IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE
CASE NO: 4200/2023

In the matter between:

FORTY SQUARES (PTY) LTD	First Applicant
THE EMPLOYEES LISTED IN SCHEDULE "A"	Second Applicant

and

NORIS FRESH PRODUCE (PTY) LTD **t/a GOLDEN HARVEST (in final liquidation)** Registration number 1[...] Registered address: 1[…] C[...] Avenue, Epping 1, Cape Town	First Respondent
JOHAN KRYNAUW N.O. In his capacity as provisional liquidator of the First Respondent	Second Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA	Third Respondent
THE SOUTH AFRICAN REVENUE SERVICE	Fourth Respondent
THE CREDITORS LISTED IN SCHEDULE "B"	Fifth Respondent

THE EMPLOYEES LISTED IN SCHEDULE "C" Sixth Respondent

CAPESPAN (PTY) LTD Seventh Respondent

BRIAN LULAMILE MBOLEKWA N.O. Eighth Respondent
In his capacity as joint provisional liquidator
of the First Respondent

ERF 3459 GEORGE (PTY) LTD Intervening Creditor

Bench: P.A.L. Gamble, J

Heard: Tuesday 11 April 2023

Delivered: Thursday 20 April 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Thursday 20 April 2023.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. The first respondent ("Golden Harvest" or "the company", where convenient) formerly operated a large wholesale fruit distribution business at premises in Cape Town and Johannesburg. Its business model involved the delivery of produce to its premises by suppliers where the fruit was stored and ripened prior to the onward transmission to its purchasers. The staff compliment of Golden Harvest in its heyday was of the order of 180 employees.

2. The shares in a Golden Harvest are held by the first applicant ("Forty Squares") whose shareholding in turn is held by two family trusts, each respectively under the control of Messers Faiek and Jasseen Davids (no relation). For the sake of convenience, and to avoid any confusion, they will be referred to as "Faiek" and "Jasseen" where necessary. Faiek and Jasseen are both directors of Golden Harvest and intimately involved in the running of the business. To be sure they are to be regarded as the guiding minds of Golden Harvest.

3. The Davids' family trusts' interests in Forty Squares were acquired in mid-2020 from three other family trusts, each controlled by persons involved in the business of Golden Harvest since its inception in 1993. One such trust was the S Voyatjes Family Trust which is controlled by Mr. Stelios Voyatjes, a former director of Golden Harvest. The other former directors were Mr. Basilis Apostolellis, who controlled the E Apostolellis Family Trust and Mr. Peter Dimatellis, who controlled the E Dimatellis Family Trust. These three persons are also the directors of Erf 3459 George (Pty) Ltd ("Erfco"), which is an intervening creditor in this matter.

THE WINDING-UP

4. Early in 2022 the business of Golden Harvest ran into financial difficulties. As a consequence of, inter alia, a cash flow crisis, it defaulted on payments to suppliers and generally gave its creditors the runaround. Eventually, on 9 December 2022 one of Golden Harvest's disgruntled suppliers, the seventh respondent herein, Capespan South Africa (Pty) Ltd ("Capespan"), which was owed some R1,4m, lodged an application in this Division for the provisional winding up of Golden Harvest under case number 20961/22. The matter was to be heard urgently the following week, on Thursday, 15 December 2022, which was during court recess.

5. The application was served on Jasseen personally (so says the return of service of the Sheriff) at 12h02 on 9 December 2022 at the company's premises at 1[…] C[...] Avenue, Epping 1, Cape Town[1]. There was no opposition on 15 December 2022 and accordingly Francis J granted a provisional order of winding-up

[1] The company also has premises at Gunners Circle in the Epping industrial area.

returnable on 23 February 2023. On that day, there was no opposition to the winding-up but counsel for Golden Harvest put in an appearance and sought a postponement of the matter ostensibly to prepare an application to place the company under business rescue. Ndita, J refused a postponement and granted a final order of winding-up.

6. Subsequent to the grant of the provisional order of winding-up, the second and eighth respondents herein, Messers Johann Krynauw and Brian Molekwa, were appointed by The Master as the provisional liquidators of Golden Harvest. They remain the provisional liquidators as the first meeting of creditors has not yet been convened by The Master but for the sake of convenience I will refer to them as "the liquidators". On 1 March 2023 the liquidators obtained an order extending their powers under section 386 (5) of the Companies Act, 61 of 1973 ("the Old Act") and on 8 March 2023 they procured an order under sections 417 and 418 of the Old Act to convene a confidential inquiry into the affairs of the liquidated company.

THE BUSINESS RESCUE APPLICATION

7. On 10 March 2023, Forty Squares and certain of the employees of Golden Harvest lodged the present application under case number 4200/2023 for an order placing the liquidated company into business rescue in terms of section 131 of the Companies Act, 71 of 2008 ("the Companies Act"). The matter was set down for hearing on 30 March 2023, again during court recess, and was heard by this Court in the Fast Lane of the Motion Court. The papers required supplementation and the parties needed to prepare full heads of argument and accordingly the business rescue application was postponed for hearing before this Court on the first day of the second term, Tuesday, 11 April 2023. There is no issue that the application is urgent and this judgment is delivered against the background of such urgency. The right is reserved to amplify the Court's reasons later should the need arise.

8. The business rescue application is formally opposed by the liquidators and by Erfco which has intervened herein by virtue of its interest as a landlord in the winding-up of Golden Harvest where it says it has claims for arrear rental of at least of R12,5m in respect of the company's premises in Johannesburg and at C[...] Street in Epping. In Erfco's affidavit, Mr. Voyatjes in fact lays claim to a debt by Golden

Harvest of more than R44m but notes that, to the extent that the company may dispute liability for part of that debt, the amount of R12,5m is undisputed.

9. In formally opposing the business rescue application on behalf of the company, Mr. Krynauw delivered a comprehensive affidavit which included affidavits by some other major creditors who allege that they too have substantial claims against the company in liquidation. These include – (i) Golden Harvest's bankers, Mercantile Bank, which says it is owed more than R56m; (ii) Growth Point Management Services (Pty) Ltd, the landlord of the Gunners Circle premises which says it is owed almost R1,1m in arrear rental and (iii) Capespan with its aforesaid claim of R1,4m. In addition, Mr. Krynauw notes that the Revenue has a claim against the company for unpaid PAYE of some R6,6m. There are also unpaid municipal bills at the various premises – R2,17m is said to be due to the City of Johannesburg and R86 084,35 is due to the City of Cape Town.

10. In the list of creditors which is annexed to the notice of motion herein, the total liabilities of Golden Harvest are said to be R136 767 282, 00 but Mr. Krynauw says the figure is much higher. Not only has the indebtedness to Erfco been understated as pointed out above, there is also a liability to Standard Bank which has not even been included in the list of creditors to whom notice has been given. Suffice it to say that the position of the company in liquidation is dire.

11. As part of the founding papers herein, Forty Squares has presented a 51-page business rescue plan ("the plan") prepared by a senior business rescue practitioner ("BRP"), Mr. Stefan Steyn which it says will save the business of Golden Harvest. Shorn of all the fine print, the plan proposes the introduction of post commencement finance ("PCF") under section 135 of the Companies Act of R20m which will be contributed to the company by Forty Squares, which it in turn will borrow from two lenders – R15m from Al Baraka Bank and R5m from Freshco ("a Namibian customer" seemingly with familial ties). The plan is proposed to be of 3 years' duration and will allegedly give creditors a dividend of 30c in the Rand. Mr. Steyn has calculated what he considers to be a likely dividend under winding-up and has come up with a figure of 7 cents in the Rand.

RESPONSE TO THE PLAN

12. The plan has been severely criticized by the liquidators, Erfco, Mercantile Bank, Capespan and Growth Point as vague (particularly in respect of the sourcing of the PCF) and speculative and unworkable as far as its, assumptions, facts and figures are concerned.

13. The liquidators point out that upon receipt of their extended powers under section 386(5) of the Old Act they cancelled all of the leases over the properties from which Golden Harvest traded. They note too that many of the key staff members of the company had left before the provisional winding-up order was granted and that presently the company has no active workforce, its operations having ceased upon the granting of the final order. I mention *en passant* that it is common cause that the Davids' caused the company to continue to trade while it was in provisional winding-up without the consent of the liquidators or The Master and that it is more than likely that in so doing it has preferred certain creditors over others. Be that as it may, the liquidators and Mr. Voyatjes, who has an intimate understanding of the business of Golden Harvest, take the point that there is really no business to be saved.

14. But perhaps the most important development in regard to the plan is that already certain of the major creditors of Golden Harvest – Mercantile Bank, Erfco, Capespan and Growth Point – have stated under oath that they will not support the plan, either in its present form or any similar iteration. The attitude of SARS is not known at this stage but the liquidators say that it would be hard to imagine that the Revenue would adopt a stance different to the other major creditors.

THE APPROACH TO BUSINESS RESCUE

15. The principles applicable to the consideration of a business rescue application are by now well established. Given the pressing nature of this matter now is not the time to embark on a scholarly re-statement of the law. Suffice it to say that in Oakdene Square[2] the Supreme Court of Appeal ("SCA") set forth the general principles to be applied in a matter such as this. With reference to the statutory

[2] Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others 2013 94) SA 539 (SCA)

requirement under section 131(4)(a) - that a court must be satisfied that there is "*a reasonable prospect of rescuing the company*" - Brand JA had the following to say.

"[29] This leads me to the next debate which revolved around the meaning of 'a reasonable prospect'. As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427(1) [of the Old Act]… On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect - with the emphasis on 'reasonable' - which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers…

[30] Self-evidently it will be neither practical nor prudent to be prescriptive about the way in which the appellant (sic) must show a reasonable prospect in every case. Some reported decisions laid down, however, that the applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement… But in considering these decisions Van der Merwe J commented as follows in Propspec[3]…

> '*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. But with respect to my colleagues, I believe that they place the bar too high…*
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> *'[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*

[3] Propspec Investments v Pacific Coast Investments 97 Ltd and another 2013 (1) SA 542 (FB) at [11]

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 of 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.'

[31] I agree with these comments in every respect. Yet, the appellants contended that the bar should be set even lower than that. Relying on the reference in s 128(1)(b) to 'the development and implementation, if approved, of a plan to rescue the company' their argument was that the reasonable prospect for rescuing the company in s 131(4) demands no more than the reasonable prospect of a rescue plan. According to this argument, the applicant for business rescue is therefore not required to show a reasonable prospect of achieving one of the goals contemplated in s 128(1)(b). All the applicant has to show is that a plan to do so is capable of being developed and implemented, regardless of whether or not it may fail. Once it is established that it is the intention of the applicant to develop and implement a rescue plan which has that as its purpose, so the argument went, the court should grant the business rescue application even if it is unconvinced that this will result in the company surviving insolvency or even achieve a better return for creditors and shareholders. I do not agree with this line of argument. As I see it, it is in direct conflict with the express wording of s 128(h). According to this section 'rescuing the company' indeed requires the achievement of one of the goals in s 128(1)(b). Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process. I have indicated my agreement with the statement in ***Propspec*** that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1) (b)."

16. The approach in Oakdene Square was applied in a situation in which the distressed company had not yet been finally wound up: the approach of the applicant in that matter was an attempt to avert winding-up by applying for business rescue. It was however clear that if the business rescue application failed, the company would be put into liquidation, and that is what happened in the court *a* quo: business rescue was refused and the company was wound up. The matter proceeded to the SCA which dismissed the appeal, thereby confirming the winding-up order.

17. Counsel for the liquidators, Mr. Ferreira, argued that that the present matter was in a different category in light of the fact that Golden Harvest has been finally wound up. Relying on Richter[4] counsel suggested that the bar was now higher and that an applicant had to show "something more" to clear the hurdle.

18. Richter focused on the question whether the business rescue provisions in the Companies Act contemplate a company being placed into business rescue after a final order of winding-up had been made. The SCA found that there was nothing in the Act which precluded this, particularly since s7(k) of the Companies Act states that the purpose of business rescue is –

"to provide for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders."

19. Dambuza AJA observed in this regard that –

"[14] Of significance is the fact that in respect of business rescue the Act refers to the interests of 'stakeholders' in contrast to the interest of creditors and shareholders which take center stage in liquidation proceedings. The rights of employees through trade unions, as stakeholders, are expressly recognized in the Act. Section 128(1)(a) defines the following as principal stakeholders and affected persons who may apply for business rescue in respect of the company: shareholders, creditors, registered trade unions representing employees, and employees not represented by a

[4] Richter v Absa Bank Ltd 2015 (5) SA 57 (SCA)

registered trade union. Business rescue therefore seeks to protect interests of a wider group of persons than liquidation. The role of companies as a means of achieving economic and social benefits is given prominence.

[15] It takes little to imagine instances, developing after the issue of the final order, that could lead to the circumstances of the company improving radically, such that it would become profitable if allowed to trade. It could be awarded a contract for which it had earlier tendered or secure funding for future projects; a major creditor might indicate a willingness to subordinate its claim. Accordingly, in the scheme of things, where, during liquidation, evidence becomes available that business rescue proceedings will yield a better return for shareholders and creditors and jobs will be retained, there could be no reason to deny business rescue only because the company is in final liquidation. Indeed, to allow it to do so would fall into the very scheme of business rescue envisaged by the Act and fulfill the objectives of providing for revival of a financially distressed company with all its attendant social benefits.

[16] Counsel for Absa expressed concern that a liberal interpretation of s131(1) may have negative results for the liquidation process. These include repetitive disruptions and uncertainty that may result from various affected parties making applications for business rescue at different times during the winding-up process, reversion of business control to the same directors who may have been the cause of the financial distress experienced by the company, and the capacity of the company under final liquidation to conduct effective business, including concluding contracts, during the implementation of the rescue plan. All these concerns are valid and appeared to have been uppermost in the mind of [the judge in the court *a quo*] when he considered the issues. Indeed implementation of the Act may produce some seemingly awkward results in the initial stages. However, that does not justify an unduly restrictive approach in the interpretation of the provisions of the Act. The simple answer is that the court can dismiss any application for business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved."

20. As I read Richter it does not say anything that goes beyond the approach advocated in Oakdene Square: a court considering business rescue must exercise its discretion properly with due regard for all the relevant statutory criteria. What Dambuza AJA does, however, contemplate in para 15 is that the court must be satisfied that there is a realistic prospect of the company being returned to profitably ("improving radically") before it will grant the order. This makes sense, because a court has already found that it is just and equitable for the insolvent company to be wound up and in this case, importantly, it did so without any objection from shareholders, creditors or employees. One would thus not want to send a hopelessly insolvent company with little prospect of commercial rehabilitation through a process of business rescue only for its winding-up to be later resumed after an unnecessary waste of time and resources to the prejudice of the waiting creditors.

FACTORS FOR CONSIDERATION IN THE PRESENT CASE

21. The loss of continued employment to some 180 workers in this company is tragic in the current financial climate. One would generally seek to promote fixed employment rather than contribute to the staggering unemployment figures which plague our economy. But that end can only be achieved if a reasonable case has been made out by Four Square for Golden Harvest, post liquidation, to be successfully returned to its former status as a solvent going concern.

22. In my considered view, the facts of this case demonstrate unequivocally that there are no anticipated circumstances that will "radically improve" the prospects of Golden Harvest being returned to solvency and commercial viability. On the contrary, the evidence presented to the Court points the other way. I shall briefly endeavour to list the most important factors.

23. Firstly, in the affidavits filed by the liquidator and the intervening creditor, the major creditors already referred to (Mercantile Bank, Erfco, Growth Point and Capespan) have all stated that they will not vote in favour of the business plan placed before the Court, nor any similar plan. These creditors are, by value, in the clear majority of the very long list of creditors attached to the notice of motion. And, as I have said, one does not know what the attitude of SARS and Standard

Bank is, but, as counsel said, it would be surprising to see them go against the firmly expressed view of the majority.

24. The significance of this stance by these creditors is to be found in the provisions of s152(2) of the Companies Act which deals with a meeting of creditors which must be convened by the duly appointed BRP within 10 days of such a plan being put up. Creditors are called upon by the section to cast a preliminary vote in favour of such plan.

"152(2) In a vote called in terms of subsection (1)(e) the proposed business rescue plan will be approved on a preliminary basis if –

> (a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted…"

25. In Oakdene Square[5] the SCA noted that the creditors' declared intention to oppose a business rescue plan had to be taken into account by the court considering the application and went on to say that the court was unlikely to interfere in that decision unless it was unreasonable and mala fide. Mr. van Reenen, for Four Square, readily conceded that Mercantile Bank holds the "swing vote", so to say, and that its opposition alone to the plan was problematic for the applicant. Counsel was unable to point to any factors suggesting that the attitude of Mercantile Bank (which alone is a creditor with 38% of the company's debt) and the other major creditors referred to above, was unreasonable or mala fide.

26. In my considered view, this factor alone renders the application for business rescue very problematic. No court is going to put a moribund company through the expectation of commercial resurrection, with all the concomitant expense and delay, if the plan is not going to be adopted by the creditors. And, might I add, most certainly not where it has already been wound up without opposition from the very parties who now seek to achieve that resurrection.

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[5] At [38]

27. Secondly, there is the fact that the liquidators have cancelled all of the company's leases. It no longer has any premises from which to trade either in Cape Town or Johannesburg. This means that new premises will have to be located, leases concluded, deposits put up and rentals paid. Given the poor trading history of Golden Harvest, it is not difficult to imagine that prospective landlords will not easily take on an entity that has been put into final liquidation as a prospective tenant, let alone to ask who is likely to put up the requisite deposit and security (such as personal suretyships) which any commercially-minded landlord is likely to demand.

28. Thirdly, the evidence establishes that the company's workforce was sorely depleted during 2022 and that many of its top managers have drifted away over the last year or so to join more profitable competitors. Moreover, the company ceased trading on 23 February 2023 and now, almost 2 months later, it has no employees. Further, as I have said, the company has failed to pay over to SARS the PAYE tax which it deducted in respect of its employees for a protracted period during 2022.

29. In such circumstances, it is fair to assume a measure of reluctance on the part of erstwhile employees to resume working for a company that has not looked after their tax obligations. In any event, if there is insufficient PCF funding (as discussed below) to ensure the viability of the company going forward, it would be irresponsible in the extreme to consider re-employing a workforce which would not be properly remunerated, with the prospect of their short-lived employment being terminated when the creditors vote against the plan.

30. Fourthly, the company has suffered severe reputational damage in the marketplace and is no doubt likely to experience difficulty in procuring produce from suppliers who, having been once burnt, are likely to be twice shy of extending any further credit to Golden Harvest in business rescue. In this regard it must be mentioned that after the provisional order was granted against the company, its directors permitted it to trade - quite unlawfully - up until the end of January 2023. The amount paid out over a period of approximately six weeks is of the order of R3,5m, payments which fall to be recovered by the liquidators. To the extent that such amounts will be recovered from suppliers and logistics companies with which

the company expects to trade henceforth, they are unlikely to do business with Golden Harvest in business rescue.

31. Fifthly, there is the issue of the PCF which can allegedly be sourced in the sum of R20m. It is said that R15m will be put up by an entity known as Borroka (Pty) Ltd (which it in turn has borrowed from Al Baraka Bank) and the balance from Freshco, a fruit supplier in Namibia with familial affinity. It appears that Borroka too has some ties with one of the Davids families. While the terms upon which these monies are to be borrowed are described in the founding papers in decidedly vague detail,[6] it is rather the manifest insufficiency of the amount which is of critical concern.

32. Ms. Morgan, on behalf of Erfco, pointed out that the once the PCF had been put towards payments in respect of rentals, salaries, utilities and motor vehicles, there would be very little money left to properly equip new premises or to procure produce and on-sell it to purchasers. Not only that, said counsel, the repayment of the Mercantile Bank loan would take around 9 years (excluding interest) and the repayment of the PCF would be of the order of 6 years.

33. I agree that on the plan as presently proposed, the PCF is not likely to be sufficient to put a company so very heavily burdened by debt (at least R167m and with minimal assets available for realization) back into solvency. In reality, to suggest that the company can be saved by the injection of capital amounting to approximately 12% of the liabilities (and that in circumstances where the capital injection must also cover the cost of the business rescue) has only to be stated for the folly therein to become apparent.

34. Sixthly, there is the issue of the proposed duration of the plan, which the BRP has fixed at 3 years. This is an extraordinarily long time given that business rescue is meant to be a speedy process aimed at a so-called “quick-fix solution”. In this regard it is to be noted that s132(3) of the Companies Act contemplates the

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[6] The attempt to bolster the evidence in the replying affidavit is to be ignored as suggested by Brand JA in Oakdene Square at [32].

completion of business rescue proceedings within 3 months of commencement, failing which the BRP must approach the court on a month-by-month basis for an extension of the process.

35. Seventhly, Oakdene Square directs the Court to have regard, not only to the restoration of the company to a going concern, but also to consider whether business rescue will offer creditors a more favourable return than winding-up. In the founding papers, Jasseen refers to the plan and asserts that with the PCF injection, the company will be able to achieve a profit margin of 19% for the 3-year period of the rescue plan. This, it is claimed, will offer creditors a return of 30c in the Rand.

36. In his affidavit, Mr. Voyatjes explains that this target is unachievable, pointing out that during the years that he was with the company, its profit margin was never more than 12% per annum. Ms. Morgan correctly pointed out that this overly ambitious projected return has the effect of skewing the calculation of the return for creditors in the business plan.

37. In the replying affidavit, Jasseen changed tack and said that the model for the business rescue plan would be to focus on the export market where higher returns would more likely be achievable. In essence, the replying affidavit contemplates a completely restructured business model: new premises, a smaller workforce and a new target market. Not only was that model impermissibly introduced in reply[7], thus depriving the parties opposing business rescue the opportunity of commenting thereon, it had the effect of undermining Mr. Steyn's plan which was based on the extant business model.

38. Indeed, one might rightfully ask in such circumstances, why the controllers of Forty Square do not take their R20m and start up a new business. Their suggestion in that regard (that they are passionate about the business of Golden Harvest) sounds rather hollow, particularly when they claim that the sellers of the company had breached certain contractual warranties as to the profitability of the company. It may thus well be, as counsel for the liquidators argued, that the move towards

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[7] Oakdene Square *ibid*

business rescue at this late stage of proceedings was for an ulterior purpose viz. to avoid the consequences of the directors' personal consequences. But that point need not be decided definitively here.

39. Turning to the suggestion by Forty Squares that the projected return of 7 cents in the Rand set forth in the plan was unchallenged by the liquidators and Erfco, it is correct that there is no direct challenge thereto in the papers. But, as Mr. Ferreira pointed out, the liquidators are not in a position at this stage to give consideration to the extent of any dividend in liquidation for the simple reason that there are a number of important unknowns. For instance, the directors of Golden Harvest have withheld the debtors' book from the liquidators and further have caused the company to continue to trade during provisional liquidation, thus concluding potentially impeachable transactions.

40. The result is that the liquidators are as yet uninformed as to the true extent of the company's assets and liabilities. That being so, any consideration of a final dividend at this stage would amount to uninformed speculation. The Court is thus unable to establish that business rescue holds better prospects than winding-up for creditors and/or shareholders in the company at this stage

41. Lastly, there is the question of the timing of the application. The facts show that Golden Harvest was already in serious financial trouble early in 2022. Further, Messer Davids had injected additional capital sums into the company in that year and still it could not maintain solvency. Then in December 2022 came the unopposed application for provisional winding-up and in February 2023, a final order was granted without any opposition having been filed. The present application for business rescue came some 2 weeks later.

42. In my view, an application for business rescue was thus warranted earlier during 2022, but certainly at latest by 9 December 2022 when the papers were served on Jasseen and the employees at the company's C[...] Street premises. Yet the directors did not follow that avenue then. They rather set about continuing to trade in contravention of the Companies Act (thereby preferring such creditors with

whom they traded) and also went about attempting to reach compromises with a limited number of other creditors.

43. The haste with which this application was ultimately brought suggests that it is not bona fide. That impression is buttressed by the manifestly inadequate plan which has been so roundly condemned by the major creditors of Golden Harvest. In this regard I can but only repeat what Dambuza AJA stated above in Richter. I am driven to conclude that this application –

"Is not genuine and bona fide… [and in any event]…does not establish that the benefits of a successful business rescue will be achieved."

COSTS

44. Counsel for the liquidators and the intervening creditor both urged for a punitive costs order against the first applicant in the event that the application failed. That submission was premised on the fact that the application was a deliberate tactic on the part of Messers Davids to advance a personal agenda – the delay of the recovery of their prospective indebtedness under suretyships put up on behalf of the company, and to protract the s417 enquiry at which they are likely to be interrogated.

45. While the submissions regarding costs are not entirely without substance, I prefer to approach the question of an appropriate order on the basis of Alluvial Creek[8].

"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of the party which the Court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright

[8] *In re* Alluvial Creek, Ltd 1929 CPD 532 at 535. See also Claase v Information Officer, South African Airways (Pty) Ltd 2007 (5) SA 469 (SCA) at 475A-B.

purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case."

46. In this matter the liquidators are obliged to litigate with funds that have been entrusted to them for the purposes of discharging their statutory duties. They have been called upon to oppose a case which is manifestly without merit. In such circumstances the interests of justice demand that they should not have to bear the attorney and client component of the costs of litigation with those monies.

47. The intervening creditor is in a different position. It was not cited as a respondent and evidently entered the lists to shore up the case in order to make sure that all relevant facts are placed before the Court and the liquidation proceeding continue. It has participated with its own funds and I do not believe that the issue of being put to the unnecessary expense of litigation applies to it. Its costs should be on the ordinary scale.

ORDER OF COURT

In the circumstances the following order is made:

A. The business rescue application is dismissed and the suspension of the liquidation proceedings of the first respondent is lifted.

B. The first applicant is to pay the costs of the first, second and eighth respondents in respect of both the business rescue application and the applicants' postponement application of 30 March 2023 on the scale as between attorney and client.

C. The first applicant and the first respondent are to pay the costs of the intervening creditor in respect of both of the aforementioned applications, jointly and severally, the one paying the other to be absolved. For the sake of clarity, it is

recorded that these costs are to be paid on the scale as between party and party.

D. Such costs for which the first, second and eighth respondents may liable will be costs in its liquidation.

GAMBLE, J

APPEARANCES:

For the first applicant:	Mr. D. van Reenen Instructed by Lionel Murray Schwormstedt & Louw Cape Town
For the first, second and eighth respondents:	Mr. A Ferreira Instructed by Werksmans Attorneys Cape Town
For the intervening creditor:	Ms. C. Morgan Instructed by Messina Inc. Johannesburg c/o Anneke Whelan Attorneys Cape Town