit from the fact that she is co-founder, director and shareholder of the first respondent, as such, she is authorised to depose to the affidavit.

[15] The first respondent states that in terms of s146 (b) of the Act the seventh respondent as a shareholder is entitled to participate in these proceedings, on behalf of the first respondent, as the Act is silent on whether the shareholders are subordinate to the business rescue practitioner or require their permission to participate in court proceedings.

[16] For easy reference s146(b) of the Act states:
"During a company's business rescue proceedings, each holder of any issued security of the company is entitled to – …
(b) participate in any court proceedings arising during the business rescue proceedings;"
The fifth to eighth respondents being shareholders would qualify as being holders of issued security in this instance.

[17] On 7 April 2015, the second and third respondents served a Rule 7 notice in terms of the Uniformed Court Rules upon the first respondent's attorneys, C J Mkhaveke Inc. This notice disputes the aforesaid attorney's authority to act on behalf of the first respondent as the first respondent was under business rescue. The business rescue practitioners submitted that they were the only ones that had the

authority to appoint attorneys on behalf of the first respondent. Further, they had not mandated the appointment of C J Mkhaveke Inc. to represent the first respondent and neither did they give authority nor consent to the erstwhile management to instruct C J Mkhaveke Inc. No response was forthcoming from those representing the first respondent. A further Rule 7 notice dated 3 June 2015, this time by the applicant was served on those representing the first respondent. This notice disputed the authority of the attorney representing the first respondent. Yet again no response was forth coming.

[18] In addition to the above, the business rescue practitioners submitted that the erstwhile management has no authority to appoint attorneys in these proceedings to represent the first respondent and cannot do so. The business rescue practitioners rely on s140 (1) (a) of the Act which states that:

"During the company rescue proceedings, the practitioner, in addition to any other powers and duties…

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

[19] The crux of the business rescue practitioners argument is that the first respondent is placed under their management in terms of s140 (1) (a) and as such its erstwhile management has no control over the first respondent whilst under business rescue. On the other hand the first respondent contends that as s146 is not clear, as shareholders and interested parties, they are not precluded from representing the first respondent. They state that the business rescue practitioners are not given superior status and as interested parties and shareholders they can represent the first respondent.

[20] The answer, in my view, lies in two sections, the first being s140 (1) (a) and s137 (2) (a) read with s146 of the Act. The former section has already been quoted above and I find it necessary to mention that s137(2) (a) states that:

"(2) During a company's rescue proceedings, each director of the company –

(a) must continue to exercise the functions of the director, subject to the authority of the practitioner;"

[21] Thus the seventh respondent who deposed to the affidavit as a director, in terms of s137 (2) (a) she cannot represent the first respondent without the authority of the business rescue practitioners. On this leg her *locus standi* to represent the first respondent must fail. As shareholder, in terms of s146, she is a holder of issued security in the first respondent and as such she is entitled to participate in any court proceedings arising during the business rescue proceedings being an interested party.

[22] Now s140 is clear that the business rescue practitioners are authorised to manage the company in business rescue even though the directors retain their functions as such (s137 (2) (a)). However, these functions are still subject to the authority of the business rescue practitioners in terms of s140. So whichever way one spins it the authority to manage the company will always lie with the business rescue practitioner, whether one is a shareholder, director or co-founder. In the result, the fifth to eighth respondents do not and would not have the right and authority to appoint the attorneys representing the first respondent. This could only come about with the authorisation of the business rescue practitioners who are the *de facto* managers of the company during business rescue proceedings.

[23] Therefore whether the joinder of the fifth to eighth respondents was during the proceedings and not at the inception is of no moment as the business rescue practitioners would still be in the position as set out above, that being, the authority that would manage the company during these business rescue proceedings.

[24] Consequently the seventh respondent together with the erstwhile management cannot act for the first respondent without the authority of the business rescue practitioners. It stands to reason that the only one able to act for the first respondent is the business rescue practitioners who seek that the current business rescue proceedings be converted to winding up or liquidation proceedings in terms of s141.

[25] Bearing in mind that the first respondent has brought a counter-application it follows that if the seventh respondent did not have *locus standi* to bring said application that application brought on behalf of the first respondent is not properly before this court.

[26] The applicants seek that the answering affidavit filed on behalf of the first respondent be struck out as the seventh respondent did not have the authority to depose to same on behalf of the first respondent. I deal with this in the following paragraphs.

[27] I agree with Adv. M P van der Merwe SC, who represents the applicant, that the fifth to seventh respondents have not amended their papers to state that they are bringing the counter-application on their behalf as affected and interested parties to the main application. This being the case the fifth to seventh respondent is left out in the cold as they have not filed an answering affidavit to the applicant's founding affidavit. What is noted is that the heads of argument is the only document that makes mention of these respondents who were recently joined to these proceedings. In essence, but for the heads of argument, there are no papers before me on behalf of the fifth to seventh respondents.

[28] These respondents sought that they be allowed to make representations as shareholders with an interest in the business rescue proceedings, in terms of Rule 28(10). Rule 28 (10) reads as follows:
"(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."
In essence these respondents seek that the answering affidavit filed on behalf of the first respondent serve as their answering affidavit as well bearing in mind that they have been joined in these proceedings by the applicant after the respondents were supposed to file their answering affidavits.

[29] In light of the discretion that I possess in terms of rule 28 I am not prepared to non-suit these respondents. This is a technicality which in my view should not delay the finalisation of this matter any further. In the circumstances as the fifth to seventh

respondents have filed heads and are represented at court I am inclined to allow them to participate in the proceedings.

[30] Consequently, the answering affidavit filed on behalf of the first respondent is also filed on behalf of the fifth to seventh respondents who are a party to these proceedings. It stands to reason that it would stand on behalf of these respondents'.

The winding up in terms of s130 or s141 of the Act

[31] Having found that the first respondent cannot be represented by the seventh respondent and the erstwhile management the only issue that remains is that which is now common cause between the applicant and the business rescue practitioners and that is that the first respondent must be wound up or liquidated. This court needs to determine whether it would be so in terms of ss130 or 141 of the Act.

[32] The applicant launched these proceedings under s130 of the Act whilst the business rescue practitioners sought the winding up in their counter-application in terms of s141 of the Act.

[33] Adv. M P van der Merwe SC concedes that in terms of s130 of the Act as an interested and affected party, such as the applicant, one could seek the setting aside of the business rescue resolution adopted by the board; the setting aside of the appointment of the business rescue practitioners and/or calling on the business rescue practitioners to pay security, prior to the adoption of the business rescue plan in terms of s152 of the Act. Once the business rescue plan had been adopted in terms of s152, that is to say a plan that contains materially accurate information in terms of s150, the applicant would be precluded from invoking this section.

[34] However, in this case the applicant argues that one is still at liberty to invoke s130, as the business rescue plan was not adopted in terms of s152. In that, in terms of s150 (2) the business rescue plan must contain *"all the information reasonably required to facilitate affected person in deciding whether to accept or reject the plan"* and in terms of s150 (4) at the conclusion of the proposed plan a certificate by the

practitioners must attest that the information provided is accurate, complete and up to date. In this instance, the applicant submits that the business rescue plan contained materially fatal and major mistakes which had induced the applicant to accept the plan.

[35] The plan was not accurate in that there was a major misrepresentation as regards the funds (R716 621.06) being available in Neuhoff Attorneys trust account. These attorneys were responsible for the transfer of the first respondent's properties which were sold. These funds, it was submitted, would hold over Ms Smit who had obtained an execution order against properties of the first respondent which the applicant had financed. As these funds were not available, on that basis alone, the applicant contends, the business rescue plan was not accurate, as contemplated in terms of s150, and as such, could not be said to have been adopted in terms of s152 of the Act.

[36] In addition, the applicant submits, in the plan no provision is made for the inclusion of Ms Smit as a creditor of the first respondent, her judgment claim has been totally left out of the rescue plan. This is yet a further indication that the plan is not accurate. There is also the matter of three property sales transactions of the first respondents creating the impression that there were prospects of monies flowing into the first respondent's business. Lastly, the monthly rentals collected for certain properties of the first respondent, as indicated in the rescue plan, were not collected for as promised by the business rescue practitioners. The rental was to pay for property related expenses and the free residue to be paid toward the debt of the applicant.

[37] With the aforesaid situation on hand the applicant contends that there is no reasonable prospect of the company being rescued as anticipated by the business rescue practitioners and as the applicant holds the majority of the creditors voting interests they submit that the plan doomed for failure leads to the foregone conclusion that the first respondent be wound up as they are unable to pay their debts and it would be just and equitable.

[38] Adv. L K van der Merwe, for the second and third respondents, argues that the applicant's reliance on the defects or incorrect information invalidating the plan is

merely a creation of a simulated environment for the applicant to rely on the provisions of s130 of the Act. That the basis set out above, is an attempt to create a basis for its argument around s130 (1), which is disputed by the business rescue practitioners. Another aspect which the second and third respondents contend cannot be dealt with under s130 is that of the conduct of the business rescue practitioners, which is also disputed. The business rescue practitioner argues that the only option in these circumstances open to the applicant is to seek their removal which is not catered for in s130. Lastly, they submit that after the adoption of the plan it is left to the business rescue practitioners to seek the conversion if they are of the view that the rescue proceedings cannot be implemented and there are reasonable prospects of rescuing the first respondent. Section 141 (2) (a) impose this duty upon the business rescue practitioners only.

[39] Adv. Ndziba, who represented the first respondent together with the fifth to seventh respondents, argued on behalf of the fifth to seventh respondents, that the applicant's contention that it was induced by the misrepresentations made in the business rescue plan, amounted to *mala fides* on the part of the applicant as it was aware that paragraph 8 (d) of the plan sets out that the funds complained of were to be generated from the property sales and would be retained in trust as security for Ms Smit's judgment debt, costs and interest, in order to secure her consent to uplift the interdicts as each property is transferred. Adv. Ndziba points out that an email dated 22 August 2014 from the transferring attorneys, Cawood Attorneys, confirms that the applicant was aware how the aforesaid amount would be attained. Thus the respondents (fifth to seventh) persist that the parties to the rescue plan were *ad idem* with regards to the source of the funds to satisfy Ms Smit's debt. The respondents submit that in terms of s152 (4) a plan that had been adopted was binding on the company, the creditors as well as the holders of company securities.

[40] The respondents aver that the plan complies with s128 (1) (b) of the Act, in that it satisfies the requirements contemplated in this section, and therefore the limitations of s130 are applicable in this instance. The applicant, it is so submitted by the respondents, by virtue of it seeking to amend its notice of motion in order to have the adopted plan set aside (in the alternative) is an acknowledgment on its part that it is bound by the limitations of s130.

[41] The applicant's contention that the plan has become impossible to implement is disputed by the respondents (fifth to seventh). They submit that it is in fact the applicant who is frustrating the implementation of the amended adopted plan. The issue raised of Ms Smit and the funds was an issue debated with the applicant and consensus was reached with the applicant on a way forward, prior to the adopting and implementation of the plan. They further contend that the applicant had given an undertaking to afford the first respondent with nil figures for the sale of the first three properties and this was confirmed in correspondence dated 17 September 2014. Consequently, they submit that there is no stalemate as alluded to by the applicant, and in fact the applicant has abused its powers as a secure creditor by holding the first respondent at ransom in frustrating the implementation of the amended adopted plan.

[42] In fact the respondents point out that as at 10 February 2015 the first respondent had sold five properties, to the tune of R1 225 000.00, that were ready for lodgement with the deeds office (letter dated 10 February 2015 to deed office). The applicant's conduct of withholding the nil figures on these properties amounts to sabotaging of the first respondent's successful implementation of the business rescue plan which would lead to rescuing it out of its financial distress.

Analysis

[43] I think it is prudent that I set out the parties in the main application, having made the finding above; these are the applicant, second and third respondents as the business rescue practitioners and the fifth to seventh respondents. The fourth respondent and the eighth respondent have not taken part in these proceedings.

[44] It was correct of the applicant to make the concession that in terms of s130, as an interested and affected party, prior to the adopting of the business rescue plan in terms of s152, the applicant could seek the setting aside of the business rescue resolution adopted by the board or the setting aside of the appointment of the business rescue practitioners and/ or calling on the business rescue practitioners to pay security. See *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others 2013 4 All SA 432 (GNP) at paras [56] and [62].*

[45] In essence, as long as the business rescue plan had not been adopted, the only ones who could seek a conversion of the plan, as is sought in this instance, to liquidation proceedings, were the business rescue practitioners. Section 141 (2) (a) (i) and (ii) clearly states that the 'practitioner' must inform the court and apply to court for the liquidation of a company under business rescue.

[46] As I stated above the answering affidavit of the first respondent serves as that of the fifth to seventh respondents. The also sought condonation for the late filing of their heads of argument which was duly granted in order that the matter is heard as it has been dragging on for quite a while and it was in the interest of justice to do so. In any event the condonation sought was not opposed by the other parties.

[47] Having stated the above the stance adopted by the applicant is that even in the face of the aforesaid it is still able to seek the liquidation of the company on the grounds that the amended adopted business rescue plan was not adopted in terms of s152, as the plan is not that which is contemplated in terms of s150.

[48] In terms of s150 (2) the business rescue plan needs to contain all information *reasonably* required to assist various stakeholders in accepting or rejecting the proposed plan. On my understanding of s150 (2) there is merely a structure which serves as guidance of what the plan ought to consist of and a business rescue plan is developed along this structure. In my view, development of a plan along this structure is dependent on specifics of each case ensuring that sufficient information is provided under the three components of the structure being Part A-Background, Part B-Proposals and Part C-Assumptions and Conditions. According to s150 (4) provision is made for a certificate at the conclusion of the proposed plan. Here the practitioners confirm the accuracy of the information contained in the proposed plan. It has emerged through the cases that substantial compliance with the provisions of s150 (2) is all that is required. See *CSARS v Beginsel 2013 (1) SA 307 (WCC) at [38] and Absa Bank Ltd v Golden Dividend 339 Ltd and Others 2015 (5) SA 272 (GP) at [44].*

[49] The applicant contends that there was no certificate, however on my inspection of the said amended plan on hand, at the end thereof, the practitioners give assurance that the information supplied to them by the directors and the

company accounting officer were reviewed by them and were up to date; that the estimates were made in good faith and the assumptions where based on factual information gathered by them in their dealings with the affairs of the company. Thus, to my mind, this amounts to substantial compliance with the provisions of s150 (4) taking into account there are no prescripts of the certificate anywhere in the Act.

[50] With regards to the content of the adopted amended plan of 14 April 2014 I do not propose to go through each and every consideration set out in s150 (2) save to state that the applicant does not take issue with the composition of the plan but rather the content thereof, as the applicant alleges that the information therein was not factually correct and consisted of misrepresentations that induced it to approve the plan.

[51] The first allegation that the applicant relies on is that a creditor, Ms Smit's, claim is not catered for in the plan. However, on examination of the plan, the business practitioners address her claim and the interdicts that she has against the first respondent under Part-A. In Part-B they set out a proposal on how they would deal with this creditor and in Part-C they set out the manner in which all the creditors would be paid. Thus it cannot be said that they do not deal with Ms Smit's claim in the plan and in my view the addressing of this claim would amount to substantial compliance with s150 (2).

[52] The second aspect that the applicant takes issue with is that the plan misrepresents that an amount of R716 621.06 was available in the trust account of Neuhoff Attorneys in order to seek Ms Smit's assurance that the interdicts she has over the first respondent's properties would be uplifted. Combined with this issue is the applicant's contention that Ms Smit's claim is not registered.

[53] I deal with the latter first, under paragraph 4 of the plan the practitioners state that Ms Smit had presented her claim but it was rejected '*pending litigation between the parties regarding dispute arising during approximately 2004*'. This litigation was also the subject of a pending appeal in this court which with the practitioners consent was to continue during the rescue proceedings. In addition with regards the interdicts under paragraph 5 of the plan, it was noted by the practitioners that they had received confirmation from Ms Smit's attorneys that the interdicts would be uplifted.

[54] Turning to the misrepresentation surrounding the alleged funds in Neuhoff Attorneys trust account I find it prudent to quote that which appears in paragraph 8 (a) and (d) of the adopted amended plan:

'8 (a) Appointing Henk Neuhoff from Neuhoff Attorneys as conveyancer for the Company. This appointment was made on 14 November 2013. Neuhoff has already communicated with the previous conveyancers and confirmed that no deposits and/or funds are available for the Company. R500 000 is currently held in Cawood Attorneys' account... No other funds are available.

(d) The BRP's will endeavour to obtain an order declaring a re-trial of the litigation between the Company and Natalie Smit in the North Gauteng High Court under case number 35326/2005 on the grounds that the entire court file and recordings were lost. This will in turn result in the funds R716 621.06 as at 31 January 2014 held in trust with Neuhoff Attorneys being made available for repayment towards Absa Bank. The R716 621.06 held in trust will be paid to Absa within 30 days from the date the re-trial is concluded.' [That underlined is my emphasis]

[55] From the aforesaid it would seem that the practitioners first say that there are no funds with Neuhoff Attorneys and in the same breath they say there are funds with Neuhoff Attorneys to the tune of R716 621.06. It is also evident that the submission advanced by Adv. Ndziba, that of the applicant having been aware of how the aforesaid funds would be attained and thus the applicant was *mala fides* cannot be true as paragraph 8 (d) does not set out how the funds would be attained, as was submitted by Adv. Ndziba. It in fact states that the funds have been in trust since 31 January 2014 and this was prior to the adoption of the plan on 14 April 2014.

[56] Of interest is the following factors:

- The first meeting of creditors took place on 6 November 2013;
- On 6 February 2014 a business rescue plan was drafted however it did not contain the details as set out in paragraph 8 (d) above;

- On 31 March 2014 the business rescue practitioners sent correspondence to the applicant which contained a draft of the amended plan, it is in this draft that paragraph 8 (d) features for the first time;
- On 1 April 2014 the applicant sent correspondence with relevant amendments to the amended plan to the practitioners;
- After the applicant's request was met the amended plan was then adopted on 14 April 2014.

[57] On 4 August 2014 the applicant sent correspondence to the second, sixth and seventh respondents, amongst others, confirming a discussion that was held. It was recorded that the second respondent had advised:
'That the interdict instituted by Natalie Smit has not been lifted as yet;
That there is not an amount of R716K held in trust as is stipulated in the approved business rescue plan;
That transfer of the only property sold to date, Unit 20, will only take place once an undertaking/guarantee for the R716K is given to the attorneys of Natalie Smit;...' [My emphasis]

The applicant stated the following in that correspondence:
'We wish to place on record that the Bank considers the incorrect and misleading information in the business rescue plan in a serious light as the Natalie Smit issue is the crux of the client's inability to realize the asset in order to repay creditors. The business rescue plan was approved in April 2014 and it seems like there have been no sincere effort to resolve the issue of the interdict since then.'

[58] In my view, from the correspondence on file between the applicant, practitioners and the fifth to seventh respondents there was an array of 'cloak and dagger' being played out by the respondents and the practitioners against the applicant. There were rental amounts being collected by the sixth respondent for at least two units owned by the first respondent. This collection of rentals commenced even before the rescue proceedings and continued during these rescue proceedings. The practitioners professed not to know of the rental collection. Whilst, the explanation advanced by the sixth respondent was that the tenants were being

evicted. The practitioners did not even take any steps to recover from the sixth respondent the rentals paid over to the sixth respondent whilst the rescue proceedings were underway.

[59] By virtue of the above conduct of the practitioners, I am therefore not surprised that after the applicant agrees to the adoption of the amended plan the practitioners now come forward and say that the amount stated as being in the trust account is in actual fact not in the trust account.

[60] The plan is compiled by the practitioners after consultation with creditors, affected persons and management of the company (s150 (1)). The plan *'must contain all the information required to facilitate affected persons in deciding whether or not to accept or reject the plan'* for this reason mechanisms are in place to ensure that the implementation of the plan is on a fair and equitable basis as regards all the creditors and affected persons (s150 (2)). In this instance the plan was considered by the applicant, who is the holder of 75% of the creditors voting interest, and was approved in terms of s152 (2) (a). Once the plan had been adopted, in terms of s152 (4), the plan is binding on the company, the creditors and holders of company securities.

[61] On implementation of the business rescue proceedings the business rescue practitioner is responsible to develop the plan and implement the plan (s140). Whilst the rescue proceedings are under way the practitioner may seek the conversion from rescue proceedings to liquidation proceedings, if the practitioner concludes that there is no reasonable prospect of rescuing the company by way of s141 (2) (a) (i) and (ii). The court may make an order discontinuing the business rescue proceedings and placing the company under liquidation (s141 (3)).

[62] In light of what the applicant seeks of this court, that being to read into s130, that the plan having not been adopted in terms of s152, as an affected party, the applicant, may proceed by way of s130 to seek the conversion from rescue proceedings to liquidation proceedings on the basis that 'there is no reasonable prospect for rescuing the company in light of the misrepresentations made. Further, that the resolution to commence business rescue should be set aside (s130 (1) (a) (ii)). This court is thus asked to set aside the resolution in term of s130 (5) (a) (i) and

(ii) and convert the rescue proceedings to liquidation as it is just and equitable to do so.

[63] To my mind this case is clearly a matter of interpretation of the statute before me. Thus I am mindful of the guidance set out by Wallis JA in *Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para [18]* which was reiterated in *Panamo Properties (Pty0 Ltd and Another v Nel N.O and Others 2015 (5) SA 63 (SCA) para [27]:*

"[27] 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. Is it then possible to reconcile s 129(5) *(a)* and s 130(1) *(a)* (iii)? In my view it is possible without doing damage to the language used by the legislature. "

[64] The only way a conversion of business rescue proceedings to liquidation proceedings is by way of ss140, 141 and in circumstances when ordered by the court in terms of s132 (2) (a) (ii). The latter states that business rescue proceedings end when the court has converted the proceedings to liquidation proceedings.

[65] The reference to *'until the adoption of a business rescue plan in terms of section 152',* which is relied upon by the applicant, must be read in context of ss130 and 152. Evident to me is that s130 specifically pertains to the objection of the company's resolution to commence with business rescue proceedings (s129). It is so that in this case the company took a resolution to commence with business rescue proceedings in terms of s129. Now I believe that it is not a coincidence that s130 specifically provides a time frame when one is able to object to the resolution, which is before the adoption of the plan. In this instance the business rescue plan has already been adopted and the resolution has come and gone.

[66] In order to invoke s130 the business rescue plan should not have been adopted and in place. Be that as it may, let's see how s152 operates with s130. When I look at s152 which deals with terms for the adoption of the plan, nowhere in

the conditions set out in s152 does it make mention of the content of the plan. It only states the procedure for the adoption of the plan and this procedure is not contested in these proceedings, but rather the content of the plan. Therefore reliance can't be placed on the fact that the 'contents of the plan containing misrepresentations' render the plan not adoptable in term of s152, as is contended by the applicant, as this section only deals with the procedure for adoption of the plan. In the circumstances the applicant's reliance on s130 to set aside, the resolution which adopted the plan in terms of s152 must fail.

[67] The only section that addresses the contents itself of the business rescue plan is s150 (2) where it states that:

'(2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether to accept or reject the plan,'

Thus, if the information, as in this case, is not correct and was in fact a misrepresentation, then it is logic that the applicant having been induced by the misrepresentation has a right of recourse. The question is under which section of the Act? It's only logical to me to expect of the Act that there be some sort of recourse for a party who is induced to accept and adopt a rescue plan based on false information provided therein. As I see it, this must be so even if it is not spelt out in s150 (2) logic dictates this from a reading of this section.

[68] As the misrepresentation was provided by the business practitioners in the plan and as it was conceded as such by the same practitioners, rationality dictates that the recourse ought to be sought from those who made the misrepresentation. In the application of interpretation of the Act, in my view, the recourse available to the applicant would be an application to court in terms of s139 (2) (a) or (b) for the removal of the business rescue practitioners and to proceed by way of s140 (3) (c) (ii), in that, the practitioner as an officer of the court be held liable for the misrepresentation made in the plan. However, even in light of the above the applicant's woes surrounding the business rescue plan and its conversion to liquidation proceedings would not be cured. In the circumstances, the applicant cannot proceed as sought in its notice of motion as there is no provision in the Act, but for the removal of the practitioners and that of holding the practitioners accountable as stated above.

[69] For the reasons set out above the applicant's contention that the plan containing inaccurate information was not a plan in terms of s150 and as such was not adopted as contemplated in s152, is in my view, not correct. The application for the business rescue proceedings to be converted to liquidation proceedings must fail.

Leave to amend

[70] In terms of Rule 28 (10), the applicant if necessary, seeks leave to amend its notice of motion to seek an order setting aside the adopted business rescue plan. The applicant has argued that the amendment be granted as it would be just and equitable to set aside the business rescue plan. The setting aside of the business rescue proceedings would come about if this court sets aside the resolution that commenced these proceedings (s132 (2) (a) (i)). This would means that this court would grant an order in terms of s130 (5) (a) which in effect not only sets the resolution aside but puts an end to the business rescue proceedings as well. This takes us back to s130 which, as I stated, is not available to the applicant in these circumstances as the business rescue plan has already been adopted. Thus the applicant cannot seek to set aside the resolution adopted, for the reasons I have already set out above. As long as the resolution stands the business rescue is not terminated. See *Panamo Properties supra at para [28] and [33].* In the circumstance, this amendment application must fail.

Counter application by the business rescue practitioners

[71] Bearing in mind that the second and third respondent sought two prayers in their counter application which encompassed, one, giving effect to paragraph 8 of the adopted amended plan by way of selling the property of the first respondent by public auction and two, in the alternative, seeking the conversion to liquidation proceedings in terms of s141(2) (a) (ii). At the commencement of the business rescue practitioner's argument the first prayer sought was abandoned.

[72] I now turn to deal with the business practitioner's counter application where they seek that the business rescue proceedings be converted to liquidation

proceedings, in terms of s141 (2) (a) (ii). This section provides that this process could be invoked at any time of the business rescue proceeding by the practitioners. In this instance the practitioners contend that there are no reasonable prospects of rescuing the company, and thus, the rescue proceedings be converted to liquidation proceedings.

[73] In terms of s141 (2) (a) (i) the practitioners '*must inform the court, the company, and all affected persons in the prescribed manner'*. As per the definition in s128 affected persons would include the employees who would be informed in terms of s144 (3) (a), the creditors in terms of s145 (1) (a) and the shareholders in terms of s146 (a), of the practitioners intention to convert the rescue proceeding to liquidation proceedings. The prescribed notification is not defined in s128. However, I am of the view that notification in terms of the Uniform Rules of Court, Rule 4 is what the legislature intended as the 'prescribed manner'. This would enable all those affected persons to make an informed decision of whether to accept or oppose the practitioners' proposed application of conversion. See *Absa Bank Limited v Naude N.O.(20264/2014) [2015] ZASCA 97(1June 2015) at para [9]*

[74] In this instance, the practitioners attempt to seek the conversion via the back door by jumping on the applicant's wagon, so to speak. This, in my opinion, could not have been the intention of the legislature of what they envisage of s141 (2) (a) (i) as informing those affected by the prescribed manner. In the circumstances in my judgment the practitioners have not complied with s141 (2) (a) (i) in that they have failed to inform those affected persons in the prescribed manner.

[75] In addition to the above s141 (2) (a) provides that the practitioners must conclude that *'there is no reasonable prospects for the company to be rescued'* in order to attain the conversion. It has been said that 'no reasonable prospect of rescuing the company' should not be mere speculation but ought to be prospects based on reasonable grounds as to why the liquidation process is now preferred. See *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) at paras [29] and [30].*

[76] In the papers before me the business rescue practitioners have failed to set out the prospects based on reasonable grounds to advocate the conversion sought.

There is nothing for me to consider in order to make an informed decision and determination whether it would be in all the affected parties' interest that the conversion be allowed. In fact in the practitioners' papers they promote the view that the business rescue plan has not been given an opportunity to take off, so to speak. They further champion that given an opportunity the business could be rescued. In this regard I refer to paragraph 14.6 of the answering affidavit of the practitioners set out below:

"In light of the above-mentioned it is therefore respectfully stated that the success of the business rescue plan can only be determined at a time after the three month period allowed for in the business rescue plan had lapsed and the public auction of the properties had taken place. I therefore reiterate the fact that the Applicant cannot, at this stage, state that the plan failed miserably seeing as the plan, as it stands, still provides for a mechanism to be utilized to the benefit of the Applicant."

Also at paragraph 16.6:

"As is clear from the content of the adopted business rescue plan, implementation of the plan only stood to take place after 18 months period, as provided for in the plan, had lapsed. As an alternative to the above-mentioned the sale of the properties on public action would represent the time of implementation of the plan itself. I have already indicated to the Honourable Court that the stage of the sale of the properties by auction has not yet reached and I therefore confirm that implementation of the plan, to date of signing of this affidavit, had not been reached."

[77] From the aforesaid, to me it is clear that the rescue plan had not been afforded an opportunity to get off the ground, so to speak. The practitioners admit that much in their papers. Without obtaining any reasonable grounds as to why the plan would now fail, how then do they expect this court to make a decision to liquidate the company without any reasonable ground before it that the plan would now fail or has indeed failed? The only reason that I can glean from these papers for the practitioners seeking the conversion is the change in attitude of the applicant toward the adopted amended plan and the fact that the parties are now not all on the same page as when the plan was adopted. That to my mind does not amount to the practitioner putting forward a factual basis that is reasonable for seeking the conversion.

[78] As I have stated there is non-compliance with s141 (2) (a) (i) and non-compliance with the provision of reasonable grounds for the conversion. Thus, in these circumstances the application in terms of s141 of the business practitioners must fail.

Counter application of the fifth to seventh respondents

[79] The respondents, being the fifth to seventh, contend as their counter application, that throughout the rescue proceedings the actions of the applicant were meant to frustrate the business rescue process and its implementation as highlighted in s128 (1) (b) (iii). Further, that the applicant's application was defective and they had not made out a case in terms of s130. This warrants the dismissal of the applicant's application and the granting instead of the amended adopted plan to be declared binding on all the parties. It is trite that the company, creditors, shareholders and affected parties are bound by the business rescue plan adopted. In the circumstances the decelerator sought is in my view not competent as it stands to reason that if the applicant and the practitioners fail in attaining the liquidation of the company then the business rescue plan is still in place and the rescue proceedings continue.

[80] The aforesaid will also cover the relief that is sought to direct compliance with paragraph 11 (b) which relief I might add does not make sense at all.

[81] In light of my findings above, in my analysis, I have concluded that the attorneys representing these respondents have *locus standi* to represent them but not the first respondent. I have also concluded that the business rescue practitioners misrepresented to the applicant, the major creditor, that there was R716 621.06 in the trust account of Neuhoff Attorneys when in fact this money was not in the trust account. Further, that the applicant's application was defective as the adoption of the plan had taken place and in terms of s130 the applicant, at this stage, could not object to the resolution to commence with business rescue proceedings. Lastly, that the business rescue practitioner's application in terms of s141 was defective for want of compliance of notification in the prescribed manner and the practitioners having failed to provided reasonable grounds to make out a case for the conversion.

[82] From the facts set out above both the practitioners and these respondent's contend that it was the applicant who frustrated the implementation of the amended business rescue plan before it could be implemented. The plan has not come to an end as is contemplated in s132 (2) and as there is no reasonable grounds for the plan not to be implemented, before me, I cannot find that the plan is impossible to implement at this stage.

[83] In the circumstances I have set out above it is apparent to me that the main application and the application to amend be dismissed. Further, that the counter application of the second and third respondents also be dismissed.

[84] The fifth to seventh respondents seek the removal of the practitioners as they have failed to exercise proper degree of care in the exercise of their duties and functions. In addition in the practitioners handling of the main application they had shown their lack of *bona fide* in protecting the interest of all stakeholders.

[85] Having already found that the practitioners misrepresent to the applicant regarding the funds in trust as explained above, this in itself warrants their removal in terms of s139 (2) (a) and (b). A further reason is that their sentiments have been highlighted in that they do not have faith in the amended plan that did not even get off the ground. It would be harsh to say that their conduct was not *bona fides* as contended. In my view, they were bound to oppose the main application for the grounds that they advanced. However, in seeking the conversion they showed little faith in the amended plan and as such I find that this would amount to them failing to perform their duties of this particular company. It would also lead to a conflict of interest if they remain as they do not have faith in the plan which they have implemented.

[86] In the circumstances the business rescue practitioners are to be removed as such. Are they liable for fruitless expenditure as submitted by the respondent's in terms of s140 (3) (c) (ii)? This section states that the practitioner could be held liable *"...for the consequences of any act or omission amounting to gross negligence in the exercise of the* (their) *power and performance of the* (their) *functions of practitioner."*

[87] I cannot find in these circumstances that the practitioners acted or omitted to act in a manner that can be said to have been grossly negligent. With regards to the misrepresentation, this in my view, was information forth coming from the same respondents thus they cannot place reliance on this conduct as information was out of their control and within the control of these respondents. Other than that the respondents have not demonstrated to me that their conduct amounted to that subscribed in s140 (3) (c) (ii).

[88] In the circumstances set out by both the applicant and these respondents, it would have been ideal for the fees charged by the practitioners in terms of s143 (1) to be subject to taxation, however there is no provision in the Act that subjects the remuneration and expenses charged and incurred by the practitioners to taxation. The practitioners are entitled to charge remuneration and expenses in terms of s143 (1) as prescribed in sub-section (6). As I am bound by the prescripts of the Act the prayer for a taxation of the practitioners fees cannot be granted.

[89] I do not find just cause for the costs prayers sought by these respondents against the applicant and the practitioners. In the circumstances the scale sought by the fifth to seventh respondents of attorney and client and *de bonis propriis* respectively, in my view, is not warranted.

Costs

[90] The costs are to follow the result. In this instance the successful parties being the fifth to seventh respondents are entitled to their costs, as affected parties. Such costs to be on a party and party scale. They have been successful in attaining the dismissal of the applicants and practitioners application for a conversion to liquidation proceedings and the removal of the practitioners.

[91] Consequently the following order is made:

[1] The main application and the application to amend of the applicant are dismissed with costs;

[2] The counter application of the second and third respondents is dismissed;

[3] The order sought of fifth to seventh respondents for the removal of the practitioners, the second and third respondents, in terms of s139 of the Act succeeds.

W. Hughes
Judge of the High Court, Pretoria

Counsel for the applicant: M P van der Merwe SC
(012) 424 4009 Cell: 082 9204 228
Attorneys for the applicant: TIM DU TOIT & CO INC
(012) 470 7777
REF: JMA NEL / A ENGELBRECHT/mm

Counsel for the second and third respondents: L K van der MERWE

Attorneys for the second and third respondents: KOSTER ATTORNEYS
072 973 5436
REF: KOSTER/5M002(1)

Counsel for the fifth to seventh respondents: M M Ndziba
(012) 460 2179

Attorney for the fifth to seventh respondents: C J MKHAVELE INC.
(012) 346 5548
REF: MR JABU MKHAVELE