IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

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

31/3/2016 DMotaung
DATE SIGNATURE

31/3/2016

Case Number: 50799/2015

In the matter between:

SENWES LIMITED	APPLICANT
AND	
ZELLEHEN BOERDERY CC	1st RESPONDENT
W CAWOOD N.O.	2nd RESPONDENT
J C BEER	3rd RESPONDENT
CIPC	4th RESPONDENT
THE TRUSTEES FROM TIME TO TIME OF THE BESTER FAMILY TRUST	5th RESPONDENT
L BESTER	6th RESPONDENT
FNB LTD	7th RESPONDENT
NEDBANK LTD	8th RESPONDENT
NOVON PROTECTA (PTY) LTD	9th RESPONDENT
P B D BOEREDIENSTE (PTY) LTD	10th RESPONDENT
STANDARD BANK	11th RESPONDENT
SUIDWES LANDBOU	12th RESPONDENT
WESBANK (A DIVISION OF FNB)	13th RESPONDENT
SARS	14th RESPONDENT
AND	

Case Number: 50486/2015

In the matter between:

ZELLEHEN BOERDERY CC	APPLICANT
AND	
SENWES LTD	RESPONDENT

JUDGMENT

MOLEFE J

[1] There are two applications before Court which are inextricably intertwined. In case number 50799/15 Senwes Ltd ("Senwes") is the applicant and Zellenhen Boerdery CC (in business rescue) ("the CC") is the first respondent. The business rescue practioners ("the BRP's") of the CC are the second and third respondents. The fourth to fourteenth respondents are creditors of the CC and were joined as interested and affected parties to the application. This application ("the urgent application") started off as an urgent application and was enrolled in the urgent court for 21 July 2015. It is only opposed by the CC, as represented by the BRP's.

[2] The main relief requested by Senwes in the urgent application is that the resolution whereby the CC adopted business rescue proceedings be set aside and that the CC be liquidated. In the first alternative Senwes requested a declaratory order that when it voted against the adoption of a business rescue plan it exercised its vote appropriately. In a further alternative Senwes sought an order interdicting and restraining the BRP's from applying any of the proceeds of the CC's crops, over which Senwes enjoys security, to pay for operating costs of the CC pending the finalization of an application by the BRP's to set aside Senwes' vote at the meeting against the tabled business rescue plan as a vote exercised inappropriately.

[3] In case number 50486/15, the CC, represented by the BRP's, requested an order setting aside as inappropriate the vote exercised by Senwes when it voted against the adoption of a business rescue plan at a meeting of interested and affected parties held on 19 June 2015. The ancilliary relief requested in this application ("ordinary application") is for an order that the business rescue plan be adopted, alternatively be referred to the affected parties for adoption.

[4] As a result of the voluminous papers exchanged in the urgent application, by agreement between the parties, after directions were sought from the Honourable Deputy Judge President Ledwaba, both applications were to be adjudicated upon as special motions. Due to the facts and underlying issues significantly overlapping, the parties were agreed that both applications be dealt and disposed as one and that reference could be had to both sets of papers for the adjudication of the ordinary application.

[5] The crux of the issue to be decided in the two applications is whether Senwes, when it voted against the adoption of the business rescue plan, exercised its vote inappropriately as contemplated in section 153 (1) (a) of the new Companies Act 71 of 2008 ("the Act").

Relevant Background Facts

[6] Senwes is a major role player in the agricultural industry and *inter alia* provides finance to farmers to establish crops and otherwise fund farming enterprises.

[7] The CC is in the farming business and conducts a farming enterprise wherein it established a variety of crops and also has a gaming farm.

[8] Senwes funded the CC to establish its crops and is a substantial creditor of the CC. At the time the CC went into business rescue it was indebted to Senwes for an undisputed amount of R7 777 783,42. Senwes is a secured creditor and procured security from the CC which included a cession by the CC to Senwes of the proceeds of its existing and future crops, mortgage bonds over the CC's farms and in addition, the management members of the CC have bound themselves as sureties in favour of Senwes for payment of the CC's debts.

[9] On 28 November 2014, the CC passed a resolution to place itself under business rescue. Pursuant to the resolution filed on 2 December 2014, the Companies and Intellectual Property Commission appointed the BRPs. The BRPs called and arranged the first meeting of creditors which was held on 18 December 2014. Claims totalling R14 073 060,92 were proved by creditors against the CC. Senwes is by far the largest creditor with its claim representing 55,27% of the voting interest.[1]

[10] Numerous further meetings of creditors were held at which the BRPs eventually submitted to the creditors an improved business rescue plan dated 29 April 2015 to be voted upon at the next meeting of creditors. Senwes was concerned that in the proposed plan, its security, the proceeds from the crops, was earmarked to be utilized to cover the CC's operating costs. Senwes recorded at the meeting that if an agreement or an arrangement could be arrived at in order to preserve Senwes' security, then Senwes will support the plan. The BRPs were not prepared to accept the suggestion and indicated that the crops are necessary to pay for the expenses of the CC.

[11] Senwes then voted against the adoption of the plan at the final meeting of the creditors held on 19 June 2015. Section 152 (2) (a) of the Act requires 75% of the creditors to vote in favour of the plan. As Senwes held 55,27% of the voting interests, its dissenting vote was fatal for the adoption of the plan.

[12] The BRPs then indicated that Senwes had exercised its vote inappropriately and brought the ordinary application to court to set aside the voting on the basis that Senwes had exercised its vote inappropriately as contemplated in section 153 (1) (ii)

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[1] Ordinary application record p224, par 41

of the Act. On the other hand, Senwes requested an undertaking from the BRPs that the proceeds of the crops would not be dealt with, pending the outcome of the intended ordinary application. When the BRPs intimated that they did not intend giving the undertaking, Senwes then brought its urgent application.

Senwes' urgent application

[13] Against the above-mentioned background, counsel for the CC and the BRPs[2] submitted that the urgent application must be dismissed with costs as no reason(s) existed for Senwes to have proceeded with the application. Counsel argued that the dispute between Senwes and the BRPs had been in existence for a number of months and there was lack of urgency in so far as the application is concerned. Counsel further submitted that the fact that the urgent application was not proceeded with, is indicative of the fact that no urgency existed and that the urgent application was an abuse of the court processes.

[14] Senwes' counsel[3] submitted that an urgent application was launched as Senwes had the concerns that as a secured creditor it would be prejudiced if the object of its security would be utilized in an expensive risky business of an entity under business rescue, to pay for enormous running expenses to establish crops. Counsel however argued that the urgent application became academic when it later became evident that the security of the proceeds of the crops had already been utilized by the BRPs.

Having regard to the background of these matters, I do not find any merit on the argument that the urgent application was an abuse of the Court processes.

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[2] Advocate LK van der Merwe
[3] Advocate M P van der Merwe SC

The striking application

[15] The CC in business rescue made an application to have the further supplementary affidavit filed by and on behalf of Senwes struck with costs in light of the fact that the content of the affidavit is scandalous, vexatious and irrelevant. Counsel for the CC and the BRPs submitted that the affidavit stands to place the BRPs in a negative light before this Court by requesting a punitive costs order against them. It was argued on behalf of the BRPs that it is opportunistic of Senwes to criticize the BRPs for the projections which they, in the spirit of the Act need to consider in moving forward with the development of a business rescue plan.

[16] It was further submitted by the BRPs counsel that the supplementary affidavit has been filed outside the parameters of the Rules of Court and that the affidavit is irrelevant for purposes of deciding the status of the vote by Senwes and should not be allowed. Although the BRPs filed an answering affidavit in answer to Senwes' further affidavit, counsel argued that this cannot be construed as conceding to the further affidavit to be allowed.

[17] Counsel for Senwes, in response pointed out that the supplementary affidavit in essence dealt with the events that occurred only after the previous affidavits were already filed. It was counsel's submission that the supplementary affidavit dealt with what appeared to be the complete erosion of Senwes' security and the reckless manner in which the BRPs allowed the proceeds of the crop to be dissipated. It was however admitted by Senwes' counsel that the punitive costs order against the BRPs is not to be proceeded with.

In my view, the supplementary affidavit strikingly reveals and exposes that Senwes' fears when it voted against the plan, were real and in fact had materialized. The application for striking the supplementary affidavit therefore fails.

Did Senwes exercise its vote inappropriately?

[18] The crisp issue to be determined by this court is whether Senwes exercised an inappropriate vote against the tabled business rescue plan as envisaged in section 153 (1) of the Act.

Section 153 of the Act provides that:

> *"(1) (a) if a business rescue plan has been rejected as contemplated in section 152 (3) (a) (c) (ii) (bb) the practitioner may*
>
> *(i) seek a vote of approval from the holders of voting interest to prepare and publish a revised plan; or*
>
> *(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interest or shareholders, as the case may be on the grounds that it was inappropriate".*

[19] Section (7) of the Act provides that on an application contemplated in subsection 1(a)(ii) or 1(b)(i) (bb), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to –

> *"(a) the interests represented by the person or persons who voted against the proposed business rescue plan;*

(b) the provision, if any, made in the proposed business rescue plan with respect to the interest of that person or persons; and

(c) a fair and reasonable estimate of the return to that person or those persons if the company were to be liquidated".

[20] Counsel for the CC and BRPs submitted that the inappropriateness of Senwes' vote is based on a number of factors: namely additional available security; prior concession by Senwes of successful rescue plan; and *mala fides* of Senwes; Counsel submitted that the cession held by Senwes over the proceeds of the crops is not the only security held by Senwes. In light of the additional security held by Senwes in the form of sureties and mortgage bonds its vote against the business rescue cannot be considered *bona fide* and/or appropriate.

[21] In this regard, Senwes' counsel relied on the provisions of section 134 (3) of the Act which reads as follows:

"If during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must –

a) Obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

b) Promptly –

i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person".

[22] It is an undisputed fact that Senwes is a secured creditor. I agree with the submissions made by counsel for Senwes that the utilization of Senwes cession security by the BRPs to pay for risky and substantial business expenses clearly flies in the face of the provisions of section 134 (3). In my opinion there is no merit in the BRPs argument that the mere existence of additional security entitled them to dissipate Senwes' cession security. Furthermore, I do not agree with the submission made by the CC's counsel that "property" as referred to in section 134 (3) does not include the harvest of the CC's farming enterprise.

[23] It is further submitted on behalf of the BRPS that prior to casting its vote, Senwes conceded to the possibility of successfully rescuing the CC utilizing the business rescue plan developed and it is argued that on this basis alone, Senwes' vote against the business rescue cannot be considered as appropriate.

[24] It is evident from the record that Senwes initially accommodated the attempts by the BRPs to devise a business rescue plan. It was only when a revised plan proposed that its security was earmarked to be utilized to cover operating costs that a difference of opinion then developed between Senwes and the BRPs. Senwes on the one hand had the concern that it could never have been the intention of the legislature to prejudice a secured creditor by allowing the object of its security to be utilized in an expensive risky business of an entity under business rescue. The BRPs on the other hand adopted the view that Senwes must accept the risk to abide by the speculative possible permutations envisaged in the plan, and that if all goes well and if the assets of the CC are sold together with the assets of the sureties, then

Senwes would be paid within 12 months. This in my view does not make Senwes' vote against the business rescue inappropriate.

[25] Counsel for the BRP's has submitted that this Court should have regard to what creditors stand to receive in a liquidation scenario. If regard is to be had to the proposed and tabled business plan, it is suggested that Senwes will receive 100 cents in the Rand with regard to its claim, over a period of 12 months whereas in a liquidation scenario, Senwes only stand to receive 66 cents in the Rand for its claim.[4] It is on this basis that it is argued that a vote against a business rescue plan with Senwes standing to receive more than in a liquidation scenario does not represent a *bona fide* vote.

[26] It is evident from the record that at the time when Senwes exercised its vote against the plan, it knew that there was a substantial yield which would become available from the crops. Senwes was not willing to sacrifice its security in exchange for the hope that over a period of a year, contemplated by the plan, it must hope for a favourable realization of the other assets of the CC and its sureties. Had the CC been put in liquidation, Senwes would have enjoyed a first right to the entire proceeds of the crops ahead of all the other creditors. Therefore, it cannot be said to be inappropriate for Senwes to prefer a winding-up instead of a business rescue. I have no doubt that Senwes exercised its vote by voting against the plan in the belief that it would further its interest this way. I do not find anything unsuitable or improper by Senwes voting against the plan.

[27] There is nothing in section 134 (3) of the Act that suggests or indicates that a secured creditor can be compelled to surrender his security. It is inconceivable to

[4] Record page 140, paragraph 11.7 read with paragraph 7 of the amended business rescue plan, Annexure "C4" page 182, paragraph 9 at page 196 of the bundle Urgent Application

view a vote against the plan to be inappropriate, if the *bona fide* belief is that the plan entails a risk for security.

[28] Counsel for Senwes argued that contrary to the contention of the BRPs that the values of the assets are common cause, it is clear from the records that the values are not common cause. The BRPs, for example contended that the value of the crop which was available at the time when the plan was voted upon is approximately R3 million. It has however been revealed in the supplementary affidavits exchanged that the crops in total yielded only R830 209,07 and that during the entire business rescue proceedings up to June 2014 expenses of R1 012 345,77 were incurred, leaving a net loss of R182 136,70.[5]

[29] The BRPs made it clear that their refusal to agree to certain upfront payments to Senwes, was on the basis that such payments may potentially create a position where the BRPs would not be able to make payments towards creditors whose claims related to the operating expenses of the CC. It was contended that in this regard, Senwes would have been elevated above other creditors who claim in a more preferred position within a business rescue scenario. It is therefore submitted on behalf of the CC and the BRPs that a vote against the proposed business plan under circumstances where the BRPs were not prepared to elevate Senwes above the other creditors is inappropriate.

[30] The BRPs attempt to justify their utilization of Senwes' security is based on the strength of section 143 (5) of the Act which reads as follows:

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[5] Supplementary affidavit p 300

"(5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors".

[31] In my view, the legislature did not intend section 143 (5) to override section 134 (3) of the Act, otherwise section 134 (3) which affords protection to a secured creditor, would be rendered nugatory. It could never have been the intention of the legislature to frustrated a secured creditor by ensnaring the secured creditor in a long business rescue process coupled with the uncertainty and speculation as to whether or not the secured creditor is ultimately going to be paid. If the secured creditor is not prepared to indulge itself in such a risk it can surely not be said that its vote against such an uncertain risky plan is an inappropriate vote. Senwes put its own resources at risk by granting finance to the CC and the security served as its safety net in the event of non-payment by the CC. The revised business plan clearly recorded the utilization of Senwes' security in clause 9.6 thereof:

"The proceeds of the harvests to be realized will be utilized to cover the operating costs, which represents expenses in business rescue for the duration of the business rescue proceedings."

[32] Counsel for the BRPs also raised the plight of the CC's employees as an issue and argued that the livelihood of employees and their families need to outweigh any short-term financial gain a creditor may derive from a vote against a business rescue plan. In this regard, counsel relied on the unreported judgment of this division by Justice Mavundla in **KJ Foods CC v First National Bank (75627/2013) [2015] ZAG – PPHC 221 (23 April 2015)** para 14 wherein the Court said the objection against the business rescue is "*not appropriate but premised on*

self-interest". The Court also added a second element, ie. *". . .whether there are reasonable grounds to believe that business rescue is viable and job loss for many can be averted or even delayed. . . "*

I have difficulty in understanding this argument when the BRPs own, business rescue plan postulates the selling of the CC's farms. In my view, a consideration such as the loss of jobs by employees is not one of the factors a Court may directly take into account in the evaluation of whether a vote is inappropriate.

[33] I agree with the submissions made on behalf of Senwes that concerns for employees is not a relevant issue in determining whether the vote against the plan was exercised inappropriately or not. Counsel in this regard relied on the unreported judgment of this division by Justice Tuchten in **Shoprite Checkers (Pty) Ltd v Berryplum and Others 47327/2014 [2015] ZAG PPHC (9 March 2015) para 38** wherein the Court said that the ordinary meaning of *"inappropriate"* is unsuitable, unfitting or improper, and that a vote by a creditor which is cast in good faith in the sense that the creditor genuinely believes that the vote (either for or against the plan) would advance that creditor's interest, does not fall into those categories of *"inappropriate".* I respectfully disagree with the approach by the BRP's counsel that a vote based simply on the interest of a single creditor cannot be regarded as appropriate and that the test for the appropriateness of the vote should not be whether or not the vote advances the interests of the creditor and not even whether or not such a vote was made on a *bona fide* basis.

[34] The purpose of business rescue proceedings is to facilitate the rehabilitation of a company that is financial distressed by providing for the temporary supervision of the company, and of the management of its affairs, business and property; a

temporary moratorium on the rights of claimants against the company or in respect of property in its possession and the development and implementation if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximizes the likelihood of the company continuing in existence in a solvent basis, or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders, than would result from the immediate liquidation of the company[6].

[35] Clearly, the business rescue plan should maximize the continuing existence in a solvent basis for the company and its creditors to get returns on their investments than would be the case from the liquidation of the company.

[36] Senwes, in *casu* exercised its rights, one of the options allowed to it by law and endeavoured to put itself in a position equivalent to which it would have been had the CC been wound up. The BRPs seem to have adopted the view that Senwes must simply accept the risk and abide by the speculative permutations envisaged in the plan, such as that if all goes well and if the CC's assets are sold, together with the assets of the sureties, then Senwes will be paid in full within 12 months. I wish to point out that Senwes holds security over some of these assets and it will have to give its consent for the cancellation of the mortgage bonds. Without such consent, the plan can simply not be implemented, regardless of the Court's view on the appropriateness of the vote. At the end of the day, the question is, should consent be granted and the assets be sold, what will be left for the CC to continue with its

[6] Section 128(1) (b) of the Companies Act

operations?? No purpose will therefore be served by allowing the business rescue plan to continue.

[37] The BRP's plan extracts only the best case scenarios of their plan and the estimations presupposes that the properties will be sold for the high values postulated. However, Senwes gave classical examples of how unpredictable the future realization of immovable assets can be. It pointed out that different valuators valued the immovable properties at approximately 40% difference. This issue was authoritatively discussed by Brand, JA in **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others, 2013 (4) SA 539 (SCA) at par 33**:

> *"[33] My problem with the proposal that the business rescue practioner, rather than the liquidator; should sell the property as a whole, is that it offers no more than an alternative, informal winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally been preserved for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve".*

[38] By adopting a resolution to go into business rescue, the CC conceded that it cannot pay its debts. If the company cannot pay its debts, it must perforce liquidate

its assets to pay its debts. The question in *casu* is whether what the BRPs are proposing is not simply an informal winding-up process, a scenario expressly dismissed by Brand JA in **Oakdene supra**. I find it difficult to agree with the argument that in the informal winding-up the creditors will be better off, resulting from the BRPs postulation that they will sell the assets at a better price than a liquidator. But if that type of argument were valid, liquidations should systematically be business rescues as business rescue systems will always render better dividends than liquidation.

[39] By voting against the plan, Senwes casted a vote in good faith in genuine belief that its vote against the plan would advance its interests because if there is no business rescue plan and the CC is liquidated, Senwes would outrank the claims of all other creditors on the proceeds of the crops. In the prevailing circumstances, I find nothing unfit, unsuitable or improper in Senwes' vote which is inappropriate. I therefore cannot, from these considerations conceivably think how it can be contended that Senwes had exercised its vote inappropriately.

[40] Zellehen Boerdery CC is unable to pay its debts and its position can only worsen to the detriment of creditors and employees generally. In these circumstances, in my view, immediate liquidation is appropriate.

[41] I therefore make the following order:

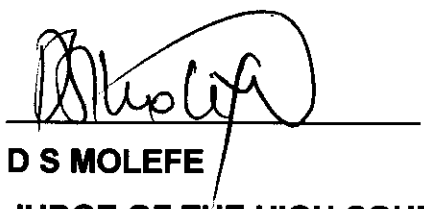
1. *The application launched by Zellehen Boerdery CC under case number 50486/15 is dismissed.*

2. *The resolution of Zellehen Boerdery CC to adopt business rescue proceedings is hereby set aside.*

3. *The appointment of the second and third respondents under case number 50799/15 as business rescue practitioners of Zellehen Boerdery CC is hereby set aside.*

4. *A final winding-up order is hereby granted placing Zellehen Boerdery CC under liquidation.*

5. *The costs of the urgent and ordinary applications will all be costs in the liquidation of Zellehen Boerdery CC.*



D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Zellehen Boerdery CC and the BRPS	:	**Adv. L K van der Merwe**
Instructed by	:	**Koster Attorneys**
Counsel on behalf of Senwes Ltd	:	**Adv. M P van der Merwe SC**
Instructed by	:	**Tim Du Toit & Co INC.**
Date head	:	**17 February 2016**
Date delivered	:	**31 March 2016**