THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1194/2019

In the matter between:

FERROSTAAL GmbH	**FIRST APPELLANT**
ATLANTIS MARINE PROJECTS (PTY) LTD	**SECOND APPELLANT**

and

TRANSNET SOC LTD	
t/a TRANSNET NATIONAL PORTS AUTHORITY	**FIRST RESPONDENT**
FERROMARINE AFRICA (PTY) LTD	**SECOND RESPONDENT**
(IN BUSINESS RESCUE)	

Neutral citation: *Ferrostaal GmbH and Another v Transnet Soc Ltd t/a Transnet National Ports Authority and Another* (Case no 1194/2019) [2021] ZASCA 62 (25 May 2021)

Coram: DAMBUZA, MOLEMELA, MBATHA JJA and GORVEN and GOOSEN AJJA

Heard: 17 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09H45 on 25 May 2021.

Summary: Companies Act 71 of 2008 – business rescue proceedings - whether it was just and reasonable to set aside a creditor's vote against the adoption of a proposed business rescue plan on the ground that its result was inappropriate. Held: there is no justification for interfering with the discretion exercised by the high court – appeal dismissed with costs.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bozalek J sitting as court of first instance):

The appeal is dismissed with costs, which costs shall include the costs occasioned by the employment of two counsel.

JUDGMENT

Molemela JA (Dambuza and Mbatha JJA and Gorven and Goosen AJJA concurring)

Introduction

[1] This appeal concerns the question whether a court's refusal to set aside a creditor's vote against the adoption of a proposed business rescue plan (on the basis that it did not make provision for that creditor's interests) was correct. The detailed facts which gave rise to the litigation are not in dispute and are set forth in the judgment of Bozalek J sitting in the Western Cape Division of the High Court, Cape Town (the high court).[1] The salient background facts to this appeal are set out in the succeeding paragraphs.

Background facts

[2] On 31 December 2006, the first respondent, Transnet Soc Limited, trading as Transnet National Ports Authority (Transnet) concluded a written lease agreement[2] (head lease) with Ferromarine Africa Proprietary Limited (FMA) over its fixed property located at the port of Saldanha. Although the leased property provided access to the

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[1] *Ferrostaal Gmb and Another v Transnet SOC Limited t/a Transnet National Ports Authority and Another* (13342/2019) [2019] ZAWCH 112; [2019] 4 All SA 409 (WCC); 2019 (6) SA 490 (WCC) (29 August 2019).

[2] The commencement date was recorded as 1 November 2006.

quay apron and quay operational area of that port, the said apron and operational area did not form part of the leased premises.[3] The head lease was for a period of 15 years, terminating on 30 September 2022, with FMA being granted an 'option' to renew the lease but on terms still to be negotiated and agreed upon prior to that date, failing which the option clause would have no effect.[4] FMA's shareholders were Ferrostaal GmbH, the first appellant, and Atlantis Marine Projects Proprietary Limited, the second appellant. FMA had two directors and no employees.

[3] On 2 December 2016, FMA was placed under business rescue. On 7 December 2016, Mr Gore, the duly appointed business rescue practitioner (practitioner), suspended FMA's obligation to pay rental to Transnet. The practitioner published the first business rescue plan (BRP) on 28 February 2017. Transnet, which happened to be FMA's only independent creditor, did not support the proposed BRP. It appears that Transnet had subsequently initiated arbitration proceedings challenging the lawfulness of the practitioner's decision to suspend FMA's obligation to pay rental. The arbitrator found that the practitioner was entitled to suspend the payment of rental within the contemplation of s 136 (2)*(a)* of the Companies Act 71 of 2008 (the Act).[5] The other aspects canvassed in the arbitration proceedings require no mention in this appeal, as nothing turns on them.

[4] On 23 November 2017, the practitioner published a second BRP. It too, did not find favour with Transnet. During August 2018, Transnet launched an application

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[3] See clause 2.2.1 of the head lease.

[4] Clause 3.2 of the head lease stipulates as follows:

'[FMA] has the option to continue to lease the Premises on terms to be agreed in writing between the parties. The terms and duration of the lease of the Premises, which shall apply after the expiry of this Lease, shall be re-negotiated and agreed upon by the Parties prior to the termination of this Lease, failing which, the option, notwithstanding the exercise thereof, shall be of no force or effect. The Lessee's option must be exercised by notice, in writing to [Transnet], by no later than 12 (twelve) Months prior to the expiry of this Lease.'

[5] Section 136(2) provides:

'Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may –

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –
(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings, and
(ii) would otherwise become due during those proceedings; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph *(a)*.'

before the high court, seeking an order setting aside the resolution passed by FMA, in terms of which the business rescue proceedings were commenced. The practitioner opposed the application on behalf of FMA and simultaneously brought a counter-application seeking to review and set aside Transnet's vote against the adoption of the published BRP. It is unnecessary, for present purposes, to traverse the bases upon which the application and counter-application were initiated and resisted by the respective parties. It suffices merely to mention that while those proceedings were pending, FMA, in principle, agreed to a sub-lease with ArcelorMittal, in terms of which it was envisaged that ArcelorMittal would install a spiral welding mill at the premises, which would be used for the production of steel piping required in the marine construction industry.

[5] On 29 July 2019, the practitioner published a final revised BRP. The main elements of that revised BRP entailed (i) Transnet approving the terms of the proposed sub-lease between FMA and ArcelorMittal for a period of three years, (ii) agreeing to receive its full rental under the head lease for the first six months of the proposed sub-lease and, (iii) the repayment of the arrear rentals only if and when an extension of the lease for a further period of 15 years was negotiated between FMA and Transnet upon the expiry of the head lease. On 31 July 2019, Transnet voted against the adoption of the revised BRP at a meeting of creditors and holders of voting rights. For the sake of completeness, it is necessary to set out the salient provisions of the revised BRP. They were couched as follows:

'13.1 The amounts payable by ArcelorMittal in terms of the ArcelorMittal sub-lease (being the rental due to [Transnet] under the Head Lease for the portion of the Premises occupied by it), plus the facility fee which would otherwise be paid to [FMA] in consideration for its facilitation services and investment in the Premises, plus the rental due by OSRL in terms of its sub-lease, *plus a cash contribution from [FMA's] own resources*, should be sufficient to cover all rental due to [Transnet] for the whole of the Premises for the period from 1 September 2019 to 29 February 2020.

13.2 [FMA] is confident that thereafter, the rental due under the Arcelor Mittal Sub-Lease and the existing OSRL Lease can be *supplemented by further sub-leases to potential sub-tenants*, and that this will be sufficient to cover the whole of the rental due to [Transnet] for the remainder of the lease. *There is not, however, sufficient time remaining in the initial period of the Lease for [FMA] to recover the Arrear Rentals incurred during the Business Rescue Period*.

13.3 Accordingly, the Practitioner proposes that;

13.3.1 the Lease continue on its existing terms (including the obligation to pay a fixed rental) with effect from 1 September 2019;

13.3.2 [Transnet] approve the ArcelorMittal Sub-lease;

13.3.3 at the appropriate time, [Transnet] negotiates in good faith with [FMA] for the extension of the Lease for the further period of 15 years contemplated in the lease;

13.3.4 the repayment of the Arrear Rentals *be deferred until the commencement of the extended period of the Lease*, and that repayment be rescheduled on terms to be agreed between [Transnet] and [FMA] *having regard to the extended period of the Lease* and the levels of new business generated by [FMA] with the co-operation of [Transnet] or, failing agreement between them be amortised over the extended lease period;

13.3.5 the claims of the creditors other than [Transnet] will be written off;

…

13.5 For purposes of illustration only, and in no way intending to pre-empt any of the negotiations between the Practitioner and [Transnet], Annexure D contains a forecast balance sheet and income statement of [FMA] for the period to the end of the Lease, *prepared on the assumption that the rental due to [Transnet] will be the amount received from sub-tenants* and that the company will contribute its facility fee received from ArcelorMittal to make up any shortfall in the [Transnet] rental.

. . .

14. <u>Benefits of the Business rescue as opposed to liquidation</u>

14.1 If the Company were now to be placed in liquidation, [Transnet] is likely to receive approximately 17.7 cents in the Rand (after liquidation costs and the Practitioner's remuneration and expenses and other claims arising out of the costs of Business Rescue). All leases and sub-leases would be terminated and the Premises would be sterilised during the liquidation process, for a period which is likely to be at least six months.

14.2 If the Plan is adopted, the Creditors will benefit as follows:

14.2.1 [FMA] will have a viable business *for the remainder of the Lease period and into any extension of the Lease period* for the benefit of all its stakeholders: [Transnet] as the landlord; revenue and employment for contractors working in the Port of Saldanha; enhancement of the business case for the Saldanha Bay Special Economic Zone; opportunities in the broader oil and gas services, energy and ship-building industries in the Saldanha area; and enhancement of the objectives set out in

> Operation Phakisa in relation to the creation of a marine economy and South Africa's attractiveness as an oil and gas hub; and
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> 14.2.2 although the repayment of Arrear Rentals due to [Transnet] will be deferred, [Transnet] will receive rental in terms of the Lease with effect from 1 September 2019 and by way of rental for the quay and the quay operational area.
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> . . .
>
> 17.3 The shareholders of [FMA] *have concluded* an agreement with Macrovest Capital Proprietary Limited in terms of which they will sell 100% of the shares in [FMA] to Macrovest, provided that this Business Rescue Plan is approved by the Creditors. Macrovest is a 100% black-owned company associated with Barend Petersen.' (Own emphasis).

[6] Transnet's rejection of the revised BRP was based on its conclusion that it was commercially unviable and failed to adequately protect Transnet's interests as the major creditor of FMA. Fundamental to Transnet's rejection of the BRP was its concern for its lack of provision for payment of arrear rental, which had accumulated to an amount of approximately R40 million as a result of the practitioner's decision to suspend FMA's obligation to pay rental. Since Transnet held the majority of the creditors' voting rights, the consequence of its vote was that the BRP was rejected.[6]

[7] Where a proposed BRP is rejected on the basis of a vote, s 153(1)*(a)* of the Act empowers a practitioner who considers the rejection of the proposed BRP as being inappropriate, to apply to court to have that vote set aside. In this matter, although the practitioner took the view that Transnet's vote against the adoption of the revised BRP was inappropriate within the contemplation of s 153(1)*(a)* of the Act, he did not approach the court to set that vote aside because the first and second appellants had, in their capacity as FMA's shareholders, decided to launch the relevant application within the contemplation of s 153(1)*(b)(i)(bb)*. Averring that Transnet's rejection of the BRP was inappropriate, the appellants, within the contemplation of s 153(1)*(b)(i)(bb)* of the Act, approached the high court on an urgent basis, seeking an order setting aside Transnet's vote against the adoption of the revised BRP. The parties agreed that it would be more practical for the urgent application to take precedence over the

[6] Business rescue plans are adopted if supported by the holders of more than 75% of the creditors' voting interests in attendance at a meeting convened in terms of s 151 of the Act.

partially heard application that had been postponed. Consequently, the urgent application was duly argued. By the time that application was finalised, business rescue proceedings had been in place for approximately three years.

[8] The question before the high court was whether it was reasonable and just to set aside Transnet's vote on the ground that it was inappropriate. The high court concluded that the revised BRP was largely based on future contingent events, such as the extension of the term of the head lease. Having noted that the revised BRP required Transnet to approve the sublease between FMA and ArcelorMittal, the high court bemoaned the fact that setting aside Transnet's negative vote would ineluctably have the unusual effect of requiring Transnet to exercise its contractual choice in a particular manner. The high court did not consider the vote taken by Transnet to be inappropriate and accordingly held that it was not reasonable and just to set it aside. Consequently, the high court dismissed that application. Aggrieved by that decision the appellants sought leave to appeal against the whole judgment of the high court. This appeal is with its leave.

The parties' submissions

[9] The crux of the appellants' argument, both in the high court and in this Court, was that the rejection of the revised BRP was not in the best interests of Transnet, as FMA's liquidation would yield a paltry dividend amounting to 17.7 cents in a rand. The appellants considered that return to be far less than the amount by which Transnet would otherwise benefit from the implementation of the revised BRP. The appellants also contended that unless the operations of FMA were saved by business rescue as proposed in the revised BRP, no sub-lease would be concluded with ArcelorMittal, as ArcelorMittal had indicated that it was not prepared to deal directly with Transnet. This would, so it was submitted, result not only in the loss of R66 million in rental to Transnet for the remaining period of the head lease, but also in the steel mill project being lost to the Port of Saldanha and the regional economy as a whole.

[10] The appellants considered the extension of the head lease to be a 'done deal' by virtue of the fact that Transnet had given FMA the option to renew it. Transnet's rebuttal on that aspect was that such an approach was inconsistent with s 56(5) of the

National Ports Act 12 of 2005[7] (National Ports Act). Transnet contended that the injunction in that subsection precludes the renewal of the head lease by private treaty, as that provision clearly stipulates that any contract outsourcing any service that ought to be performed by a port authority must be preceded by a fair, equitable, transparent, competitive and cost-effective procedure. Transnet's principal argument was that the revised BRP failed to make adequate provision for the protection of its interests and was hinged on numerous contingencies and uncertainties.

Issue for determination

[11] The central issue for determination in this appeal is whether the high court was correct in refusing to set aside Transnet's vote against the adoption of the revised BRP on the basis that its vote was not inappropriate, considering all the circumstances.

The applicable law

[12] The concept of business rescue proceedings was introduced by the Act in order to facilitate the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of relevant stakeholders.[8] The Act envisages the rehabilitation of a company that is financially distressed by providing for, first, the temporary supervision of that company and the management of its affairs, business and property; second, a temporary moratorium on the rights of claimants against that company or in respect of property in its possession; and, third, the development and if approved, the implementation of a plan to rescue the company in

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[7] Section 56(1) of the National Ports Act 12 of 2005 provides:
'The Authority may enter into an agreement with any person in terms of which that person, for the period and in accordance with the terms and conditions of the agreement is authorised to –
(a) design, construct, rehabilitate, develop, finance, maintain or operate a port terminal or port facility, or provide services relating thereto;
(b) provide any other service within a port designated by the Authority for this purpose;
(c) perform any function necessary or ancillary to the matters referred to in paragraphs (a) and (b); or
(d) perform any combination of the functions referred to in paragraphs (a), (b) and (c).
(2) …
(3) …
(4) Notwithstanding any other provision of this Act, the Authority may enter into 30 agreements in terms of which it contracts out any service which the Authority is required to provide in terms of this Act.
(5) An agreement contemplated in subsection (1) or (4) may only be entered into by the Authority in accordance with a procedure that is fair, equitable, transparent, competitive and cost-effective.'

[8] Section 5(1) of the Act directs that its interpretation and application must give effect to the purposes stated in s 7 of the Act. Section 7*(k)* states that one of these purposes 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. See s 7(k) of the Companies Act 71 of 2008. Also see *FirstRand Bank v KJ Foods* 2017 (5) SCA 40 para 80, 24 and 33.

question.[9] Section 153(1) of the Act allows a business rescue practitioner to apply to court to set aside the vote taken by the holders of voting interests against the adoption of the plan on the grounds that it is inappropriate. Section 153(1)*(a)* provides:

'If a business rescue plan has been rejected as contemplated in section 152(3)*(a)* or *(c)(ii)(bb)* the practitioner may - (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 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.'

[13] Section 153(7) provides as follows:

> 'On an application contemplated in subsection (1) *(a) (ii)* or *(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 –
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> (a) the interests represented by the person or persons who voted against the proposed business rescue plan;
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> (b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
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> (c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.'

[14] Henochsberg submits that the provisions of s 153(7)*(a)* to *(c)* and all relevant circumstances as well as the purpose of business rescue provide insight as to what the court should take into account when determining whether it would be reasonable and just to set aside a rejection vote.[10]

Discussion

[15] As stated before, the business rescue proceedings were not instituted by the practitioner, but by FMA's shareholders. Notably, the practitioner disclosed that he had not carried out an audit of FMA's books and records and that he had not verified all of the information furnished to him by FMA. For their part, the appellants, being the

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[9] See s 128(1)*(b)* of the Companies Act 71 of 2008. In *FirstRand Bank v KJ Foods* this court described business rescue as the 'development and implementation of a plan to rescue an entity by restructuring its affairs, business, property, debt and other liabilities in a manner that maximises the likelihood of the entity continuing in existence on a solvent basis. If it is not possible for the entity to so continue in existence the plan must be developed and implemented in a manner that results in a better return for the entity's creditors or shareholders than would result from its immediate liquidation.'

[10] Piet Delport et al *Henochsberg on the Companies Act 71 of 2008* at 538.

applicants in the matter, merely averred that they had read the practitioner's affidavit and aligned themselves with the contents thereof. The result was that some material information was not disclosed in the appellants' papers. I will revert later to this aspect.

[16] The approach laid down in the majority judgment in *FirstRand Bank Ltd v KJ Foods CC*[11] (*FirstRand* judgment) is instructive. In that matter, the company in business rescue (KJ Foods) employed over 200 permanent employees. Due to its financial woes, KJ Foods commenced business rescue proceedings, culminating in the appointed practitioner proposing a BRP. FirstRand voted against the proposed BRP. The practitioner lodged an application with the high court seeking to set aside FirstRand's negative vote on the grounds that it was inappropriate. The high court set aside FirstRand's vote rejecting the adoption of the BRP. FirstRand then approached this Court on appeal.

[17] The main issue for determination in that appeal was whether a court dealing with an application for the setting aside of a rejection vote ought to first establish whether the vote was inappropriate before invoking its discretion to decide whether it was reasonable and just to set it aside, as envisaged in s 153(7). In that seminal judgment, this Court observed that a court is enjoined by s 153(7) to determine only whether it is reasonable and just to set aside the particular vote, taking into account the factors set out in s153(7)*(a)* to *(c)* and all circumstances relevant to the case including the purpose of business rescue. It echoed the sentiment that while the construction of chapter 6 of the Act, dealing with business rescue, reflected a legislative preference for the restoration of viable companies rather than their destruction, the rider was that only viable companies ought to be restored.[12]

[18] The majority judgment stated that the meaning of the word 'inappropriate' could be understood as 'not suitable or proper in the circumstances'.[13] Significantly, it held that the interpretation of the term 'inappropriate' should take place within the wider context of the objects of business rescue, which includes providing the efficient rescue

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[11] *FirstRand Bank Ltd v KJ Foods CC (In business rescue*) [2017] ZASCA 50; [2017] 3 All SA 1 (SCA); 2017 (5) SA 40 (SCA) para 80.
[12] *FirstRand Bank Ltd v KJ Foods CC* note 11 above para 77; *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* [2013] ZAKZPHC 56; 2014 (1) SA 103 (KZP); [2014] 1 All SA 173 (KZP) para 10.
[13] Ibid para 84.

and recovery of financially distressed companies in a manner that balances the rights and interests of all stakeholders.[14] It pointed out that the determination of whether a vote is inappropriate entailed a single enquiry and a value judgement requiring the consideration of all the facts and circumstances. Applying that value judgment, this Court paid consideration to the fact that the employees of KJ Foods would continue working for the rescued company if the proposed BRP was adopted, but would lose their jobs if the company was liquidated. It also considered that in terms of the proposed BRP, FirstRand would have its claim settled in full by KJ Foods in a series of payments over a period of time and other creditors would also benefit. It further took into account that the concurrent creditors would receive 100 cents in the rand if the proposed BRP was adopted, whereas they would only receive 51 cents in the rand if KJ Foods were to be liquidated. Having considered all the facts and circumstances of that case, it held that FirstRand's rejection of the final BRP was premised on self-interest and was thus inappropriate. The discussion that follows will demonstrate that the facts of the present case are distinguishable from those of the *FirstRand* judgment.

[19] Unlike in the *FirstRand* judgment, in this matter, the company in distress, FMA, has no employees whose interests need to be taken into account; as such there was no general benefit to existing employees. Furthermore, it appeared that since the inception of the lease, the primary use for which FMA had utilised the premises was to rent it out to various tenants engaged in the business of manufacturing and repairing vessels in the oil and gas industry, which yielded revenue for it in the form of sub-lease rental. Based on the revised BRP, it would seem that FMA's intended purpose was to use the premises for purposes of sub-letting it to other parties in return for rental and a 'facility fee'. Unlike in the FirstRand judgment, FMA's only business and principal asset was the head lease it had over the leased property (premises).[15]

[20] I turn now to Transnet's contention that the revised BRP is skewed in favour of FMA and thus failed to balance the interests of all the stakeholders. The contents of the revised BRP speak for themselves. It is abundantly clear from the provisions of clause 13.3.4 of the revised BRP that no provision has been made for the payment of

[14] Ibid para 75.
[15] See clause 6.1 of the revised business rescue plan.

arrear rental to Transnet during the subsistence of the head lease, whether by FMA or a third party.[16] The repayment of arrear rental is simply deferred until the commencement of the extended period of the lease. Furthermore, no explanation is proffered for FMA not starting to pay the arrear rentals during the remaining period of the lease. This omission could not have been an oversight, considering that the terms of the sub-lease between FMA and ArcelorMittal made provision for ArcelorMittal to provide an undertaking to FMA, guaranteeing performance of the former's rental obligations to the latter.

[21] It is to be observed from the contents of the revised BRP that by the time FMA's entitlement to exercise its option in terms of the lease agreement is realised, the arrear rental in the amount of approximately R40 million would still be unpaid, as no provision has been made for the settlement of that amount during the subsistence of the head lease. Instead, the revised BRP expressly states that the payment of arrear rental would be deferred until the commencement of the extended period of the lease. In other words, the arrear rental would not be paid unless and until the extension of the lease had been agreed upon between Transnet and FMA.

[22] The difficulty is that even if the head lease were to be extended, repayment of the arrear rentals would, in terms of clause 13.3.4 of the revised BRP, be scheduled on terms still to be agreed between Transnet and FMA. The terms that are still to be agreed upon include new business generated by FMA. The BRP expressly states that in the event that Transnet and FMA were unable to agree on the rescheduling of the payments, the arrears would have to be amortised over the 15-year extended period of the lease. The high court's observation that this would place Transnet in a weakened bargaining position in relation to the negotiation of the terms for the extension of the lease, cannot be faulted. It is indeed difficult to believe that any prudent creditor would agree to such a one-sided arrangement. As that arrangement encroached on Transnet's future exercise of its contractual rights, its reluctance to endorse a BRP couched in those terms can hardly be considered unreasonable.

[16] That this is so, is evident from the provisions of the revised BRP, especially clause 13.3.4 thereof.

[23] As stated before, the appellants had taken the view that the renewal of the lease was a fait accompli because of the inclusion of the 'option clause'. In argument before us, counsel for the appellants did not dispute that notwithstanding the inclusion of that clause, it was clear from the provisions of the head lease that Transnet and FMA would first have to enter into negotiations before the lease could be extended.[17] This Court in *Roazar CC v The Falls Supermarket CC*[18] *(Roazar CC)* reaffirmed that as a general rule, an agreement to negotiate and conclude another agreement is not enforceable because of the absolute discretion vested in the parties to either agree or disagree. That being the case, counsel rightly conceded that since the head lease made no provision for a dead-lock breaking mechanism, it merely amounted to an agreement to negotiate in the future.

[24] In my view, Transnet's concern about the revised BRP's failure to provide a firm arrangement for the settlement of the arrear rental is not unfounded. It must be borne in mind that FMA had, approximately a month before the commencement of the business rescue proceedings, requested a reduction of the rental on the basis that its business was no longer viable. Since the advent of the business rescue proceedings, FMA had not paid rental, save for paying over small amounts it had collected from its subtenants. As a result, the arrear rental had ballooned to approximately R40 million. It was therefore important for the revised BRP to demonstrate that FMA would be able to settle the arrears.

[25] Transnet also expressed misgivings as to whether future rentals would be paid. That concern, too, is not unwarranted. It is clear from the provisions of clause 13.2 of the revised BRP that the approval of the ArcelorMittal deal would not generate sufficient revenue to cover FMA's monthly rental obligations in the future, given that it was expected that revenue to be generated by sub-leases to 'potential sub-tenants' would augment the amount available for rental. It is self-evident that in the event that further sub-leases were not concluded in the future, there would not be sufficient funds

[17] This is acknowledged by the practitioner in clause 13.3.3 of the revised BRP.
[18] *Roazar CC v The Falls Supermarket CC* [2017] ZASCA 166; [2018] 1 All SA 438 (SCA); 2018 (3) SA 76 (SCA) para 13; *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35.

to cover the full rental payable to Transnet. It is on that basis that Transnet contended that the implementation of the revised BRP was based on uncertain future events.

[26] According to clause 13.1 of the revised BRP, FMA would supplement the rental revenue received from its subleases with a 'cash contribution from own resources' in order to cover the rental due to Transnet for the six months period from 1 September 2019 to 29 February 2020.[19] However, the revised BRP does not mention where the cash contribution would be obtained. Although this information falls within the knowledge of the appellants as the shareholders of FMA, they, too, did not disclose this in their affidavit. Since FMA has not yet secured prospective additional sub-tenants, Transnet's concern about its future viability is therefore not unreasonable.

[27] The appellants disclosed that they had concluded an agreement with Macrovest Capital Proprietary Limited (Macrovest) in terms of which they would sell 100% of the shares in FMA to Macrovest provided that the BRP was approved by FMA's creditors. However, the purchase price for that shareholding was not disclosed. In the absence of information about the purchase price for the shares, it is indeed difficult to determine where the 'cash contribution' alluded to in clause 13.1 would be obtained from. This is especially so because when it comes to the rental falling due after 29 February 2020, clause 13.2 makes no reference to any cash contribution that would supplement revenue received from the sublease and the facility fee. These are some of the legitimate considerations that weighed heavily with the high court. The high court's conclusion that the non-disclosure of the purchase price made it 'unable to assess what compensation the applicants will receive should the revised plan be adopted and which plan, by any reckoning, will leave [Transnet] in an uncertain position as regards the arrear rentals and the long-term future use of the premises for at least three years', is therefore justifiable.

[28] The appellants were at pains to point out that they had written off their claims against FMA in respect of the loan accounts. However, it bears noting that, on their own version, they had concluded an agreement with Macrovest for the sale of their shareholding in FMA. Although the purchase price of the shares has not been

[19] See clause 13.1 quoted in para 5 of the judgment.

revealed, it stands to reason that they will be compensated for their shares. The abandonment of their claims must be seen against that light.

[29] Transnet contended that the implementation of the revised BRP would not achieve the legislated objective of facilitating the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all stakeholders.[20] Nothing in the appellants' papers suggests that this concern about the implementation of the revised BRP and the future commercial viability of FMA are unsustainable or far-fetched. The trite principle laid down in *Plascon-Evans Paints Limited v van Riebeeck Paints (Pty) Ltd*[21] is therefore in favour of Transnet.[22]

[30] This brings me to the argument pertaining to the applicability of the provisions of s 56(5) of the National Ports Act. The provisions of that subsection are peremptory and enjoin port authorities that have decided to outsource the services they are statutorily required to perform, to follow procedures that are fair, equitable, transparent, competitive and cost-effective.[23] It bears mentioning that s 56(5) of the National Ports Act largely echoes the provisions of s 217 of the Constitution, whose purpose is 'to prevent patronage and corruption, on the one hand, and to promote fairness and impartiality in the award of the public procurement contracts, on the other'.[24] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief*

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[20] See s 7*(k)* of the Act.

[21] *Plascon-Evans Paints Limited v van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 at 634E-635C.

[22] This principle laid down that an applicant who seeks final relief on motion must, in the event of a dispute of fact, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact, or are so far-fetched or untenable that the court is justified in rejecting them merely on the papers. See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).

[23] Section 217 of the Constitution provides:

'Procurement -

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination

(3) National legislation must prescribe a framework within which the policy referred to in subsection (3) must be implemented.'

[24] *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) para 40.

Executive Officer, South African Social Security Agency and Others,[25] the Constitutional Court cautioned that the compliance with components of the constitutional and legislative procurement framework were not mere internal prescripts that could be disregarded at whim.

[31] This Court has also held that a public procurement contract concluded in breach of legal provisions designed to ensure a transparent, cost effective and competitive tendering process in the public interest is invalid and will not be enforced.[26] A contractual term that obliges an organ of state to extend a lease agreement despite the tenant not settling a substantial arrear rental can hardly be described as cost-effective. I agree with Transnet's argument that consenting to extend a lease agreement that was manifestly not cost-effective would severely prejudice Transnet, as Saldanha Bay was one of the busiest ports in South Africa. Moreover, a factor that bears consideration is that once a vote to reject a proposed BRP is set aside by a court of law, it follows that the BRP in question is adopted by operation of law.[27] The setting aside of Transnet's rejection vote would therefore give an imprimatur to non-compliance with peremptory legal requirements pertaining to a public procurement. The high court rightly refused to follow that course.

[32] I consider next the appellants' argument pertaining to the return that would be yielded by FMA's liquidation. The assertion that Transnet stood to benefit from the adoption of the revised BRP as opposed to FMA's liquidation was based on the fact that FMA's liquidation would yield only 17.7 cents in a rand for Transnet and that all leases and subleases on the premises would be terminated, resulting in the premises not generating income for approximately six months to allow for the procurement process to be finalised. This should not be considered in isolation.

[33] Transnet correctly asserts that what also needs to be taken into account is that in addition to immediately yielding a dividend for Transnet, the liquidation process would also free the premises up, leading to a competitive tender process that could

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[25] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) para 40.
[26] *Qaukeni Local Municipality and Another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) para 16; *Gobela Consulting v Makhado Municipality* [2020] ZASCA 180 para 17.
[27] *FirstRand Bank v KJ Foods* note 10 above, para 89.

potentially give Transnet an opportunity to fully exploit the property's commercial value. That the property in question indeed has significant commercial value is attested by correspondence attached to Transnet's answering affidavit, in terms of which a third party had expressed interest in renting the premises on a long-term basis as it considered them to be ideally located for its participation in the oil and gas industry. The relatively low dividend that can be yielded on liquidation must therefore not be considered in isolation.

[34] Although the appellants tried to put a high premium on the assertion that ArcelorMittal did not want to negotiate directly with Transnet and suggested that that ArcelorMittal would move the steel mill to Mombasa if the proposed sublease between FMA and ArcelorMittal was not approved, Transnet disputed that unsubstantiated allegation. It was asserted that Transnet's officials had held several meetings with ArcelorMittal and there had been no suggestion that ArcelorMittal was reluctant to enter into any dealings with it. The high court correctly concluded that the appellants had not disclosed sufficient information on this aspect to take the matter beyond conjecture.

[35] I deal next with an issue that arose during the hearing of this appeal. A pertinent question posed by the bench during the exchange with the appellants' counsel was in relation to the envisaged end-date of the business rescue process, given the future contingent events on which the BRP depended. The basis for that question is that s 128(1)*(b)*(i) envisages a temporary supervision of the distressed company by the practitioner. Notably, the import of s 132 (2) of the Act is that the practitioner's functions do not come to an end until the practitioner has overseen substantial implementation of the BRP, at which stage he or she will file a notice indicating the termination of the BRP. Counsel could not give a satisfactory indication regarding the substantial implementation of the revised BRP.

[36] As regards the temporary moratorium on the rights of claimants envisaged in s 128(1)*(b)*(ii) of the Act, the revised BRP was unfortunately not a model of clarity. It stated that '[i]f the [BRP] fails and the Company is not placed in liquidation and instead the Business Rescue continues, then the moratorium will likewise remain in effect.' Given the fact that the payment of arrear rental will only be negotiated at the end of

the head lease which would terminate in three years' time, and that the arrears would, in the absence of an agreement on the structuring of the repayments, be amortised over an extended 15-year period, the vague arrangement set out in the revised BRP cannot be described as "temporary" within the contemplation of s 128(1*)(b)*(ii) of the Act. This non-compliance with the provisions of s 128(1)*(b)*(ii) constitutes an additional reason why the high court's refusal to set aside Transnet's vote rejecting the proposed BRP is unassailable.

[37] I am satisfied that all the circumstances alluded to in the foregoing paragraphs militate against finding that Transnet's vote against the adoption of the revised BRP was inappropriate and thus constitute sufficient factual bases for dismissing the appeal. It is therefore not necessary for this Court to examine the rest of the reasoning that informed the high court's decision.

[38] It is trite that for the appellants to be successful in this appeal, this Court must be satisfied that the high court was wrong in the exercise of its value judgment.[28] It is equally trite that a court determining whether a vote against the adoption of a BRP was inappropriate exercises a discretion.[29] The parties expressed divergent views relating to the standard of interference that this Court as an appellate court is entitled to apply. The Constitutional Court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*[30] carefully illustrated the difference between a discretion in the loose sense and one in a true sense. It is unnecessary for purposes of this judgment to traverse the ground already covered by that court on that topic. It suffices to mention that the Constitutional Court cautioned that 'even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations.'[31]

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[28] Compare *Rawlins v Dr D C Kemp t/a Centralmed* [2010] ZASCA 102; [2011] 1 All SA 281 (SCA); [2011] 1 BLLR 9 (SCA) para 15-18.
[29] *FirstRand Bank v KJ Foods* note 11 above, para 71.
[30] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).
[31] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* note 28 above para 87.

[39] It is clear from the well-reasoned and comprehensive judgment of the high court that in exercising its value judgment to determine whether the revised BRP fell to be set aside on the basis of being inappropriate, it carefully took the provisions of s 153(7*)(a)* to *(c)* of the Act and all the circumstances of this case into account. There can be no quarrel with a conclusion that the high court's discretion was properly exercised, regardless of whether it constitutes a true or loose discretion. It is therefore not open to this Court to tamper with its decision. It follows that the appeal must be dismissed. There is no reason for departing from the general rule applicable to costs orders.

Order

[40] The appeal is dismissed with costs, which costs shall include the costs occasioned by the employment of two counsel.

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M B MOLEMELA

JUDGE OF APPEAL

Appearances

For appellants:	M J Fitzgerald SC
Instructed by:	Bowman Gilfillan Inc., Cape Town
	Matsepes Attorneys, Bloemfontein
For respondent:	A Bham SC (with him N C Ferreira)
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