IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 13342/2019

In the matter between:

FERROSTAAL Gmb	1st Applicant
ATLANTIS MARINE PROJECTS PROPRIETARY LIMITED	2nd Applicant

and

TRANSNET SOC LIMITED	
t/a TRANSNET NATIONAL PORTS AUTHORITY	1st Respondent
FERROMARINE AFRICA PROPRIETARY LIMITED	
(IN BUSINESS RESCUE)	2nd Respondent

JUDGMENT: 29 AUGUST 2019

BOZALEK, J:

[1] This is an application in terms of section 153(1)(b)(bb) of the Companies Act 71 of 2008 ("the Companies Act") in which the applicants seek to set aside a vote taken against a revised business rescue plan at a business rescue meeting on 31 July 2019.

[2] First applicant, Ferrostaal Gmb, is the 80% shareholder and a loan account creditor in the company in business rescue which is second respondent, Ferromarine Africa Proprietary Limited ("hereinafter FMA"). Second applicant is a minor creditor of FMA and the holder of the balance of the shares in FMA.

[3] The first respondent is Transnet Soc Limited trading as Transnet National Ports Authority ("hereinafter TNPA") and has standing, *inter alia* by virtue of its authority over and interest in the Port of Saldanha.

Back ground

[4] FMA was placed into business rescue on 2 December 2016 and thus those proceedings have now lasted for approximately twenty months. The business rescue practitioner, Mr Gore, published the first business rescue plan on 28 February 2017 and an updated proposal on 23 November 2017, neither of which was supported by TNPA which is now, far and away, FMA's largest creditor. FMA's only business and principal asset is the head lease it has over certain of TNPA's property located at the port of Saldanha measuring in extent 2200 square metres and which provides it with access to the Quay Apron and Quay operational area (the premises)." The premises were to be used by FMA for the fabrication of structures to service the off-shore and on-shore oil, mining and gas industries. The lease is for a period of 15 years and terminates in September 2022. i.e. in approximately three years. Be that as it may, it would appear that the primary use to which FMA has put the premises is to lease it out to various subtenants and the only revenue which it derives from the property is that which it earns directly or indirectly from such sub leases. FMA has no employees and has two directors.

[5] As at mid-2018 the monthly rental payable by FMA to TNPA was approximately 1.5 million rand per month. However, when FMA was placed in business rescue the business rescue practitioner purported to suspend its obligations to pay rental in terms of the lease. The lawfulness of that decision was challenged by the TNPA in a protracted arbitration. In August 2018 the arbitrator

ruled that TNPA's response to the suspension, i.e. its purported termination of the main lease agreement in October 2017, was invalid and that the lease subsisted. In effect, the arbitrator ruled that during the business rescue proceedings the business rescue practitioner was entitled to suspend the FMA's obligation to pay its monthly rental.

[6] Notwithstanding that the TNPA opposed both the initial and the revised business rescue plans, the business rescue proceeding proceeded without being driven to a head until August 2018. At that stage TNPA launched proceedings in this court to set aside the resolution in terms of which the voluntary business rescue proceedings were commenced, declaring that they had ended and converting the FMA's business rescue status to one of liquidation. The application was brought on the basis that there was no reasonable prospect of rescuing FMA. Those proceedings were strenuously opposed by FMA (in business rescue) and the business rescue practitioner. In turn FMA and Mr Gore brought a counter-application seeking to review and set aside the decisions of the TNPA not to support the various versions of the business rescue plan and its decision to institute proceedings to end the business rescue. The hearing in that matter commenced in May 2019 before this court. It was postponed, part-heard, to 6 and 7 August 2019.

[7] For the sake of completeness I should mention that concurrent with that application, a similar application, but relating to a lease which a sister company of FMA held in the port of Cape Town, was heard. That lease, however, was due to expire much earlier, in early 2020. When the hearing resumed in early August the Court was advised that those proceedings had been settled.

[8] As far as the part-heard FMA application is concerned, it appears that between the hearing dates significant developments, already foreshadowed in the papers, took place. It transpires that on 19 July 2010 FMA concluded, in principle, a sub-lease with ArcelorMittal which envisages ArcelorMittal installing a spiral welding mill valued in excess of US dollars R10 million on the leased premises at the Port of Saldanha which will be used for the production of steel pilings to be used in the marine construction industry. The mill is currently being shipped from Australia to Saldanha and its estimated date of arrival is 25 August 2019.

[9] Pursuant to this development the business rescue practitioner issued a revised business plan which takes into consideration the additional income to be generated for FMA from the proposed sub-leases. That plan was considered at a meeting of creditors on 31 July 2019 but was voted down by TNPA. Since TNPA holds by far the majority of the creditors voting interests, the consequence of its vote was that the plan was rejected.

[10] The business rescue practitioner took the view that the vote in question was inappropriate, as contemplated in section 153(1)(a) of the Companies Act, but that FMA itself would not apply to court to set aside the result of the vote since FMA's shareholders i.e. the first and second applicants, had indicated that they would bring the necessary application. Such an application was brought on 2 August 2019. When the resumed hearing commenced on 6 August, the parties were in agreement that the urgent application be decided before the partially completed proceedings which I have just described. The parties adopted this stance since, if that application is successful, the earlier proceedings will in effect fall away.

The applicable statutory provisions

[11] The key provisions applicable to this matter form part of section 153 of the Companies Act which deals with a failure to adopt a business rescue plan and, insofar as they are material, provide as follows:

> *"(1)(a) 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."*

Sub-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 plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to –*
>
> *(a) the interests represented by the person or persons who voted against the proposed business rescue plan;*
>
> *(b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and*
>
> *(c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated"*

[12] The leading case dealing with these provisions appears to be **First Rand Bank Limited v KJ Food CC 2017 (5) SA 40 (SCA)** where the main issue was whether a court dealing with an application for the setting aside of a rejection vote on the grounds of it being inappropriate must first establish whether the vote was inappropriate before invoking its discretion under section 153(7) to set it aside.

[13] The Court held that in such circumstances a court was enjoined by section 153(7) to determine only whether it was reasonable and just to set aside the particular vote, taking into account the factors set out in section 153(7)(a) to (c) and all the circumstances relevant to the case, including the purpose of business rescue in terms of the Companies Act. This, the Court held, entailed a single enquiry and value judgment. Dealing with the effect of setting aside the result of the vote, the Court rejected the notion that, where the meeting of creditors had been adjourned pending the outcome of the setting-aside application, if such application was successful the business rescue plan had again to be put to a vote at the resumption of the postponed meeting. Such a procedure, the Court held, was clearly not envisaged by the Act since it could lead to a *"possible never-ending loop"* of applications and resumed meetings. Therefore, in those circumstances the relevant business plan was adopted *"by the operation of law"* and was *"a natural consequence of the setting aside of the result of the vote."*

[14] Relevant to the present proceedings are firstly the Court's description of the business rescue procedures as being 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."[1]

[15] Equally relevant is the Court's observations concerning the nature of the test to be applied in determining whether a vote against a business rescue plan was inappropriate. The Court quoted with approval the dictum of Gorven J in **DH Brothers Industries (Pty) Limited v Gribnitz** dealing with business rescue. *"I respectfully agree that the chapter as a whole reflects "a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction" but only of viable companies, not of all companies under business rescue."* Similarly, it expressed the approval for the definition of inappropriate as meaning *"not suitable or proper in the circumstances."*

[16] The Court rejected an argument that it is the subjective view of a preponderance of creditors or dominant creditor in voting against the business rescue plan that determines whether the vote was inappropriate, as being unsustainable in the light of the wording of section 153(1). The Court held ultimately that the determination that the vote was inappropriate was a value judgment made after consideration of all the facts and circumstances. "*The Court is enjoined by section 153(7) to determine only whether it is reasonable and just to set aside the particular vote ... put differently the vote will be set aside on application on the grounds that its result was inappropriate, if it is reasonable and just to do so."*

---

[1] At para 68

The background to the revised business plan

[17] As a consequence of the business rescue practitioner's decision to suspend the FMA's rental obligations with effect from December 2016, the arrear rental now owing to TNPA amounts to some R40.8 million, excluding VAT. The head lease expires at the end of September 2022 whereupon FMA enjoys an *"option"* to renew the lease but on terms which have to be negotiated and agreed upon prior to that date, failing which the option clause is of no effect. Although FMA ceased paying its full rental it has, during the period in question, paid an amount of R3.6 million excluding VAT in respect of rentals received by it from its sub-tenants. This amount, however, does not reflect all monies received by it from its sub-tenants since part of the consideration which sub-tenants pay to FMA is a fee for the *"facilities"* which they enjoy, a so-called *"facility fee"*, which is less than the sub-lease rentals but which is still very substantial.

The revised business rescue plan

[18] The main elements of the final revised business rescue plan involves TNPA confirming the terms of the proposed sub-lease between FMA and ArcelorMittal for a period of three years, a clear provision for TNPA to receive its full rental under the head lease for the first six months of the proposed sub-lease and the repayment of the arrear rentals only if and when an extension of the lease for a further period of 15 years is negotiated between FMA and TNPA upon the expiry of the present head lease.

[19] The relevant provisions of the revised business plan read as follows:

13.1 The amounts payable by ArcelorMittal in terms of the ArcelorMittal Sub-Lease (being the rental due to TNPA under the Head Lease for the portion of the Premises

occupied by it), plus the facility fee which would otherwise be paid to the Company 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 the Company own resources, should be sufficient to cover all rental due to TNPA for the whole of the Premises for the period from 1 September 2019 to 29 February 2020.

13.2 The Company is confident that thereafter, the rental due under the Arcelor Mittal Sub-Lease and 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 TNPA for the remainder of the lease. There is not, however, sufficient time remaining in the initial period of the Lease for the Company 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 TNPA approve the ArcelorMittal Sub-lease;

13.3.3 at the appropriate time, TNPA negotiates in good faith with the Company 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 TNPA and the Company having regard to the extended period of the Lease and the levels of new business generated by the Company with the co-

operation of TNPA or, failing agreement between them be amortised over the extended lease period;

13.3.5 the claims of the creditors other than TNPA will be written off;

...

13.5 For the purposes of illustration only, and in no way intending to pre-empt any of the negotiations between the Practitioner and TNPA, Annexure D contains a forecast balance sheet and income statement of the Company for the period to the end of the Lease, prepared on the assumption that the rental due to TNPA 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 TNPA rental.

The practitioner's revised proposal states further as follows:

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

14.1 If the Company were now to be placed in liquidation, TNPA 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 the Company 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: TNPA as the landlord; revenue and employment for contractors working in the Port of Saldanha; enhancement of the business for

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

14.2.2 although the repayment of Arrear Rentals due to TNPA will be deferred, TNPA 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."

[20] Finally, the revised proposal contains some detail regarding FMA's plans to sell its shares stating as follows:

"17.3 The shareholders of the Company have concluded an agreement with Macrovest Capital Proprietary Limited in terms of which they will sell 100% of the shares in the Company to Macrovest, provided that the Business Rescue Plan is approved by Creditors. Macrovest is a 100% black-owned company associated with Barend Petersen."

TNPA's response

[21] Prior to voting against the revised business proposal on 31 July 2019 the TNPA committee met on 29 July to consider the proposal and ultimately resolved not to support an initial recommendation by the Port of Saldanha to support the revised business rescue plan. The minute of its internal meeting cited the following reasons:

- *FMA's is in arrears in respect of the rental in the amount of R48 981 R205-71 as at end August 2019 and a material issue is the fact that the*

business rescue plan does not provide a firm commitment or solution to the debt in respect (sic) the arrear rental.

- *The plan does not incorporate security or a bank guarantee in favour of TNPA to give assurance to TNPA that FMA will pay the outstanding debt or adhere to payment plan considering FMA has failed to pay full rental for more than two years.*
- *FMA currently has one tenant, namely OSRL and the proposed sublease with ArcelorMittal Projects South Africa (Pty) Limited would be the second tenant and the two subleases do not cover the rental FMA is required to pay.*
- *TNPA is in effect the only independent party that is impacted by the Business Rescue process as other companies involved are related parties.*
- *The plan is dependent upon MacroVest acquiring FMA's shareholding but excludes the payment of the arrear rentals owned by FMA to TNPA. A bona fide plan would have included the settlement of FMA's debt owing to TNPA.*
- *As a principle, TNPA is not in favour of subleasing its properties therefore, supporting the business rescue plan will set an undesirable precedent;*
- *An arrangement with a Company not in good standing with TNPA as this would set a bad precedent.*

- *The plan is not aligned to TNPA's Port Development Framework Plans for the Port of Saldanha. The continued lease with FMA effectively sterilises the area and prevents from the Port from implementing the Port's strategic plans.*

- *Companies in business rescue generally pay the full rental and in this instance FMA has not been paid full rental since 2016;*

- *The entire proposal is dependent on the negotiation and extension of the lease and that can only be done through an open, fair and transparent process."*

The applicants' case

[22] In summary, the applicants contend that the revised business plan is clearly just and reasonable. Setting aside the TNPA's vote will mean that the proposed sub-lease with ArcelorMittal will go ahead. This will produce R66 million of rental over the three remaining years of the head lease for the TNPA and the preservation of the latter's claim for the arrear rentals. The applicants estimate furthermore that the ArcelorMittal's sublease and project will create 200 jobs for the community and other positive spinoffs for Saldanha Bay and the region. If, at the end of the lease it is renewed for a further period of 15 years the TNPA will recover the rental arrears; if not TNPA will retain its claim against FMA for those arrears. By contrast, if the vote is not set aside and there is a liquidation there will be no immediate benefit to the TNPA other than a dividend of 17.7 cents in the rand. The TNPA will then have to look for a new tenant through an open and transparent tender procedure which will take at least six months. Over that period TNPA would lose R9 million rental income versus the R7 million liquidation dividend which it will receive.

TNPA's attitude

[23] In summary, the TNPA's attitude is that any viable business rescue plan must address the historical debt, namely the arrears of R40.8 million (excluding VAT) and, secondly, the question of future rentals in terms of the head lease. Its view is that the proposed business rescue plan does not make adequate provision for the protection of the TNPA's interests in either of these areas, the proposal containing numerous contingencies and uncertainties which impose significant risk on the TNPA with none of the other affected parties bearing any risk arising out of the plan and with the overall result being that TNPA is precluded from dealing with its own property and securing commercial benefit therefrom for a substantial period of time.

Discussion

[24] There can be no doubt that the issue of the arrear rental must be a critical component of any business rescue plan. In essence, the moratorium which FMA presently enjoys in respect of its extremely substantial arrear rentals (some R48 million including VAT) will endure for another three years if the revised plan is adopted and will only be addressed as and when any extension to the head lease is negotiated at the end of that period. In my view, it is striking that no explanation (other than there is *"insufficient time"*) is furnished as to why the FMA cannot begin to address these arrears immediately but only in three years' time. The business rescue practitioner's revised business plan provides no explanation in this regard. The question can well be asked what will change in three years' time to then place FMA in a more advantageous position to address the arrear rentals issue.

[25] A further critical element to the proposed plan is that even after the head lease expires in three years time, the plan offers little certainty as to how these

arrears can be effectively addressed. This will be almost entirely contingent upon whether any negotiations in good faith at that time between TNPA and the FMA for the extension of the lease for a further period of 15 years are successful. However, the success of those negotiations is not simply dependent upon the parties reaching agreement as to the usual terms of a lease i.e. duration, rental, etc but also upon reaching agreement on the terms under which the arrear rentals are to be repaid. If the TNPA does not agree to an extension of the lease for whatever reason it will be left with nothing more than a claim against FMA for its arrear rentals. Since FMA's main asset is its head lease over the property, which will expire in three years time, should the parties failed to reach agreement on a 15 year extension, the TNPA's claim against FMA in respect of arrear rentals appears unlikely to result in any sizable dividend in the event of FMA going into liquidation at that stage.

[26] A further relevant factor is that insofar as the revised plan leaves both the possible extension of the lease and the terms of repayment of the arrears as the subject of negotiation in three years time, this will place TNPA in a weakened bargaining position at that stage. Put differently, assuming agreement can be reached on the extension of the lease TNPA might well find itself having to accept unfavourable repayment terms in respect of the arrear rentals failing which it must then find another lessee for the premises. It can of course be argued that there is a backstop in the sense that if agreement cannot be reached on the terms of repayment over the extended lease period then, in terms of the revised business proposal, the arrears will be amortised over the extended lease period. In these circumstances, however, TNPA would be receiving the last instalments of the arrear rental some 20 years after the debt began to accrue. Not only would the value of

these payments have substantially depreciated over such a long period, but the revised proposal makes no provision for interest.

[27] The applicants' answer to the question of interest is that if the plan is approved, the head lease continues in accordance with its existing terms including provisions relating to interest on overdue amounts. The relevant clause provides for interest to be payable on arrear rental where the lessee failed to make any payment *"due during the term of the lease."* This may or may not be an answer to the question of interest, but it is disquieting that the issue is not dealt with in the revised proposal with the result that it could well be the subject of a future legal dispute.

[28] Furthermore, to the extent that the applicants contends that a claim for interest would form part of the TNPA's damages claim and inasmuch as the revised proposal makes no provision for any security for the claim, this offers limited comfort to TNPA.

[29] Accordingly, there is, in my view, weight in TNPA's argument that the revised business rescue plan makes any prospect of repayment of any portion of the arrear rental indebtedness uncertain and dependent upon the happening of an uncertain future event, namely, agreement on a 15 year head lease extension.

[30] A second important issue in assessing the reasonableness of the revised business rescue plan and the resulting vote is the question of future rental in terms of the existing head lease. According to the revised plan once the ArcelorMittal sub-lease is approved by TNPA and becomes operative TNPA will receive some R1.5 million rand monthly rental as per the terms of the head lease. This, it will be noted from clause 13.1 the revised plan, appears to be guaranteed only for the first six months i.e. 1 September 2019 to 29 February 2020, and will have to be made up by

FMA sacrificing its facility fee/s and in addition making a cash contribution from its own resources.

[31] Disquietingly, payment of the agreed rental for the remainder of the three year period does not appear to be clearly provided for or guaranteed by the revised plan. Clause 13.2 of the revised plan makes reference to the FMA being *"confident"* that it will be able to continue making payment of the full rental what appears to be possible future sub leases.

[32] Conspicuously absent from the revised plan is a clear indication that for that 30 month remaining period the FMA will continue, if needs be, to sacrifice its facility fee/s and to make a cash contribution from its own resources in the event that its rental income from sub-leases does not meet its rental obligation to TNPA in terms of the head lease. This issue became a bone of contention during argument, with the applicants contending that the revised plan made it apparent that there would be more than sufficient income to cover TNPA's full fixed rental under the head lease for the remainder of its duration. In this regard they contended that on a proper interpretation of clauses 13.2 and 13.5 it is clear that the facility fee/s would be sacrificed for the entire remainder of the head lease should there be any shortfall. It is correct that clause 13.5 refers to the FMA contributing *"its facility fee from ArcelorMittal to make up any shortfall in the TMPA rental"* but the clause is introduced by the words *"for the purposes of illustration only and in no way intending to pre-empt any of the negotiations between the practitioner and the TNPA."* It is thus, again, open to argument as to precisely what the revised business plan provides for in this critical respect. On the face of it clause 13.5 is binding neither upon the FMA nor the practitioner and thus does not eliminate the uncertainty as to

the reach of clause 13.2. At best for FMA the business rescue plan appears to be internally contradictory and lacking in clarity on this issue.

[33] Yet a further aspect of uncertainty regarding the ArcelorMittal proposed sub-lease relates to the options which are extended to ArcelorMittal to extend the sub-lease to stages 3 and 4. There is, however, no guarantee that ArcelorMittal will exercise that option or indeed remain in occupation for any period beyond the initial period of the sub-lease. This introduces a further contingency into the revised business rescue plan.

[34] Against this scenario, with all its inherent uncertainties, must be contrasted the situation if the vote rejecting the revised business plan is upheld. In that instance TNPA will immediately be able to deal with its property as it seek fit and to seek a new tenant. It would appear to be common cause that in order to do so the premises will not be able to be put to productive use for a period of approximately six months while a tender procedure unfolds. That delay, however, will also be experienced by TNPA if the 15 year lease extension is not granted in three years following good faith negotiations. If the delay is incurred at this point in time TNPA will at least receive the assured dividend of 17.7 cents in the rand whereas in three years time that dividend will not necessarily eventuate.

[35] What must also be taken into account is that approval of the revised business rescue plan or, more accurately, setting aside of the vote as inappropriate, necessarily entails compelling TNPA to exercise its contractual rights in a particular manner. This is because in terms of the head-lease TNPA is entitled to approve or disapprove of any-sub lease over its property. This is evidenced by a critical component of the revised business rescue plan that *"TNPA approve the ArcelorMittal*

sub-lease" and the terms of the ArcelorMittal sub-lease which includes the following condition precedent: *"TNPA gives its consent to this sub-lease, as required by clause 14 of the head lease."*

[36] In its post-hearing head of argument the applicant described this consequence of the relief sought as being *"radical in its effect"* and relied on the decision of the Supreme Court of Appeal in **Bredenkamp & Others v Standard Bank of South Africa Limited 2010 (4) SA 468 (SCA).** It argued that the SCA held in that case that the courts will refuse to enforce a contractual term only where it is contrary to public policy. Counsel submitted that there were no public policy or constitutional considerations in effect entitling this Court to compel TNPA to approve the ArcelorMittal sub-lease. It was pointed out further that even in the **First Rand Bank** matter, where the Court did intervene and set aside the vote of the majority creditor or majority of creditors as inappropriate, there was no suggestion that the business rescue plan was dependent on compelling FRB to exercise a contractual right in any particular way as a result of the adoption of the business plan.

[37] Reliance was also placed on the SCA's judgment in **Roazar CC v The Falls Supermarket CC 2018 (3) SA 76 (SCA) at para 13** where the Court confirmed that, as a general rule, an agreement that the parties will negotiate to conclude another agreement is not enforceable because of the absolute discretion vested in the parties to agree or disagree.

[38] Given the wide powers afforded to a court in terms of section 153(7) to set aside a vote in business rescue proceedings as inappropriate and the discretion which the court enjoys in terms of this power, I do not consider that the two cases relied on by TNPA stand as an obstacle to the relief sought by the applicants.

However, the principles established in those matters point to the weighty and far-reaching implications should this court approve the relief sought in the present matter.

[39] A further feature of the revised business plan is the lack of any guarantees either from FMA or a third party, for FMA's performance in terms of its rental obligations. By contrast, when regard is had to the terms of the sub-lease with ArcelorMittal, provision is made for ArcelorMittal's holding company to provide a signed guarantee to FMA guaranteeing performance in respect of both the rental and the facility fee due to FMA.

[40] It is also of some significance that the revised business rescue plan provides that the applicants, FMA's present shareholders, will sell their shareholding in FMA to a company, Macrovest. The applicants did not disclose the terms of that sale and in particular the price that they will receive for their shareholding. This leaves the Court unable to assess what compensation the applicants will receive should the revised plan be adopted and which plan, by any reckoning, will leave TNPA in an uncertain position as regards the arrear rentals and the long term future use of the premises for at least three years. Significantly, the revised business rescue plan is apparently not, in the eyes of FMA's present shareholders, attractive enough for them to see out the next three years of the business relationship, let alone the next 15 years thereafter.

[41] A further factor requiring consideration is the likely consequences should the revised business rescue plan not be put into operation. The applicants' case in this regard is that unless FMA is saved by business rescue no sub-lease will be concluded with ArcelorMittal and the steel mill project, with all its benefits, will be lost

to the Port of Saldanha and the regional economy as a whole. The appellants' case is that in that instance ArcelorMittal will divert its investment to the port of Mombasa, Kenya. They contend that ArcelorMittal needs to install and commission the mill urgently, and will not subject itself to a lengthy public procurement process which will necessarily have to precede the conclusion of any lease between it and TNPA directly. On behalf of TNPA it was argued that it was inherently improbable that the steel mill will be irrevocably lost to the the Port of Saldanha in the event that the sub-lease is not concluded between ArcelorMittal and FMA.

[42] There are two difficulties in assessing these implications, the first being that there is insufficient information to take the matter much beyond conjecture and, secondly, such information as there is, is second-hand. The applicants were insistent in their affidavits that ArcelorMittal had made it plain that it would not conclude a lease directly with TNPA but requires FMA to facilitate the use of the premises. There was, however, no affidavit or even a communication from ArcelorMittal confirming that this was its position. Furthermore, these assertions are made by FMA's managing director who clearly has an interest in ensuring the continued existence of FMA and the adoption of the revised business plan. What is more, TNPA was a party to discussions with ArcelorMittal recently and it filed an affidavit to the effect that there was no suggestion from ArcelorMittal at such meetings that if the sub-lease was not concluded directly with FMA it would move the steel mill to Mombasa. What must also be taken into account is that on FMA's version the steel mill has already been acquired and shipped to Saldanha and is due to arrive there on 25 August 2019.

[43] Given these factors and the lack of direct evidence, it is somewhat difficult to accept the mere assertion that if FMA is involved in the sub-lease, the project will be lost to the Port of Saldanha. No persuasive case is made out by the applicants or FMA that its expertise is such that ArcelorMittal would be unwilling to enter into the project with anyone but FMA. Indeed, this would be a somewhat startling assertion to make given that, as matters stand, FMA has no employees but only two directors whom, one would assume, are unlikely to remain in their positions once the envisaged sale of the applicants' shareholdings in FMA takes place.

[44] On behalf of the applicants it was argued that TNPA's stance towards the revised business rescue plan was *"out of sync"* with purposes of the Act. They emphasise that if the plan was adopted TNPA would immediately receive full rental payment of more than R1.5 million per month under the head lease as opposed to 17.7 cent dividend in the rand on liquidaton.

[45] As I have pointed out, it is uncertain whether the revised plan makes provision for full payment of the rental for 30 of the remaining 36 months of the lease and no security is provided for such payments. What is more, the plan provides for no part of the arrear rentals to be paid during the three year period and what happens thereafter is also uncertain given that the parties will have to reach agreement on the terms of any extension of the head lease for a further 15 year period. Not only will the terms of repayment of the arrear rental form part of those negotiations but if these are wholly unsuccessful TNPA will have no more than a claim against FMA for that debt. Thus, if TNPA ultimately decides not to extend the head lease it will be back in the situation it presently finds itself but having no more than a claim to the

arrear rentals against FMA which is unlikely at that stage to have any asset of value ; furthermore the TNPA will have no guaranteed dividend.

[46] In the event that the negotiations are only partly successful i.e. no agreement is reached on repayment of the arrear rentals, TNPA will have to accept payment of the arrears over a period of an additional 15 years.

[47] By contrast, if the vote is not set aside the drawn-out business rescue proceedings will now be brought to an end. TNPA will receive an assured dividend of 17.7 cents in the rand and becomes free to deal with its own property as it sees fit and on such terms as it can negotiate with third parties. In that instance it will have the additional advantage that there will no longer be an intervening party in the person of FMA which, through the hefty *"facility fee"* which it charges to sub-lessees, diminishes the rental which can be earned from leasing the relevant premises.

[48] The applicants criticised TNPA for being unable to place before the Court any realistic proposals whereby it could turn the property to advantage should the business rescue proceedings be discontinued. In my view this criticism is somewhat unfair. By virtue of the head lease which it holds, FMA has held sway over the premises for the past ten years or so. Over the last two or more years it has done so without meeting its primary obligation, namely, to pay the rental due. The business rescue proceedings and the litigation in which the parties have been involved have inevitably had the consequence that TNPA cannot market the property or enter into meaningful negotiations with any other party regarding its possible alternative use. If the property has significant commercial value, as seems to be demonstrated by the fact that ArcelorMittal are prepared to conclude a sub-lease, I can see no reason why TNPA should not be able to exploit its commercial value unhindered by

contractual obligations with FMA, obligations which are heavily tilted in the latter's favour by reason of the suspension of its obligation to pay rental for the past 20 months and the proposed extended moratorium of at least three years in respect of the arrear rental which has accrued as a result.

The value judgment

[49] In considering whether the result of a vote should be set aside on the grounds that it is inappropriate, section 153(7) requires a court to be satisfied that it is reasonable and just to do so having regard to the (a) the interests of those who voted against the proposed rescue plan (b) the provision made by that rescue plan with respect to those interests (c) a fair and reasonable estimate of the return to such persons if the company were to be liquidated. All this must be done having regard to the purpose of business rescue proceedings. What is known in the present matter is that the votes for and against the revised business rescue plan were those of TNPA, representing a claim of some R48 million, versus those of the applicants representing claims of some R4,5 million.

[50] From the point of view of the applicants, TNPA's vote against the revised plan was inappropriate since it precludes the possibility of the sub-lease with ArcelorMittal going ahead which will mean a loss of R66 million in rental over three years for the TNPA, the preservation of its claim for the arrear rentals and the loss of 200 jobs for the community and other positives spin-offs for Saldanha Bay and the region. After three years TNPA may then reassess whether it wishes to renew or not for a further fifteen year period. If there is a renewal it will result in the arrears been paid off. If not the TNPA will retain its claim against FMA for those arrears. In contrast to the above picture, upon liquidation there will be no immediate benefit other than the 17,7

cents in the rand dividend and TNPA will be left to find a new lessee with which to conclude a new head lease and with no certainty that it will achieve the rental it would otherwise have achieved through the proposed ArcelorMittal sub-lease. Over the six months tender procedure period TNPA will lose R9 million rental income gaining only a R7 million liquidation dividend. In summary, from the perspective of the applicants, the comparison is between the uncertain income stream that TNPA claims it can generate if it were to resume control over the premises and the real financial benefits described in the revised plan.

[51] By contrast TNPA's vote against the revised business rescue plan will result in its premises being freed up for it to market to interested tenants (including ArcelorMittal) albeit subject to a six month tender process. Although it might lose R9 million in rental over this period it will achieve immediate payment of a dividend of 17.7 cents in the rand. In marketing the property TNPA will be at a competitive advantage compared to its present situation inasmuch as no potential tenant will have to pay the rental plus a substantial facility fee to FMA. By voting against the proposal TNPA therefore puts to an end much of the uncertainty which it currently faces over the next three or more years, cuts its losses vis-à-vis FMA and restores to TNPA its property thus enabling it to market it to the best advantage in future, unencumbered by an intervening party.

[52] Further factors which must be taken into account in this regard are the applicants' case that a sub-lease can only be secured with ArcelorMittal through its agency which is, in my view, less than persuasive. Furthermore, adoption of the revised business rescue plan will not save any jobs since FMA has no employees. At best implementation of the proposed sub-lease will create job opportunities but

such opportunities will no doubt be created as and when TNPA is free to make productive use of the premises following FMA's liquidation. The revised business rescue plan is clearly favourable to the applicants but even they appear to see their best interests being served by selling their shareholding to a third party for an undisclosed sum. This raises the suspicion that the revised business plan creates value principally for the applicants as shareholders in FMA.

[53] The value judgment necessary to be exercised by the Court has more than the usual difficulties in such a situation inasmuch as a valuation of the interests provided for in section 153(7)(a), (b) and (c) requires a considerable degree of crystal ball gazing. In particular, it is unclear when and on what terms TNPA will be able to make productive use of the premises and whether it will be able in the short medium and long term to make better commercial advantage of the premises than would be the case if the revised business rescue plan is put into operation.

[54] I am mindful, moreover, that setting aside the result of the vote would have the additional and unusual effect of requiring TNPA to exercise a contractual choice in a particular manner, in effect directed by the Court for the purposes of adopting the revised business rescue plan.

[55] Having regard to all these circumstances and competing interests and notwithstanding the uncertainty should FMA be placed into liquidation, I am unable to find that the result of the vote was inappropriate and, in particular that, when regard is had to the various interests in section 153 (7) (a), (b) and (c) that it is *"reasonable and just"* to set aside the result of the disputed vote. In the result the application must fail.

[56] As far as costs are concerned, having achieved full success the respondents are entitled to their costs.

[57] For these reasons the following order is made:

The application is dismissed with costs, including the costs of two counsel.

BOZALEK, J