REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 53473/2021

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

Date: 28 March 2022 E van der Schyff

In the matter between:

ROGAL HOLDINGS (PTY) LTD	APPLICANT
M C & E N NKHULU	INTERVENING PARTIES
and	
VICTOR TURNKEY PROJECTS (PTY) LTD	FIRST RESPONDENT
JERIFANOS MASHAMBA N.O.	SECOND RESPONDENT
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	THIRD RESPONDENT
ALL AFFECTED PARTIES OF THE FIRST	

RESPONDENT FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] On or about 6 September 2021 the first respondent adopted a resolution to commence with voluntary business rescue proceedings in terms of section 129(1) of the Companies Act, 71 of 2008 (the 2008-CA). The first creditors' meeting was held on 17 September 2021. On 15 October 2021 the second respondent convened a further meeting with creditors. Since the applicant launched this application, and on 3 December 2021, the business rescue plan was rejected at a further meeting of creditors. It is common cause that, to date, no business rescue plan has been adopted.

[2] The applicant seeks an order that the resolution adopted by the first respondent to commence with business rescue proceedings in terms of section 129(1) of the Companies Act, 71 of 2008, (2008-CA) be set aside, that the first respondent is finally wound-up, and further and alternative relief. In the alternative the applicant seeks an order that the business rescue proceedings of the first respondent be converted to liquidation proceedings in terms of section 132(2)(a)(ii) of the Companies Act.

[3] The application was first enrolled in the urgent court on 9 November 2021. An application was also filed under the same case number by an intervening party, represented by the applicant's legal representative, seeking permission to intervene and similar relief. The urgent application was struck from the roll and subsequently re-enrolled in the opposed motion court. It was set down for hearing in the opposed motion court in the week of 28 February 2022. In compiling the opposed motion roll, I directed that the matter would be heard on 2 March 2022. On the date and time allocated for hearing, counsel for the first and second respondents (the respondents) informed the court that the first and second respondents' attorneys of record

withdrew as attorneys of record on 2 February 2022. He requested that the matter be postponed since he only received his brief on 28 February 2022. No substantive postponement application was filed and counsel for the applicant submitted that this was mere delay tactics employed by the respondents. Counsel for the applicant indicated that he is also acting on behalf of the intervening party, and confirmed that the application by the intervening parties is also before the court. After both counsel confirmed that they would be ready to argue the matter on Friday 4 March 2022, the application was stood down.

[4] The respondents subsequently filed a supplementary answering affidavit, to which the applicant filed a supplementary replying affidavit. Although the deponent to the applicant's supplementary affidavit, the applicant's attorney of record, avers in the affidavit that the respondents' supplementary affidavit is fatally defective and should be disregarded by the court, counsel submitted that the applicant does not object to the court having regard to the supplementary answering affidavit because, when considered in conjunction with the applicant's supplementary replying affidavit and the annexures thereto, it reveals inherent discrepancies in the respondents' case.

[5] I found it a serious concern that the supplementary answering affidavit and confirmatory affidavit that was only handed up when the proceedings commenced on 4 March 2022, was commissioned by the counsel representing the respondents. I indicated that in the absence of the applicant continuing with the objection and in order to prevent an undue delay and a possible postponement of the matter, I would provisionally accept the documents but that independently commissioned affidavits needed to be uploaded to the electronic case file. I note, however, that although the respondents subsequently uploaded documents that purport to be affidavits by the second respondent and the first respondent's director, the date of commissioning of the affidavits by the independent commissioner of oaths precedes the hearing of the matter. It is factually impossible for the content to have been confirmed as true under oath on 3 March 2022 before the independent commissioner of oaths and the mere appending of an independent commissioner of oaths' stamp does not render the document properly commissioned. The documents are also not initialled on all the respective pages by either the deponent or the commissioner. Although the

supplementary answering affidavit and accompanying confirmatory affidavit were admitted conditionally, the respondents did not utilise the opportunity to remedy the defect and as a result the affidavits delivered on behalf of the respondents remains defective. The statements were accepted but the probative value thereof is diminished by it not being confirmed under oath or affirmed.

[6] The respondents contest the applicant and intervening parties' *locus standi* on the basis that s 130(1) of the 2008-CA provides that only an affected person may apply to a court for an order setting aside the resolution that the company voluntarily begin business rescue proceedings at any time after the adoption of the resolution in terms of s 129 until the adoption of a business rescue plan. The respondents aver that the applicant does not have *locus standi* to bring an application for liquidation because the applicant's claim, if any, is unliquidated, and because the applicant and the first respondent agreed to a dispute resolution mechanism under the building agreement which provides for arbitration.

[7] The respondents assert that the applicant wrongfully alleges that it has a liquidated claim as envisaged in s 9(1) of the Insolvency Act. They submit that the claim relates to amounts that the applicant claims constitute the difference between payments made and actual value received; that the applicant's claim is based on a dispute regarding the amount of work performed by the first respondent, the amount paid by the applicant, the state of completion of the works, defects in the work performed, an alleged overpayment for services provided, the value of such services and the portion of such services rendered. These disputes relate not only to the original agreement between the parties but also to a number of variation orders. In the result, the respondents submit that the applicant's claim is a claim for damages that requires determination by way of oral evidence.

[8] The issues as to whether the applicant made out a case to have the resolution to commence business rescue proceedings set aside, and to have the first respondent wound-up, are two distinct issues. It will be dealt with separately.

Notification requirement in terms of s 130(3) of the 2008-CA

[9] Before the point *in limine* is addressed, and because the relief sought by the applicant is premised on s 130 of the 2008-CA, it is necessary to determine whether the notification requirement of s 130(3) has been met. Section 130(3) prescribes that an applicant applying to a court to have the resolution in terms of s 129 set aside, must (i) serve a copy of the application on the Company and the Commission, and (ii) notify each affected person of the application in the prescribed manner.

[10] Regulation 124 of the Companies Regulations[1] set out the 'prescribed manner' in which an applicant is required to notify affected persons, and in this regard provides as follows:

> **124. Notices to be issued by affected persons concerning court proceedings.** —*See s. 130 (3) (b) and 131 (2) (b)*—An applicant in court proceedings who is required, in terms of either section 130 (3) (*b*) or 131 (2) (*b*), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant. [My emphasis].

[11] The applicant provided proof that the affected parties known to it, have been notified of the application in accordance with the regulations 7 and 124. In addition, the applicant indicated in the founding affidavit that the application was also served on the business rescue practitioner with the specified purpose of the business rescue practitioner informing all affected parties. The applicant submits that a court must be mindful of the fact that an applicant who is not at arms-length will in most cases not be able to obtain the information necessary to be able to notify "all" affected persons. The papers filed of record indicate that the business rescue practitioner informed all the affected parties in the status report dated 15 November 2021, that it has been ceased with a liquidation application which was "dismissed" in the urgent court based on urgency and is set down for hearing in March 2022. I am satisfied that the applicant demonstrated that it took reasonable steps in accordance with the

[1] GNR. 351 of 26 April 2011: Companies Regulations, 2011 *GG* No. 34239.

prescribed regulations to ensure that all affected parties were notified of the application.

Locus standi

[12] The applicant avers it possess the requisite *locus standi* to approach a court for the relief sought by virtue of its status as a creditor of the first respondent, in the result, the applicant claims to be an affected party within the meaning of the 2008-CA. The respondent denies that the applicant is a creditor.

[13] When dealing with the first respondent's indebtedness towards it, the applicant states that it is the holder of a liquidated claim as contemplated in s 9(1) of the Insolvency Act, 24 of 1936 based on the following:

i. The applicant and the first respondent concluded a written building agreement on 10 January 2020, and on 3 November 2020 concluded and signed an addendum to the initial agreement. The applicant complied with all of its contractual obligations in that it afforded the first respondent access to attend to the building works, did not hinder, interfere or obstruct the first respondent in carrying out its work, and made payment of all the milestone payments on or before the date such payments became due and payable. The first respondent however breached the contractually agreed milestones and only completed 60% of the work. The applicant alleges that it overpaid the first respondent. In addition, certain variation orders were requested by the applicant, agreed upon by the parties and paid in full by the applicant. The first respondent either did not attend to, or only partially acted in accordance with, the agreed variation orders. Cancellation of the agreement was effected on 30 July 2021 and the applicant regained possession of the worksite. The applicant claims that the respondent is indebted to it in the amount of R588 784.53.

[14] In reply to the respondents' denial of its *locus standi* the applicant avers that for purposes of an application for business rescue, a creditor with an existing claim of which the enforcement is contingent or conditional, possesses the requisite *locus standi* to launch an application to set aside the resolution to commence business rescue proceedings. The applicant also informs the court, that the first respondent requested the applicant's attorneys not to refer the matter to arbitration but to mediation in order to resolve the dispute between the parties. Consequent to the first respondent's request to enter into mediation, the first respondent proceeded to pass the resolution to commence business rescue proceedings. The Arbitration Foundation of South Africa notified the applicant that the mediation has failed because it did not receive any response from the respondents.

[15] I agree with the submission made by the first and second respondent that the applicant's claim against the respondents, if it exists, is an unliquidated claim for damages. Griesel J explained in *Tredoux v Kellerman*[2] that a liquidated amount of money is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment' or, put differently, where ascertainment of the amount in issue is 'a mere matter of calculation'. The applicant needs to adduce expert evidence for its damages to be quantified. This is, however, not the end of the question as to whether the applicant is a creditor for purposes of being regarded as an affected person in business rescue proceedings.

[16] The term 'creditor' is not defined in the 2008-CA. In *Henochsberg on the Companies Act 71 of 2008*[3] the learned authors propose that the term will, in the first instance, bear its ordinary meaning. In *Moosa v Olgar and Another*[4] the court grappled with the question whether s 121 of the Insolvency Act 32 of 1916, requires that a creditor must have a liquidated claim in order to be recognised as a creditor in terms of s 121. The court explained on 689:

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[2] (A 405/08) [2009] ZAWCHC 227 (3 February 2009) para [18].

[3] 445, 446.

[4] 1932 NPD 686

> 'The usual sense of the word "creditor" is one who gives credit in business matters, *i e.* to say, one relying on the promise of a person to pay money has given credit to such person: and therefore means one to whom money is due.'

[17] This meaning attributed to the term correlates with the definition attributed to the term in the dictionaries referred to below:

i. Cambridge Dictionary: 'someone who money is owed to'
ii. Collins Dictionary: 'a person or commercial enterprise to whom money is owed.'

[18] Over the years, courts have grappled in different contexts with the meaning that is to be attributed to the term 'creditor'. It is evident that the term is interpreted within the context of the statutes and circumstances that renders its interpretation necessary. In *Paruk v Mather and Others*[5] Hathorn J warned against endeavouring to give any meaning to the term "creditor" in section 169 of Law 47 of 1887, other than "creditor". In this matter one Kathrada entered into a deed of composition with certain of his creditors. The deed was not signed by one of the alleged creditors Paruk. Paruk, obtained an order authorising the issue of summons under s 169 of the Insolvency Law to compel the appearance of certain creditors. On the return day of the summons an objection was raised on behalf of the creditors that the proceedings were bad because Paruk has not tendered any proof as a creditor in the assigned estate. The magistrate held that the summons had been wrongly issued as the deed had been registered in terms of s 158 and not s 167, and that the right conferred by s 169 only referred to deeds of assignment registered under s 167. It was contended on behalf of the creditors (i) that the words 'any creditor' in s 169 do not refer to creditors who have not proved and that there is nothing on record to show that the applicant is even a creditor, and (ii) that a party could only be a creditor if he had a 'legally-proved claim' and that a creditor must prove his claim before he can examine the debtor or share in a dividend. It was argued on behalf of Paruk that he is a creditor 'who is bound by the deed; and he is therefor entitled to

[5] (1910) 31 NPD 335.

the advantages offered by s 169. The judges concerned were in agreement that the plain words of the statute did not limit the class of applicants to creditors who have proved claims. Because the enactment was 'intelligible in itself' and giving the term its ordinary meaning did not lead to absurdity, the court held that the word used must be given its ordinary meaning

[19] In *MacMaster's Trustees v Executor of Kruger*[6] the term was taken in a wider sense so as to extend to persons to whom anything for whatever cause is due. In *Scholtz v Sieff*[7] it was held that in terms of the Insolvency Act 32 of 1916 the term means any person who has a right to sue in his own name for a sum of money or goods. In *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd*[8] Trengrove J held that a person who has a valid claim for unliquidated damages for breach of contract can be regarded as a creditor for purposes of s 113 of the now repealed Companies Act 46 of 1926. Guided by the legislature's extension of the meaning of the term 'creditor' by introducing the words 'any contingent or prospective creditor' he stated on 528:

> 'Similarly a person who has a valid claim for damages for breach of contract against a company also has a claim which arises from an existing *vinculum juris* and this claim is prospective or contingent in the sense that the exact extent of the loss still has to be determined. The mere fact that the claim may still be unliquidated, at the time of the filing of a winding up petition, should not in itself disqualify such an applicant from petitioning for winding up.'

[20] In *Sideralloys International SA v Rahida Investment (Pty) Ltd*[9] the court had to determine whether the applicant was an affected person for purposes of business rescue proceedings. Sideralloys based its *locus standi* on its status as a creditor of Rahida. It averred that Rahida was indebted to it in the amount of $2.9 million,

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[6] (1861-1863) 4 Searle 210.

[7] 1928 OPD 132.

[8] 1971 (1) SA 524 (T).

[9] (2797/18) [2019] ZAGPJHC 227 (18 July 2019).

together with interest, arising out of an alleged breach of contract committed by Rahida. Rahida disputed that it committed the breach and disputed that Sideralloys is an affected person for purposes of instituting an application for business rescue. Keightly J found that Sideralloys failed to establish that Rahida was in breach of the agreement. She continued:

> 'It follows, as a matter of course, that Sideralloys has failed to establish that Rahida is indebted to it for damages arising from the alleged breach as contended for by Sideralloys. Sideralloys is not a creditor on this basis, and thus not an affected person under section 131(1) of the Act. In the circumstances, it does not have *locus standi* to apply for an order placing Rahida under supervision and business rescue'.

[21] The specific context within which the term 'creditor' is to be interpreted for purposes of the current matter is Chapter 6 of the 2008-CA. Section 142(3) prescribes that within five business days after business rescue proceedings begin, the directors of a company must provide the business rescue practitioner with a statement of affairs containing, amongst others particulars of 'any creditors and their rights or claims against the company.' Section 133 creates a general moratorium on legal proceedings against a company in liquidation. Section 150(2)(a)(ii) prescribes that a proposed business rescue plan must include 'a complete list of the creditors of a company when business rescue proceedings began … as well as an indication of which of the creditors have proved their claims'. Section 152(4) determines that a business rescue plan that has been adopted is binding on the company and each of the creditors, whether or not such creditor had proven their claims against the company. Section 154(2) determines that:

> 'If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.' [My emphasis].

[22] In my view, the key to answering the question as to whether the applicant is a creditor for purposes of being acknowledged as an affected party, lies in s 154(2). Will the

applicant be entitled to enforce its debt, if subsequently proven, if the business rescue plan is approved, 'except to the extent provided in the business plan'? This turns on the question as to whether the debt in question can be said to be 'owed by the company immediately before the beginning of business rescue proceedings.'

[23] In *Frieselaar No v Ackerman*[10] Petse JA, writing for the majority explain:

> 'Similarly, the phrase 'debt is due' is not defined in the Prescription Act. But it is now well settled that the term must be given its ordinary meaning, that is, that a debt owing and already payable or immediately claimable or immediately exigible at the election of the creditor. (See: *Electricity Supply Commission v Stewarts & Lloyds SA (Pty) Ltd* 1979 (4) SA 905 (W) at 908E; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532H.) Put differently, there must be a debt in respect of which the debtor is under an obligation to perform immediately. …
> As to when 'a debt is due' this court, in *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) said the following (para 15): 'A debt is due . . . when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.' [Citations omitted.]
> More than a decade ago in *Minister of Finance & others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) the following was stated (at 119J-120A): 'This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal

[10] (1242/2016) [2017] ZASCA 03 (02 February 2018) para [22].

rights, nor until the creditor has evidence that would enable it to prove a case "comfortably".'[11]

[24] In determining whether the debt is due, or owing, the provisions of the Building Agreement concluded between the parties provide the point of entry to the discussion. Important for this discussion is that the agreement provides for variation orders. In clause 15.6 the parties *inter alia* agreed that the 'client' may from time to time issue written instructions for the alteration or modification of the design, quality or quantity of the works as described in the contract. Variations will not change the essential character of the works and must be signed by both the contractor and the client. No variation would vitiate the agreement.

[25] In clause 20 of the agreement, the 'default' clause, the parties *inter alia* agreed that:

i. Should any party breach or otherwise be in default of any of its obligations under or in terms of this agreement and remain in default or fail to remedy such breach within 14 (fourteen) days of receipt of written notice calling upon it to do so, the other party will be entitled, but not obliged, in addition to any other rights which it may have or remedies which may be available to it:
    a. To cancel the agreement in writing;
    b. To obtain an order against such defaulting party for specific performance, with or without claiming damages;
    c. To claim such damages as it may have suffered *in lieu* of specific damages, together with all amounts owing under or in terms of this agreement, whether or not such amounts have become due for payment; and
    d. Refer the matter to dispute resolution in accordance with 21 below.
ii. Unless expressly waived in writing and such waiver is signed by the contractor, the contractor receives the right to exercise a builder's lien over the works in circumstances where the client is in default.

[11] At paras [24], [25]

[26] Clause 21 is titled ‘settlement of disputes’. The parties agreed that should any dispute, disagreement or claim arise between the parties in connection to this agreement, the parties would first endeavour to resolve the dispute by negotiation. If the matter is not resolved by negotiation the parties agreed to submit the dispute to AFSA administered mediation. If the dispute is not resolved it would, if arbitrable in law, be finally resolved in accordance with AFSA’s rules by an arbitrator or arbitrators appointed by AFSA. Clause 21 would not prevent a party from approaching a court of competent jurisdiction to obtain urgent relief.

[27] Clauses 20 and 21 should be interpreted in conjunction with each other. In light of the fact that it is expressly stated in clause 20 that in circumstances of breach or default ‘a party will be entitled to, but not obliged’ to refer the matter to dispute resolution in accordance with clause 21, the applicant is not obliged to exhaust the alternative dispute resolution mechanism provided for in clause 21 before the debt arising from the first respondent alleged breach of contract and default can be said to become owing or due.

[28] The applicant’s main contentions regarding the first respondent indebtedness are set out in paragraph [13] *supra.* In an annexure to the founding affidavit, a letter dated 15 July 2021, the applicant’s attorneys of record notified the first respondent of its alleged breach and default, and provided the first respondent with 14 days to rectify the default. The applicant also invited the first respondent to participate in negotiations as provided for in clause 21.1 of the agreement. In a letter dated 30 July 2021 the applicant stated that the first respondent failed to reply to the letter dated 15 July 2021 and failed to attend to the defects listed in the letter. The applicant informed the first respondent that it cancelled the agreement with immediate effect and shall be taking possession of the works immediately.

[29] In answer, the respondents denied that the first respondent is indebted to the applicant. They aver that the estimation that the building work was completed only at 60%, was done by the applicant who does not set out the basis on which the estimation is made or provide the court with the basis of his expertise rendering him

able to make such calculation. Because the respondents regard the applicant's claim as an unliquidated claim for damages they submit that the applicant is not a creditor.

[30] The respondents' denial of the first respondent's indebtedness amounts to a bare denial. Of importance is the fact that the respondents did not deny, not even as a bare denial, the applicant's statement that the applicant complied with all the contractual obligations incumbent upon it and made payment of all milestone payments on or before such payments becoming due and payable. The respondents denied that the applicant did not hinder and /or obstruct the first respondent but provided no evidential basis for this submission.

[31] The respondents do not deny that the first respondent failed to complete the building works in the time period agreed upon. They state that the first respondent would have completed the works as agreed to in the agreement, save for *inter alia* the continued changes as is evidenced in the variation orders. This 'defence' does not take account of or address the fact that the parties agreed that variation orders may be issued, and where agreed to, that the variation orders would not vitiate the building agreement.

[32] The respondents deny that there was any overpayment and aver that as a result of the variations the applicant is indebted to the first respondent in the amount of R68 704.00. The respondents' failure to provide evidence for this averment in the answering affidavit the face of the detailed information provided in the applicant's founding affidavit supported by annexures leads me to accept the applicant's version as stated in the founding affidavit. The respondents attempt to address this shortcoming in the supplementary affidavit filed at the eleventh hour wherein Mr. Viljoen states that 80% of the building works were completed. However, Mr. Viljoen's statement is not properly commissioned, despite an opportunity being provided for the filing of a properly commissioned affidavit. It does not constitute any sworn or affirmed evidence before this court. In any event, even if Mr. Viljoen's statement is accepted, it is evident that the building works were not timeously, or at all, completed. This is seen against the background of the first respondent failing to

participate in mediation proceedings and then passing the resolution to commence business rescue proceedings.

[33] The respondents admit that the required cancellation notice was sent by the applicant, but denies, without proffering any grounds therefore, that the applicant was entitled to cancel the contract. The respondents assume that the mere fact that the applicant's claim is disputed gives rise to material disputes of fact which cannot be decided by way of motion proceedings. The Supreme Court of Appeal held in *Wightman t/a JW Construction v Headfour (Pty) Ltd*[12] that:

> 'A real, genuine and *bona fide* dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact to be addressed.'

The respondents failed to engage meaningfully with the evidence presented in the founding affidavit, when it neglected to provide a factual basis for its bare denials.

[34] However, even I accept that a dispute exists regarding the first respondent's liability to compensate the applicant for damages, and that the first respondent might have a counter claim against the applicant, the applicant made out a case that a cause of action exists and that it has a claim that should be tried by a court of law. In this sense, the applicant is a creditor. It is not only creditors who have proven claims against the debtor that are to be regarded as affected parties. The 2008-CA does not require that the creditor must have a liquidated claim before being recognised as a creditor for purposes of Chapter 6 of the 2008-CA. Where a party holds a debt that is 'owing' in that a complete cause of action for the recovery of the debt exists, and that party would be precluded from enforcing its claim because of the business rescue proceedings except if in accordance with the provisions of the business rescue plan, that party holds a direct and substantial interest in the business rescue

[12] 2008 (3) SA 371 (SCA) at para [13].

proceedings and is an affected party, irrespective as to whether it acquired any voting interests.

[35] The applicant is an affected person with the required *locus standi* to approach the court for an order that the resolution adopted on 6 September 2021 to commence with business rescue proceedings is set aside.

[36] Since the applicant is an affected person and s 130 (1) authorises an affected person to apply to court to have the adoption of the resolution in terms of s 129 set aside before a business plan is adopted, the moratorium on legal proceedings does not apply.

The *status quo* of the business rescue proceedings

[37] Section 153 of the 2008-CA deals with the failure to adopt a business rescue plan. Section 153(1) states that if a business rescue plan has been rejected as contemplated in s 153(3) (a) or (c)(ii)(bb),[13] the business rescue practitioner may either (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan, or (ii) advise the meeting that the company will apply to a

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[13] (3) If a proposed business rescue plan—

(*a*) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153;

(*c*) does alter the rights of any class of holders of the company's securities—

(i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities whose rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and

(ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised —

(*aa*) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or

(*bb*) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153.

court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate. If the practitioner does not take any action contemplated above, any affected person present at the meeting may (i) call for a vote of approval from the holders of voting interests requiring the practioner to prepare and publish a revised plan; or (ii) apply to the court to set aside the result of the vote by the holders of voting interest or shareholders, as the case may be, on the ground that it was inappropriate.

[38] The applicant contends that the second respondent failed to publish the business rescue plan as provided for in terms of s 150(5) and stated that neither the applicant nor any other creditor represented by the applicant's legal representative, agreed to or voted in favour of an extension of the prescribed timelines for the publication of the business rescue plan, nor has the second respondent requested such a vote. The second respondent in turn alleges that the time period for the compilation of the proposed business plan was extended to 15 November 2021 at a meeting of creditors that occurred on 21 September 2021 and 15 October 2021. The minutes attached to the founding affidavit by the applicant is the minutes of the first creditor's meeting held on 21 September 2021. From these minutes it is gleaned that the meeting was adjourned to the 15th October 2021 for the business rescue practitioner to provide a status update prior to a further meeting in November where a plan would be presented. Since I am of the view that the applicant is a creditor without any voting rights, the fact that the applicant did not vote in favour of an extension of the prescribed timelines is neither here nor there. The minutes of 21 September 2021 does not reflect that there was a vote on the issue of the extension of the time periods, but for purposes of the current discussion I will accept that the parties with the voting interest agreed to the extension of the time.

[39] The court is in the dark as to what transpired on 15 October 2021, except for the applicant's reply that a status report was circulated dated 15 October 2021 wherein the second respondent informed that: 'The BRP is not in a position to determine whether the company can be rescued or not. Therefore, another status report will be tabled on 15 November 2021".

[40] It is not apparent what transpired on 15 November 2021 and whether a creditors' meeting was held. It is common cause, however, that a meeting occurred on 3 December 2021. The business rescue plan was rejected by the majority of creditors present at the said meeting. The second respondent states in the supplementary answering affidavit filed that on 3 December 2021 after the plan was rejected:

> 'the creditors were advised that the process as contemplated under the Act which allows me [the second respondent] to prepare and publish a revised Business Rescue Plan ("Revised Plan") will be followed accordingly in accordance with the Companies Act as amended.'

This submission is supported by the signed minutes. Although the applicant contends that this is in contradiction to what transpired at the meeting and presented a transcribed record of the proceedings, I fail to see the contradiction. The transcribed record of the proceedings, to which no objection was raised, reflects that the second respondent stated that he would be guided by the Companies Act going forward.

[41] The reality is, however, that the business rescue plan was rejected at the meeting of 3 December 2021. The second respondent does not contend that he sought a vote of approval from the holders of the voting interest to prepare and publish a revised plan, the minutes of the meeting likewise does not indicate that such a vote was sought. The second respondent did not advice the meeting that the company would apply to a court to set aside the result of the vote by the holders of voting interests or shareholders on the ground that it was inappropriate e.g. the major creditor, albeit present, was not in a position to participate in the vote. The transcribed record reflects that the second respondent merely indicated that he would be guided by the Companies Act. In the minutes of the meeting it is likewise recorded that:

> 'Mr. Wikus asked the BRP whether he will terminate the BRP and the presiding officer responded that he will follow the provisions of the companies act fully and is not terminating the rescue but rather provide

an amended rescue plan according to the provisions of the company's act'.

[42] Section 153(5) prescribes that if no person takes any action contemplated above, the practitioner must promptly file a notice of termination of the business rescue proceedings. Can it be said that the business rescue proceedings terminated despite the business rescue practitioner not having filed such a notice?

[43] Counsel for the applicant referred me to *Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd and Others*[14] where Koen J considered the list of circumstances in which business rescue proceedings end. The court held that s 132 prescribes the situations in which business rescue proceedings end. The court held that s 132(2)(b) is clear that if a notice of termination is filed by the business rescue practioner the business rescue proceedings are brought to an end. This is, however, not the only scenario provided for in the 2008-CA for the termination of business rescue proceedings. Section 132(2)(c)(i) provides that business rescue proceedings end when the plan is finally rejected. This constitutes an independent, and sufficient ground, that brings the proceedings to an end. The filing of the termination notice is an obligation placed on the business rescue practitioner to foster good administrative governance, but it is not a requirement for the termination of the business rescue proceedings. These proceedings are terminated automatically when the plan is finally rejected.

[44] At first blush, the decision in *Land and Agricultural Development Bank, supra,* seems to promote a different position than what was held by a Full Court of this Division in *Commissioner for the South African Revenue Service v Primrose Gold Mines (Pty) Ltd* (CSARS-decision).[15] Since I am bound to follow a decision of the Full Court of this Division even if I am of the view that Koen J's decision is correct, it is necessary to have regard to the CSARS-decision. It is of importance that in the CSARS-

[14] *Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd and Others; Agri Oil Mills (Pty) Ltd and Others v CIPC and Others (Land and Agricultural Development Bank of South Africa Intervening)* (not yet reported) (KZP) case no: 3246/2019P (13 May 2021)

[15] AA932/14) [2016] ZAGPPHC 737 (23 Augustus 2016).

decision the court defined the 'single and narrow issue' of the appeal as 'whether the respondents [the business rescue practitioners] still held office, and hence had *locus standi,* when they brought the application for the liquidation of Primrose in August 2014'. The facts underpinning this 'single and narrow issue' were that after the business rescue plan was finally rejected the business rescue practitioners filed a notice of termination with the CIPC. The CIPC did not accept the termination notice as a valid termination of the business rescue proceedings. After this notice was filed, the directors of Primrose proceeded to issue a resolution to place Primrose in business rescue again. The CIPC informed the business rescue practitioners that in its view they remained the business rescue practitioners a that the new resolution by Primrose's directors was regarded as non-existent. The business rescue practitioners then approached the court for a declaratory order in respect of their status as business rescue practitioners. The business rescue practitioners interpreted the court a quo's order that the business rescue proceedings in respect of Primrose were still pending, and 10 months after they filed the termination notice, they launched a liquidation application.

[45] It is against this background, where the business rescue plan was finally rejected and a termination notice was filed with the CIPC, that the court on appeal expressed the opinion that 'once a termination notice has been filed, either in terms of section 153(5) or s 141(2)(b)(ii) of the Act, it will end the business rescue proceedings.' The court, on appeal, did not engage with the question as to whether the final rejection of a business rescue plan in itself, in the absence of the practioner or affected parties taking the steps contemplated in s 153, terminates business rescue proceedings. This position was dealt with by Koen J in *Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd*, and I am respectfully in agreement him.

[46] The second respondent should heed the provision of s 153. It is not the business rescue practitioner's prerogative to decide that a revised plan be prepared and published. The meeting can direct the business rescue practitioner, when so requested, to prepare and publish a revised plan. No affected person present at the meeting, not even the major creditor who abstained from voting, called for a vote that the practitioner prepare and publish a revised plan or applied to the court to set

aside the result. When the meeting held on 3 December 2021 was closed, and no party indicated their intention to approach the court for an order to set aside the vote or subsequently approached the court for such relief, the rejection of the business rescue plan became final and through the operation of the law the business rescue proceedings were terminated.

[47] However, I am of also of the view that a proper case is made out that no reasonable prospect exists for rescuing the first respondent. My view is informed by the second respondent's status reports, where it is amongst others reported, that:

i. We anticipate that IF the Arbitration goes the Victor Projects way, an award of up to R6m MIGHT suffice;
ii. The arbitration awards are anticipated to be in December 2021;
iii. The company requires cash to fund the arbitration proceedings until December as the current lawyers abandoned ship because of non-payment; any cash realised will be utilised to fund the arbitration proceedings;
iv. Initially based on the information provided it seemed that the assets of the company exceeded the liabilities and on closer inspection, the liabilities far exceed the assets;
v. We have claim forms to the value of R30m as of to-date and we expect more forms to come in;
vi. All assets are encumbered with FNB being a secured creditor and have personal sureties signed;
vii. The BRP is not in a position to determine whether the company can be rescued or not. Therefore, another status report will be tabled on 15 November 2021.

In the event that I am wrong in my approach to the CSARS-decision, and should have found that the business rescue proceedings were not terminated because no notice of termination was filed, I am of the view that a proper case is made out for setting aside the first respondent's resolution.

Re: **The winding-up of the first respondent**

[48] I have already explained that I am of the view that the applicant is a creditor and an affected party for purposes of business rescue proceedings. For purposes of the liquidation application, and because the applicant has a valid claim based on breach of contract and is entitled to claim damages, the applicant is a contingent creditor. The first respondent, however, likewise made out a case that it has a counter-claim against the applicant. Where in a liquidation application, a creditor's demand is met with a counter-claim a court should be very slow to grant the drastic relief sought in liquidation proceedings. The facts before me, and more specific, the content of the business rescue practitioner's reports referred to above, support, at minimum a provisional finding that the first respondent is unable to pay its debts.

[49] In granting the order I took into account the facts placed before the court by both parties, and considered that the company's employees, and creditors who were notified of the proceedings did not oppose the relief sought.

Intervening parties

[50] Neither party specifically addressed me on the intervening parties' application to intervene. Counsel for the applicant, however, confirmed that this application was also before the court, and he was not gainsaid. I considered the papers filed and is of the view that the intervening parties made out a case to intervene. They seek similar relief than the applicants, and are represented by the same legal representatives.

Costs

[51] Although the applicant submitted that a *de bonis propriis* costs order should be granted, I find no reason substantiating a departure from the general principle that costs follow the event.

ORDER

In the result, the following order is granted:

1. The business rescue proceedings of the first respondent terminated when the business rescue plan of the first respondent was finally rejected at the meeting of creditors held on 3 December 2021;
2. The first respondent is placed in provisional winding-up;
3. A *rule nisi* is issued calling upon any interested person to appear on 16 May 2022 in the unopposed motion court at 10h00 or as soon thereafter as the application can be heard, and give reasons, if any, why this Court should not order the final winding-up of the first respondent company.
4. Service of this order is to be affected by:
   4.1. The Sheriff at the registered office of the first respondent;
   4.2. The Sheriff on the employees of the first respondent;
   4.3. Electronically or by hand to the Master of the High Court and the South African Revenue Services;
   4.4. One publication in each of the Beeld and The Citizen newspapers;
   4.5. Publication in the Government Gazette;
   4.6. Electronically on the Companies and Intellectual Property Commission by electronic mail;
   4.7. Electronically or by hand to all known creditors of the first respondent.
5. All the costs of this application, including the wasted costs incurred on 2 March 2022, are costs in the liquidation.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Adv. J Wessels
Instructed by:	Van Greunen & Associates Inc.
For the first and second respondents:	Adv. M L Langa
Instructed by:	Rachel Jiyana Inc.
Date of the hearing:	2 March 2022, 4 March 2022
Date of judgment:	28 March 2022