REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 269/2019P

In the matter between:

SUGAN KRISHNA NAIDOO	**APPLICANT**
and	
JOHN MICHAU N.O	**FIRST RESPONDENT**
NEIL DAVID BUTTON N.O	**SECOND RESPONDENT**
THE SKN GROUP (PTY) LTD **T/A TITAN TRANSPORT** **REG NO. 2012/120203/07**	**THIRD RESPONDENT**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**FOURTH RESPONDENT**
THE GENERAL BODY OF CREDITORS	**FIFTH RESPONDENT**
SCANIA FINANCE SOUTERN AFRICA (PTY) LTD	**SIXTH RESPONDENT**
ABSA BANK LIMITED	**SEVENTH RESPONDENT**

CASE NO: 3519/2019P

In the matter between:

JOHN MICHAU N.O	**FIRST APPLICANT**
NEIL DAVID BUTTON N.O	**SECOND APPLICANT**

and

THE SKN GROUP (PTY) LTD	**FIRST RESPONDENT**
SUGAN KRISHNA NAIDOO	**SECOND RESPONDENT**

JUDGMENT

Madondo DJP

Introduction

[1] In the main application, under case number 269/2019P, Sugan Krishna Naidoo (the applicant), seeks an order in terms of s 153(1)(*b*)(i)(*bb*) of the Companies Act 71 of 2008 ('the Act') setting aside the result of the vote by the creditors and other holders of voting interests who on 14 January 2019 voted against the adoption of the business rescue plan in respect of the SKN Group (Pty) Ltd t/aTitan Transport (the third respondent), in accordance with the provisions of Chapter 6 of the Act on the grounds that it was inappropriate. The non-adoption of the business rescue plan resulted in its rejection. The applicant also seeks an order that the rejected business rescue plan be adopted. In amplification of its application, the applicant states that the non-adoption of the business rescue plan was inappropriate in that it was exercised in a manner that was oppressive or unfairly prejudicial to or it disregarded the interests of the applicant as contemplated in s 163(1) read with s 163(2) of the Act.

[2] The respondents' contention is that the business rescue plan was not approved on a preliminary basis as contemplated in s 152(2)*(a)* of the Act in that it was not supported by the holders of more than seventy-five (75) per cent of the creditors' voting interests that were voted. The respondents do not only oppose the main application but they also seek an order in terms of s 141(2)*(a)*(ii) of the Act that the business rescue proceedings of the first respondent, under case number 3519/2019, be discontinued and that the respondent company be placed into liquidation. The applicants' application in this case is based on the conclusion there is no reasonable prospect of the respondent company being rescued as contemplated in s 128(1)*(b)* of the Act. According to the applicants, since the respondent company is hopelessly insolvent, liquidation will be more advantageous to creditors and shareholders as opposed to business rescue proceedings. The applicants, in their capacities as the duly appointed business rescue practitioners of the respondent company, reached such a conclusion after the financers of the respondent company had repossessed most of the respondent company's trucks and trailers, which were subject to instalment agreements in financers' favour, due to non-payment of the instalments. These trucks and trailers were the respondent company's tools of trade in carrying out its business. Since the two matters, under case number 269/2019P and 3519/2019P respectively, are closely interrelated, it has been agreed between the parties that they should be heard together.

The parties

[3] The applicant in the main application is Sugan Krishna Naidoo ('Naidoo'), a major male businessman, the sole director and shareholder of the third respondent.

[4] The first and second respondents ('the practitioners') are major male business rescue practitioners appointed in terms of section 131(5) of the Act, and are cited herein in their capacities as the duly appointed joint business rescue practitioners of the third respondent.

[5] The third respondent is the SKN Group (Pty) Ltd (in business rescue) ('the SKN Group'), a company duly incorporated and registered as such in accordance with the company laws of the Republic of South Africa, having its registered address

at Suite 12, Water House, 10 Nolls Worth Crescent, La Lucia, KwaZulu-Natal and carrying on business as the supplier of line haul transport and warehousing from JB McIntosh Drive, Shongweni, KwaZulu-Natal. The SKN Group operates a fleet of heavy-duty trucks and trailers throughout the country. The finances for the bulk of the SKN Group's fleet of trucks and trailers are ABSA Bank Limited ('Absa'), Route Quest (Pty) Ltd ('Route Quest') and Scania South Africa (Pty) Ltd ('Scania').

[6] The fourth respondent is the Companies and Intellectual Property Commission ('the CIPC') carrying on business at DTI Campus, Block F, 77 Meintjies Street, Sunnyside, Pretoria. The fifth respondent is the general body of the creditors. The sixth and seventh respondents are Scania and Absa respectively, two of the financers of the SKN Group referred to above.

Factual Background

[7] There are no material and genuine disputes of fact in this matter, and the facts are mostly common cause, save for legal issues relating to whether the vote against the adoption of the business rescue plan was inappropriate, whether there are reasonable prospects of the SKN Group being rescued, whether the practitioners are entitled to bring an application in terms of s 141(2)*(a)*(ii) of the Act for an order terminating the business rescue process and placing the SKN Group into liquidation pending the finalisation of the s 153 application, and whether liquidation will be more advantageous to the creditors and shareholders than the business rescue process.

[8] On 20 November 2016 the SKN Group was placed under provisional liquidation at the instance of Samuels Oil (Pty) Ltd in terms of the order issued by the Durban High Court under case number 1983/2016D. Subsequently to the granting of the provisional liquidation order, Jeminah Moola, an employee of the SKN Group, instituted business rescue proceedings before the Pietermaritzburg High Court under case number 8743/2017P. Samuels Oil (Pty) Ltd sought and obtained leave to intervene in the proceedings. The court in terms of s 131(4)*(a)* of the Act placed the SKN Group under supervision and commencing business rescue proceedings on 28 September 2017. In pursuance of this order, the CIPC, acting in accordance with s 131(5) read with s 138 of the Act, appointed the first and second respondents as the business rescue practitioners in respect of the SKN Group.

[9] Following upon their appointment, the practitioners, in consultation with Naidoo in his capacity as the sole director and shareholder of the SKN Group prepared a business rescue plan in terms of s 150(1) of the Act. Such plan was published in terms of s 151(5) of the Act on 28 December 2018.

[10] On 14 January 2019, the practitioners convened a meeting to propose, consider and vote on the business rescue plan. At such meeting, 16 creditors attended. The creditors voted against the adoption of the business rescue plan, and the votes totalled 74. This represented 63 per cent of the voting interests, and due to their vote the business rescue plan could not be approved on a preliminary basis in terms of s 152(3)*(a)* of the Act (which requires seventy-five (75) percent of creditors' voting interests that had voted, to approve the business rescue plan).

[11] In terms of s 152(3)*(c)*(ii)*(bb)* the plan could thereafter only be dealt with in terms of s 153 as the majority of the voting rights opposed the adoption of the plan. The practitioners then advised the meeting that they would not proceed in terms of s 153(1) (a) on the basis that they lacked the support and cooperation of creditors to issue a certificate of substantial compliance. Acting in terms of s 153(3)*(a)*(ii), the practitioners then adjourned the meeting for five days as s 153(2)*(a)* directs. On resumption of the meeting on 22 January 2019, Naidoo notified the meeting that following the rejection of the business rescue plan, he the applicant would make an application to court to have the vote set aside in terms of s 153(1)*(b)*(i)*(bb)* on the ground that the vote was inappropriate. On the same date, Naidoo issued an application for an order setting aside the vote against the adoption of the business rescue plan under case number 269/2019. This, in terms of s 153(2) *(b)*, had the effect of postponing the meeting until the court has disposed of the s 153 application.

[12] Consequent upon the failure to adopt the business rescue plan, Absa and Route Quest instituted an urgent application for the repossession of their trucks and trailers from the SKN Group, which were subject to instalment sale agreements. On 5 March 2019, Naidoo instituted urgent application proceedings under case number 1593/2019 seeking an order interdicting and restraining Scania, Absa and Route

Quest from repossessing the trucks and trailers. The application was dismissed with costs on an attorney and client scale.

[13] The application was granted. On 26 March 2019, Naidoo sought leave to appeal against the judgment, and the application was dismissed with costs on an attorney and client scale. There has been a plethora of court applications following the order placing the SKN Group under business rescue, which are not relevant for the determination of this matter.

[14] On 23 May 2019 the practitioners brought an application before this court, under case number 3519/2019P, in terms of s 141(2)*(a)*(ii) of the Act for an order that the business rescue proceedings in respect of the SKN Group be discontinued and that it be placed into liquidation. The practitioners grounded their application on the fact that the SKN Group is hopelessly insolvent. It is their contention that the SKN Group will not be able to pay its debts as they become due in the ordinary course of its business.

[15] With regard to the inappropriateness of the vote against the adoption of the business rescue plan in the main application, Naidoo concedes that the proposed business rescue plan was not adopted because it was not supported by seventy-five (75) percent of the creditors' voting interests. The six creditors who voted against the adoption of the business rescue plan constituted the majority of the voting interests in terms of value.

[16] Naidoo, however, contends that the vote of the majority of creditors by value must be made inconsideration of the interest of the estate. According to Naidoo, the vote not to adopt the proposed plan was not in the interest of the estate, as required, but it was clearly exercised for an ulterior purpose which was self-serving for the secured creditors. It was Samuels Oils (Pty) Ltd which had placed the SKN Group under business rescue. However, it was out voted by the other creditors who exercised their discretion capriciously.

[17] Absa, Route Quest Management, Route Quest and Biotrace were represented by proxies at the meeting and that is common cause. Naidoo avers that

prior to the meeting of 14 January 2019; such creditors had already given instruction to proxies to vote against the adoption of the plan. This, according to Naidoo, shows that they did not intend to meaningfully participate in the meeting. They had already made up their minds to vote against the adoption of the business rescue plan prior to the plan being properly tabled, discussed and ventilated at the meeting, including any amendments that could have been included to cater for any substantive reason offered by them not to accept the plan in this current form. The instruction to proxies to also vote against any amendments indicates that such proxies participated at the creditors' meeting in bad faith.

[18] It is Naidoo's submission that the decision to vote against the adoption of the business rescue plan was exercised without a proper application of the minds of the creditors, as the decision had already been made prematurely and without appreciating the purpose and object of the creditors' meeting. Naidoo contends that the objection by Scania was inappropriate as it was based on an ulterior motive on the grounds that the SKN Group had a costs order against Scania, and which Scania was avoiding to pay. Further, the SKN Group had a pending claim for damages against Scania, and to which Scania did not have *bona fide* defence.

[19] Naidoo further avers that the secured creditors voted against the business rescue plan because they wanted to be paid sooner rather than later as in a liquidation scenario, as opposed to in the business rescue process. They would also unfairly and unduly benefit in the return of the vehicles, which the SKN Group had paid substantial sums of money for. Their vote is inappropriate because they did not participate in the proceedings in good faith, they adopted their votes prematurely and sought to expedite their claims irrespective of the life and death consequences of the remaining unsecured creditors, despite them receiving full payment in terms of the rescue plan. Naidoo argues that in terms of the plan their interests and claims are recognised. The plan provides for the full satisfaction of their claims.

[20] Naidoo avers that the business rescue plan will satisfy all the creditors' claims in full and that it is in the interest of the general body of creditors. According to Naidoo, the benefits of adopting the business rescue plan as opposed to liquidation are, amongst others, as follows:

(a) The secured creditors would receive payment of their debts in full which equates to 100 cents in the Rand;

(b) The concurrent creditors would receive payment of their debt in full which equates to 100 cents in the Rand as opposed to 0.1 cents in the Rand which they will receive in a liquidation scenario;

(c) The costs of business rescue will be substantially less than the costs of liquidation. The liquidator's fees, administration costs and disbursements are substantially greater than those to be incurred if the business rescue plan is approved;

(d) The dividend that would be received by the creditors in the liquidation of the SKN Group would be lower than the dividend that is anticipated to be received by creditors as a result of business rescue.

In the circumstances, Naidoo submits that a business rescue will result in a better return than upon a liquidation and will balance the interests of all stakeholders. According to Naidoo as the vote not to adopt the business rescue plan was inappropriate, it is just and equitable to set it aside.

[21] Scania states that the reasons for it voting against the adoption of the business rescue plan were as follows:

(a) It concluded written agreements of lease with the SKN Group during October 2015 in respect of the vehicles, which the SKN Group utilised in the operation of its business. Ownership of the vehicles remained vested in Scania until the last rental payment has been made. In the event of a breach, Scania was entitled to cancel the agreements and repossess the vehicles;

(b) The business rescue plan did not correctly differentiate between secured and concurrent creditors;

(c) The business rescue plan did not make provision for payment to Scania for the use of its vehicles;

(d) The business rescue plan effectively excluded Scania from the business rescue process;

(e) The SKN Group had demonstrated an unusual appetite for litigation and non-commitment to agreements to such an extent that Scania had lost all faith in its ability to run a successful business;

(f) The SKN Group would not allow the business rescue practitioners to run its business.

[22] Scania avers that, in the premises, it has exercised its voting right in good faith and in its best interest, by voting against the business rescue plan. With regard to the order issued against it in favour of the SKN Group, Scania states that such order relates to an *ex parte* application, which its attorneys lodged in the incorrect magistrates' court. The draft bill of costs presented to Scania totalled a mere R30 411.85. When taxed, this amount will be set off against the amount due and owing by the SKN Group to Scania.

[23] Scania further states that an amount of R449 426 is outstanding by the SKN Group to it, as well as an amount of R1 269 685.97 which is the aggregate for 8 months arrear rentals not paid, which includes interest. Scania presented a claim of R2 154 724.34 at the first meeting on 14 January 2019, as its claim included a claim for the unexpired term of the lease agreements as at the date of the business rescue.

[24] It is further argued by Scania that by voting for the non-adoption of the business rescue plan, it was ensuring that it received monthly payments and was protecting its ownership rights. The SKN Group would have otherwise remained in possession of Scania's vehicles, without paying for its use. In the circumstances, Scania argued that had it voted in favour of the adoption of the business rescue plan, it would have been acting irrationally.

[25] The reason why Route Quest voted against the adoption of the business rescue plan was that the SKN Group had last made a payment to Route Quest during December 2016, and the business rescue plan proposed that the SKN Group's indebtedness to Route Quest would be payable over the next 40 months. According to Route Quest, apart from this being an insult, it does not make any financial sense. The SKN Group had been generating a substantial income from its three trailers and it failed to pay Route Quest a single cent since December 2016, therefore Route Quest argues that it voted rationally.

[26] In the second application the practitioners seek an order that the business rescue proceedings in respect of the SKN Group be terminated, and that it be placed under final liquidation on the grounds that there are no prospects of the SKN Group being rescued.

[27] The practitioners aver that the SKN Group is in dire financial straits and unable to pay its debts. It is their contention that the SKN Group is hopelessly, factually and commercially insolvent and that its financial position is terminal and that it has whatsoever no prospects of financial recovery. The practitioners base such conclusion on, firstly, that the SKN Group has selectively been paying its creditors. It has been using the business rescue proceedings to its own advantage by continuing to operate and retain moneys recovered from its present customers and creditors while not paying the practitioners or its remaining creditors. Secondly, ten of the SKN Group's trucks have been repossessed by Absa, Route Quest and Scania. The remaining two trucks, which belong to Scania, are subject to being repossessed at any time. The SKN Group cannot generate sufficient income to enable it to continue trading profitably, and accordingly the SKN Group is trading under insolvent circumstances. Thirdly, the SKN Group and its director refused to communicate with the practitioners through email or telephone messages.

[28] The practitioners have further argued that a liquidator would be in a better position, after having investigating the affairs of the SKN Group, to institute appropriate proceedings to recover payments of undue preferences to various creditors, and to call upon the SKN Group's director and others to provide a full account of all moneys received and paid while the SKN Group has been under business rescue. Likewise, a liquidator would be in a position to recover any outstanding moneys due to the practitioners or creditors. Accordingly, the SKN Group needs to be placed under liquidation as a matter of urgency.

[29] The SKN Group argues that there is no provision in the Act which allows the practitioners to apply in terms of s 142(2)*(a)*(ii) to terminate the business rescue, after they have acted in terms of s 153(2)*(b)*, as the proceedings are judicial in nature and exceed the scope and powers of the practitioners. In support of its argument in this regard, the SKN Group refers to s 165(1) of the Act, which provides:

'(1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.'

[30] According to the SKN Group, the practitioners became *functus officio* after they have exercised their discretion to adjourn the creditors' meeting pending the determination of the s 153 application. The business rescue proceedings evolved into a judicial proceeding once the practitioners made the decision to await the final determination of s 153 application. In the SKN Group's argument, the practitioners have no authority to intrude into the pending judicial application by relying on s 142(2), which applies only during the rescue proceedings.

[31] The SKN Group contention is that the practitioners are not entitled to conflict themselves by lodging an application to court for the termination of the business rescue proceedings after they have in terms of s 141(1) of the Act investigated the SKN Group's affairs, business and financial situation and concluded that the SKN Group is reasonably capable of being rescued. Section 141(1) provides as follows:

'Investigation of affairs of company –

(1) As soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.'

[32] The SKN Group avers that the practitioners concluded in terms of the business rescue plan that the rescue proceedings would be far more advantageous to the estate, and that all the creditors would be paid in full, as compared to liquidation, which would only result in certain secure creditors being paid to the prejudice of all other creditors and employees.

[33] With regards to insolvency and the prospect of the SKN Group being rescued, it denies that it is hopelessly insolvent and states that it can, in fact, trade out of its alleged financial distress. On the whole, according to the SKN Group, the published business rescue plan will return it to solvency and will provide a better deal for creditors and shareholders than what they will received through liquidation.

Issues

[34] The two matters combined have raised the following issues, namely whether:

(a) the vote not to adopt the business plan was inappropriate;

(b) it is reasonable and just to set such vote aside;

(c) the practitioners are entitled to lodge an application in terms of s 142(2)*(a)*(ii) of the Act for the termination of the business rescue proceedings pending the final determination of s 153 application;

(d) there are reasonable prospects of the SKN Group being rescued; and whether

(e) the SKN Group is insolvent.

Was the vote not to adopt the business rescue plan inappropriate?

[35] Naidoo's application is grounded on the assertion that the respondents' vote against the proposed business rescue plan was inappropriate. In terms of s 152(2) and (3) the proposed business rescue plan can only be adopted if it is supported by the holders of more than seventy-five per cent of the creditors' voting interests that were voted. It is common cause in the present matter that the vote did not reach the required threshold percentage, and consequently the business rescue plan could not be approved.

[36] Naidoo attacks the rejection of the plan by the holders of the creditors' voting interests as inappropriate as contemplated in s 153(1)*(b)*(i)*(bb)* read with s 153(7), alternatively that the vote was oppressive or prejudicial to his interests and the voting power executed at the meeting was exercised in a manner that was oppressive or unfairly prejudicial to or that it unfairly disregarded the interests of Naidoo. Section 153(1) *(b)*(i)*(bb)* provides as follows:

'(b) If the practitioner does not take any action contemplated in paragraph (a) –

(i) any affected person present at the meeting may –

(aa) . . .

(bb) apply to the 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. . . .'

[37] The court must firstly establish whether the vote was inappropriate. Secondly, the court must consider whether it would be reasonable and just to set aside the result of the vote, taking into account the factors listed in s 153(7) of the Act.

[38] In determining whether or not the vote is inappropriate, the court should in terms of s 153 (1) read with s 153(7) have regard to:

'(7) 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 business rescue plan with respect to the interests of that person or those persons; and

(c) a fair and reasonable estimate of the return to the person, or those person, if the company were to be liquidated.'[1]

[39] In *Kanderssen (Pty) Ltd v Bowman NO*[2] the court held:

'(2) A resolution of creditors is not *bona fide* and may be set aside by the Court if it has been passed not in the honest belief that it was in the interests of the estate and for the benefit of creditors, for some collateral object, whether that object is a fraudulent one or not. . .' (references omitted)

[40] In terms of s 7(k) of the Act the purpose of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders' including creditors.[3] An act which unduly undermines the achievement of the purpose of the Act, as stipulated in s 7(k), is inappropriate. The determination whether a vote was inappropriate is a value judgment which is made after consideration of all the facts and circumstances. The minority dissenting decision in KJ Foods case held the view that in In determining whether or not the vote is in appropriate the test is objective.[4]

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[1] See also *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd & another* 2014 (6) SA 214 (LP) paras 5-6; *Collard v Jatara Connect (Pty) Ltd & others* 2018 (5) SA 238 (WCC) para 19.

[2] *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T) at 1146F. See also *Paruk & others vs Parker Wood & Co Ltd* 1917 AD 163 at 168.

[3] See also *Cloete Murray & another NNO vs FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).

[4] *KJ Foods* fn 2 para 34.

The Shorter Oxford English Dictionary[5] defines the word 'inappropriate' as unsuitable, improper, wrong, inadvisable, misguided, undesirable, misplaced etc.

[41] It is common cause and acceptable practice in the trade industry and commercial world that the creditors are represented by a proxy at a meeting of this nature, and to instruct such proxies to vote in favour or against the business rescue plan. There is nothing in law, which prevents the creditors in the business rescue proceedings from doing so. In my view, the publication of the plan beforehand is intended to give the creditors an opportunity to give a proper consideration to it and ascertain if their rights are affected, positively or negatively, and to determine the extent thereof. It is against this backdrop that the creditors are able to make proposals as to the amendments which should be effected to the business rescue plan, if the circumstances so demand. It is inconceivable that a creditor would come to the meeting of this nature without having formed an opinion as to the proposed business rescue plan, which would be the subject matter of the meeting.

[42] The next question to decide is whether or not the creditors were unreasonable and *mala fide* in refusing to adopt the business rescue plan and in exercising their rights to vote in terms of s 152 of the Act on 14 January 2019. In *Oakdene Square Properties (Pty) Ltd & others, v Farm Bothasfontein (Kyalami) & others*[6] the court held that the proclaimed opposition to the adoption of the proposed business rescue plan by the majority of creditors can only be ignored, if it is said to be unreasonable or not bona fide.

[43] It is not in dispute that the SKN Group retained possession and control over two (2) of Scania's trucks to generate a substantial income therefrom whilst having not paid a single cent to Scania since December 2016, with the arrears amounting to approximately to R2.7 million. According to Scania, the business rescue plan did not correctly differentiate between the secured and concurrent creditors. Such differentiation in my opinion was essential and necessary for a particular creditor to make an informed assessment and decision in the protection of its interests. The

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[5] *The Shorter Oxford English Dictionary* 6 ed (2007).
[6] *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 (SCA) para 38.

business rescue plan did not make provision for the payment to Scania for the use of its vehicles, and effectively excluded Scania from the business rescue process. The failure on the part of the SKN Group to make provision for the payment to Scania for the use of the trucks and the exclusion of Scania from the business rescue process was very prejudicial to Scania. This is so since, in terms of s 154(2), once the business rescue plan has been approved and implemented, a creditor is not entitled to enforce any debt owed by a company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan. Had Scania accepted the business rescue plan in its present form, it would be precluded by s 154(2) from claiming the payment of rentals for the vehicles which the SKN Group was then using. Also, the exclusion of Scania from the business rescue process would be dangerous to Scania as in terms of s 152 (4) (a) and (b), an adopted business rescue plan will be binding on the company and every holder of the company's securities irrespective of whether or not such person was present at the meeting or voted in favour of adoption of the plan. Had Scania, in these circumstances, voted for the adoption of the business rescue proceedings, it would have suffered a great loss.

[44] The Act calls for striking a balance between the interests of the company under business rescue and its creditors. It is not in dispute that the SKN Group had last made payment to its creditors in December 2016, except to those who supply fuel and oils which it needed for its operation. Further, none of the moneys the SKN Group generated during the business rescue proceedings from the trucks were paid to Absa, Route Quest and Scania. At the commencement of the business rescue proceedings, the liability of the SKN Group to its creditors was approximately R22 315 204.63. In the premises, it would be financially imprudent on the part of the creditors to allow the extension of the repayment period by the SKN Group for a further forty (40) months. This will certainly tip the scale in favour of the SKN Group to the prejudice of its own creditors. It is not in dispute that the business rescue plan does not make provision for the payment of the creditors in full, let alone how such payment will be effected. I therefore agree with the submission that the overall conspectus of the business rescue plan does not make any financial sense nor is it supported by any empirical evidence. Accordingly, the creditors cannot be faulted for voting against the adoption of the proposed business rescue plan. I do not find

anything sinister in such voting; instead, the creditors have made a case that they were voting in protection of their economic interests. The SKN Group had not maintained all payments due to the other respondents in terms of the existing agreements with them.

Is it reasonable and just to set aside the result of the vote on the proposed business rescue plan?

[45] As has been previously stated, the determination of whether a vote by creditors against the adoption of a proposed business rescue plan was inappropriate and ought to be set aside, entails a value judgment. Taking all of the factors into consideration, it is not reasonable and just, in the present case, to set aside the vote against the approval or adoption of the business rescue plan.

Did the practitioners become *functus officio* in respect of the proposed business rescue after launching a s 153 application?

[46] The Act is silent on whether or not the practitioners may prepare and publish a revised plan and put it to a vote after making some amendments to it or having supplemented such rejected plan. However, in anticipating such an eventuality, the practitioners have launched an application in terms of s 142(2)*(a)*(ii) for an order discontinuing the business rescue proceedings and placing the SKN Group under liquidation.

[47] The SKN Group contends that the practitioners have no authority to intrude into the pending judicial application in terms of s 153 by relying on s 142(2) of the Act. According to the SKN Group, the practitioners became *functus officio* once they exercised their discretion to adjourn the business rescue proceedings pending the final determination of s 153 application. The SKN Group further argues that the application in terms of s 142(2) *(a)*(ii) is not competent when an application is pending in terms of s 153 because it is in the realm of judicial proceedings and not business rescue proceedings. Further, it is argued that the practitioners cannot be permitted to exercise two competing decisions. The practitioners in their business rescue plan were of the opinion that the published plan would successfully rescue the business, that it would satisfy all the creditors' claims in full, and that it would be

in the interests of the general body of creditors. Having said all this, the practitioners now aver that there are no reasonable prospects of the SKN Group being rescued.

[48] It has been argued on behalf of the SKN Group that once the practitioners have lodged an application under s 153, they are *functus officio* in respect of such application. The answer to this question is according to the decided authorities, which have held that, it is dependent entirely on the nature of the functions a particular functionary concerned performs. In *Enyati Colliery Ltd & another v Alleson*[7] the court held that it was the essential nature of the functions discharged by the commissioner which must decide whether he functioned as a court for the administration of justice.

[49] In *Matiwane v Estcourt Town Council*[8] the court held that where a Bantu Affairs commissioner, in deciding whether rent was in arrears and whether there had been a failure to observe any terms or condition under s 20(5) and s 38bis of Act 25 of 1945, was required to receive evidence, hear the parties' submissions and as a consequence had to grant or refuse an order affecting the rights of others, this would be a judicial proceeding. In *Slade v The Pretoria Rent Board*[9] the court with regard to the word 'judicial' held:

' . . . the term "judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purposes of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others.'

[50] The practitioners when assisted Naidoo to in refer the matter to court for an order that the result of the vote on the business rescue plan be set aside, were not exercising or performing any judicial or quasi-judicial functions nor were they exercising any discretion. They were merely executing a statutory duty by doing what the provisions of the Act required them to do in the event of the business rescue not being adopted on the grounds that it had failed to receive seventy-five (75) per cent of voting interests on a preliminary basis as s 152(1)*(a)* of the Act directs. Before

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[7] *Enyati Colliery Ltd & another vs Alleson* 1922 AD 24 at 30.
[8] *Matiwane v Estcourt Town Council* 1967 (3) SA 104 (N) at 107F-G. See also *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 at 513.
[9] *Slade v The Pretoria Rent Board* 1943 TPD 246 at 254.

referring the matter to court under s 153 they did not receive any evidence, hear any submissions or representations by the parties and as a consequence they did not take a decision. They had no say nor could they influence the decision by creditors to or not to adopt the business rescue plan. Their conduct was procedural or administrative in nature and it was not a judicial pronouncement.[10] They were not even a tribunal, but they had been appointed in terms of the statutory provisions to supervise the business rescue process. The Act only confers on them powers to table, propose and put the business rescue plan to a vote and to refer the matter to court in order to set aside the result of the vote, if they deem that fit, on the grounds that it was inappropriate or to accept the outcome. Such provision is merely procedural and is intended for the benefit of the SKN Group, who may waive it. More so, the proceedings were not intended to be judicial in nature and no appeal lies in respect of them.[11] In fact, the practitioners do not intend to review their prior act but to request the court, on the basis of the time facts and the financial position of the SKN Group, to discontinue the business rescue proceedings and place the SKN Group under liquidation.

[51] It has been argued on behalf of the SKN Group that the practitioners are not entitled, after concluding that the company is capable of being rescued, to turn against such conclusion and hold that it is not capable of being rescued, and that by so doing the practitioners have conflicted themselves. In the circumstances, they are not permitted to interfere with the s 153 application proceedings, which they had referred to court. Unbeknown to the practitioners that the vehicles, on which the SKN Group was entirely dependent for the continued operation of its business, would soon be recovered by the finance companies due to non-payment of the instalments by the SKN Group, the practitioners concluded that the SKN Group was then capable of being rescued. They have now reached the conclusion that there is no longer any prospect of a successful business rescue. The dispossession of the trucks and trailers as the tools of trade left the practitioners with no choice but to opt for the liquidation of the SKN Group. The business rescue plan as published was premised on the SKN Group having its full fleet of vehicles in order to general income to comply with payment proposals. The present business rescue plan,

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[10] *Minister of the Interior & another v Harris & others* 1952 (4) SA 769 (A) at 787B.
[11] *Municipality of Vereeniging v Mahomed Essop* 1916 AD 550 at 552.

according to the practitioners, can no longer be the vehicle to a successful rescue of the business. The practitioners are of the view that liquidation, in the circumstances, will be more advantageous to the creditors and shareholders.

[52] In order to achieve this objective, the practitioners launched an application in terms of s 141(2) of the Act for an order that the proceedings in respect of the published business rescue plan be discontinued and that the SKN Group be placed under liquidation. Section 141 (2)*(a)* provides as follows:

'(2) If, at any time during business rescue proceedings, the practitioner concludes that –

(a) there is no reasonable prospect for the company to be rescued, the practitioner must-

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation.'

[53] In terms of this section, once the practitioner concludes that there is no reasonable prospect for the company to be rescued, the practitioner must accordingly inform the court and all affected persons of such conclusion, and apply for an order terminating the business rescue proceedings and placing the company concerned under liquidation. There is nothing in the Act which precludes the practitioner from doing so pending the final determination of the s 153 application, if it has been lodged. In my view, it would be unreasonable and imprudent for the practitioner to allow the proceedings to continue well knowing that the ultimate outcome thereof will not help to resuscitate the business of the company concerned. The circumstances of the SKN Group have totally changed due to the recovery of the vehicles, which it used as the tools of trade.

Reasonable prospects

[54] Having disposed of the preliminary matter, I now turn to deal with the fundamental remaining issues. The question to decide is whether there are any reasonable prospects of the SKN Group being rescued. This means that a prospect must be based on reasonable grounds. A mere speculative suggestion is not enough.[12] In order to satisfy this requirement, the applicant must provide a

[12] *Oakdene Square Properties* fn 9 para 29.

substantial measure of detail about the proposed plan.[13] With regard to reasonable prospect, Van der Merwe J had the following to say in the *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another*: [14]

'[11] I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt, that in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved . . . . '

In para 15 the learned Judge went on to held:

'[15] In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'

The repossession of the vehicles by the finance companies dealt the prospects of the SKN Group being rescued a telling blow. Naidoo conceded in the application for the recovery of the vehicles that should Scania, Absa and Route Quest execute against its tools of trade and other assets, the effect of such execution would drive the SKN Group into liquidation (Annexure 'AB16'). This also occurred in its founding affidavit and heads of argument under case number 1593/2019P. Seeing that the most of the SKN Group's assets have been returned to finance companies, the practitioners have concluded that there is absolutely no prospect of the SKN Group being rescued. According to them they are left with no alternative but to apply in terms of s 141(2)*(a)*(ii) for the termination of business rescue proceedings and placement of the SKN Group under liquidation.

[55] The business rescue plan, as published, was premised on the SKN Group having its full fleet of vehicles in order to generate income to comply with payment

[13] *Southern Palace Investments 265 (Pty)Ltd v Midnights Storm Investments* 386 Ltd 2012 (2) SA 423 (WCC) paras 24-25.
[14] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another* 2013 (1) SA 542 (FB) para 11.

proposals. Based upon figures which were provided by Naidoo to the practitioners and which were included in the business rescue plan, the SKN Group was factually and commercially solvent.

[56] The SKN Group does not have an impeccable record in not defaulting on payments due.[15] None of the creditors whose claims predate the provisional liquidation of the SKN Group on 20 November 2016 have been paid, with the exception of a few payments made to Scania during December 2016, and payments to the employees and the current trade creditors who are supplying fuels and oils to the SKN Group in order to enable it to continue operating. At some stage the SKN Group retained possession and control of two of Scania's trucks to generate a substantial income therefrom whilst having not paid a single cent to its creditors since 2016, with the arrears amounting to approximately R2.7 million. It has been argued that the SKN Group prefer to keep the business rescue proceedings alive for its own benefit.

[57] It is not in dispute that communication between the practitioners and Naidoo has broken down subsequent to the failure to adopt the business rescue plan. Naidoo refuses to respond to any form of correspondence, be it e-mails or telephone calls by the practitioners. This, according to the practitioners, has resulted in an untenable situation. The practitioners contend that as the SKN Group does not have a business plan and is not being operated by the its practitioners, there are virtually no prospects of it being rescued.

[58] The SKN Group contended that having regard to the positive conclusions reached by the practitioners, it will be able to trade its way out of insolvency and at the same time satisfy all creditors in full. The Act[16] defines business rescue as proceedings aimed at facilitating the rehabilitation of a financially distressed company, which is done by providing for:

'(i) the temporary supervision of the company, and of the management of its affairs, business and property;

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[15] Compare *KJ Foods* fn 2 para 36.
[16] Section 128(1)*(b)*.

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
(iii) 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 maximises the likelihood of the company continuing in existence on 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.'

[59] Where the business rescue proposal reveals that employees will be paid in full and that there will be a better return for creditors than if liquidation supervened, there should be no reason why a winding – up should be preferred.[17] In essence, the business rescue plan is aimed at returning the SKN Group to a state of solvency or enabling it to pay creditors a better dividend as compared to a liquidation scenario. In the present case, it was only after the repossession of the vehicles, which the SKN Group used in its business that it became apparent to the practitioners that there remained no prospect of a successful business rescue.

[60] What is required is the achievement of one of the two goals set out in s 128(1)(b) namely: (a) to return the company to solvency or (b to provide a better deal for creditors and shareholders than what they would receive through liquidation. The secondary goal (a better return for creditors and shareholders than through liquidation) is provided for as an alternative, in the event that the achievement of the primary goal (the return of the company to solvency) proves not to be viable.[18] What the section requires is the continuing existence of the company on a solvent basis.

[61] In *Dallinger v Halcha Holdings (Pty)Ltd & another*[19] the Federal Court of Australia held that business rescue can be available even where 'it is not possible for the company to continue in existence [provided its] . . . administration is likely to result in a better return for creditors than would be the case with an immediate

[17] See *Commissioner, South African Revenue Services v Beginsel NO & others* 2013 (1) SA 307 (WCC) para 62; *Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd & others* 2012 (2) 378 (WCC).
[18] *Oakdene Square Properties* fn 9 paras 23 & 26. See also s 128(1)*(b)*(ii) and s 131(4).
[19] *Dallinger v Halcha Holdings (Pty) Ltd & another* (1996) 14 ACLC 263; [1995] FCA 1727 para 28.

winding up.' .[20] If the primary goal cannot be achieved, it is inconceivable that the business rescue proceedings can be allowed to continue merely on the hope that the administration of the company concerned will result in a better return for the creditors. This will certainly have the effect of defeating the primary objective of the business rescue proceedings, ie to facilitate the rehabilitation of the company. The mere fact that the business rescue plan provides at best for the achievement of the second goal (a better deal for creditors and shareholders than liquidation) does not amount to 'rescuing the company' as defined in s 128(1)*(h)* read with s 128(1)*(b)* of the Act.[21]

[62] I now turn to decide whether or not it would be just and equitable for the business rescue proceedings to be terminated. All evidence should be evaluated 'before reaching a conclusion on the just–and-equitable basis.'[22] There must at least be a real possibility of the business of the company being resurrected.[23] The SKN Group has been hard put to demonstrate the possibility of it continuing to exist in a state of solvency. Nor has it shown that its creditors or shareholders stand to derive better returns in the business rescue process. It has not advanced any details as to the source, nature and extent of the resources that are likely to be available to it which will make it reasonably possible for the business to be rescued. There are no prospects to generate sufficient income to settle amounts due to creditors whose total claims are in excess of R15 000 000. Nor has the SKN Group reached any form of arrangement with the bank to settle the amounts due in respect of the various instalment agreements. The amounts payable to each creditor have been calculated based on the amount available after operating expenses have been paid and each creditor is paid a pro rata of the claim. The whole plan is based on the company actually generating a turnover. Nor does the SKN Group state what it intends to do in order to trade out of its insolvency, let alone generating a profit. The SKN Group's claim that, in the circumstances, it would be able to trade out of insolvency is merely speculative, and not supported by the objective facts and empirical evidence. The SKN Group has therefore failed to prove that either of the business rescue goals set

[20] Section 128 (1)*(b)*(iii).
[21] *Oakdene Square Properties* fn 9 para 25. See also *Millman, NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd Intervening* 1972 (1) SA 741 (C) at 745A.
[22] *DH Brothers Industries (Pty) Ltd v Gribnitz NO & others* 2014 (1) SA 103 (KZP) para 19.
[23] See *Oakdene Square Properties* fn 9 para 39.

out in s 128(1)*(b)* of the Act, namely; the continued existence of the SKN Group in state of solvency or a better return for its creditors and shareholders, will be achieved. As indicated above, since the drafting of the business rescue plan, the circumstances of the SKN Group have changed to such an extent that the business rescue plan is no longer relevant and fitting in the situation. In the premises, I believe that there is a very real possibility that liquidation will in fact be more advantageous to creditors and shareholders. It has been against this backdrop that the practitioners are of the view that business rescue process is no longer a viable option.

Is the SKN Group insolvent?

[63] The practitioners aver that the SKN Group is hopelessly insolvent, which it vehemently denies. The practitioners contend that the SKN Group is under severe financial stress and that, therefore, it cannot meet its monthly commitments as and when they fall due. The Act has laid down the solvency and liquidity test as contained in s 4(1). The section provides:

'4. Solvency and liquidity test –

(1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonable foreseeable financial circumstances of the company at that time –

a. the assets of the company, as fairly valued, equal or excess the liabilities of the company, as fairly valued; and

b. it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of –

(i) 12 months after the date on which the test is considered; or . . . . '

[64] In terms of s 4(2) of the Act any financial information which must be considered in determining the solvency and liquidity of the company in question must be based on accounting records satisfying the requirements of s 28 and financial statement satisfying the requirements of s 29. In terms of a schedule of creditors (Annexure 'NDB19') provided by the SKN Group, it is indebted to its creditors in an amount of R15 105 315. This indebtedness is not in dispute. This claim was also reflected in the business rescue plan and voted at the meeting in terms of s 152. Whereas a valuation report (Annexure 'NDB20') indicates that the SKN Group's assets are valued between R5 380 000 and R7 280 000. This valuation includes the

vehicles which have been repossessed by various financial institutions. This may have the effect of reducing the value of the SKN Group's assets even further. The valuation of the SKN Group was performed by a professional valuer, (Annexure 'NDB4').

[65] I now turn to decide whether it is just and equitable to place the SKN Group into liquidation. In 2016 the SKN Group was placed under provisional liquidation which was suspended pending the finalisation of the business rescue proceedings. The practitioners aver that business rescue process will no longer be viable. Justice and equity involves the weighing up of the nature of the proceedings, the objects of the Act, the purpose of business plan, the advantage to creditors and restoring the insolvency of the SKN Group without adversely affecting any person's rights. All tendered evidence clearly shows that the liabilities of the SKN Group by far exceed the value of its assets and it is also unable to pay its debts as and when they fall due. It is therefore evident that the SKN Group is both factually and commercially insolvent. The liquidator will be in a better position to investigate the affairs of the SKN Group, to recover all outstanding moneys from it and to investigate the various averments by Naidoo. As a consequence, I find that it is just and equitable to grant the relief sought in the second application.

Costs

[66] The referral of the matter to the court for the setting aside of the vote that did not approve the business rescue plan is the procedure provided for in the Act. The rejected plan can in terms of s 152(3)*(a)* only be considered further in terms of s153. Naidoo felt aggrieved by the non-adoption of the business rescue plan by the creditors as he maintained that the vote was inappropriate in various ways. In the circumstances, the only avenue that was in terms of s 153(1)*(b)*(i)*(bb)* open to him was to apply to court to have the result of such vote set aside on the grounds that it was inappropriate. On the contrary, the creditors were of the view that the setting aside of the vote would be financially prejudicial to them, and in the circumstances they were entitled to oppose the application. In the premises, I find it fair and just that each party be ordered to pay its own costs in respect of the main application under case number 269/2019P.

[67] However, the same cannot be said for the second application by the practitioners under case number 3519/2019P. After the repossession of the trucks and trailers by creditors due to non-payment by the SKN Group of the amounts due by it to the creditors in terms of the agreements, the practitioners concluded that the business rescue process would no longer be a viable option. Since the rejection of the business rescue plan there has been no meaningful communication between Naidoo and the practitioners, and the former was not co-operative. Naidoo obstinately relied on the practitioners' earlier conclusion that the SKN Group was capable of being rescued and used that as the justification for opposing the application by the practitioners in terms of s 141(2)*(a)*(ii) of the Act. Naidoo has not made a case for the existence of a reasonable prospect that the SKN Group can successfully be rescued. In the circumstances, I would have found it proper and just that the costs should follow the results. However, the practitioners have for some reason not asked for costs.

Order

[68] In respect of case number 269/20149P, I make the following order:

(a) The application is dismissed;

(b) Each party is ordered to pay its own costs.

[69] With regard to case number 3519/2019P, I make the following order:

(a) The application is upheld;

(b) The business rescue proceedings in respect of the SKN Group (Pty) (Ltd) (the first respondent) be and are hereby terminated in terms of the provisions of s 141(2)*(a)*(ii) of the Companies Act 71 of 2008;

(c) The first respondent be and is hereby placed under final liquidation in the hands of the Master of the KwaZulu-Natal High Court, Pietermaritzburg.

(d) No order as to costs is made.

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MADONDO DJP

Date reserved: 13 September 2019
Date delivered: 8 January 2020

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