IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 7128/22

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **APPLICANT**

and

RA GOVENDER CLOSE CORPORATION (IN BUSINESS RESCUE) **FIRST RESPONDENT**
(Registration Number: 1997/036599/23)

IGOLKISSHORE RAGUNANDAN N.O. **SECOND RESPONDENT**
(Identity Number: 5[...])

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **THIRD RESPONDENT**

ORDER

The following order is made:

1. It is declared that:

1.1 the business rescue proceedings of the first respondent terminated in terms of section 132(2)(c)(i) of the Companies Act, 2008 on 19 May 2022; and

1.2 all actions taken by the second respondent and all proceedings in the business rescue of the first respondent, after 19 May 2022, are null and void.

2. A rule nisi is issued calling upon all persons interested to show cause to this Court on the 3rd May 2023 at 09h30 or so soon thereafter as the matter may be heard, why the first respondent should not be finally wound-up.

3. This order operates, with immediate effect, as a provisional order for the winding-up of the first respondent.

4. Service of the order to be effected by:

4.1 Publication forthwith in both the Government Gazette and the Mercury;

4.2 Service on the South African Revenue Service;

4.3 Service on the registered address of the first respondent at 5[...] D[...] Street, Jacobs, Durban;

4.4 Service on the employees of the first respondent, if any; and

4.5 Service on every registered trade union that represent any of the employees of the first respondent, if any.

5. The second respondent is directed to pay the costs of this application personally.

JUDGMENT

Z P Nkosi J

[1] The applicant seeks an order declaring the business rescue proceedings to be at an end in terms of s 132(2)(c)(i) of the Companies Act 71 of 2008 ("the Act") and for the issuing of a rule nisi provisionally winding-up the first respondent. The

application is resisted by the second respondent purely on the interpretation of s 153 of the Act.

[2] The following facts seems to be common cause or not in dispute. The applicant is a creditor of the first respondent. The first respondent was placed in business rescue, on 14 January 2022 and the second respondent was appointed as its business rescue practitioner. The second respondent published a business rescue plan, on 5 May 2022. The plan was introduced at a meeting, on 19 May 2022. for consideration by creditors. The second respondent did not invite discussion, and entertain and conduct a vote on motions to amend the proposed plan. Instead, he called for a preliminary approval of the proposed plan.

[3] The plan was rejected by the creditors. The second respondent did not seek a vote of approval to prepare and publish a revised plan. He invited creditors to make binding offers to purchase the voting interests of the applicant and FirstRand Bank. No affected persons called for a vote of approval requiring the practitioner to prepare and to publish a revised plan.

[4] The first respondent's member (Govender) made a binding offer which was summarily rejected whereafter, the second respondent adjourned the meeting for five days. The meeting resumed on 26 May 2022 after the second respondent unilaterally republished a revised plan and proposed a fresh vote.

[5] The plan was again rejected. Govender again made a binding offer which was summarily rejected. Thereupon, the second respondent again adjourned the meeting. Thereafter, on 31 May 2022 the second respondent again unilaterally published another revised plan. The meeting resumed on 1 June 2022 and was adjourned for the applicant to bring this application.

[6] The issue that requires determination is whether, after a business rescue plan has been rejected by the holders of creditors voting interest at the meeting held in terms of s 151 of the Act, and a binding offer made by affected persons to purchase the voting interest of a person who opposed the adoption of the plan, at a value independently and expertly determined in terms of s 153(1)(b)(ii) of the Act, is

rejected, the business rescue proceedings are at an end, or whether the whole process is locked in an ongoing cycle by virtue of the wording of s 153(4) of the Act. In short, the issue concerns an interpretation of s 153, particularly s 153(4).

[7] It is submitted on behalf of the applicant that where a binding offer is made, the practitioner cannot invokes 153(4) to unilaterally make substantive changes to the plan at a reconvened meeting. It is contended on the applicant's behalf that the second respondent did so unlawfully on two occasions.

[8] Counsel for the applicant argues, in his heads of argument that in terms of s 153(4) of the Act, the practitioner is faced with two scenarios. Firstly, where the binding offer is rejected, the plan requires no necessary revisions to appropriately reflect the results of the offer. In other words, he can do no more than make necessary revisions appropriately reflecting the result and can certainly not fundamentally amend the plan unilaterally since the rejection of the offer does not affect voting interests. Necessary revisions, in this context, do not equate to "prepare and publish a revised plan.".

[9] Secondly, where the binding offer is accepted the practitioner must make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer. It is submitted by the applicant that this is limited to reflecting the change in the voting interests and, by virtue of such change, s 152 applies with regards to a fresh vote on the existing business rescue plan and s 153 applies where the plan is again rejected.

[10] It is the contention of applicant's counsel that applying the principles of interpretation as set out in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), s 153(4)(b) of the Act finds application only where the binding offer is accepted. Otherwise, any other interpretation and application will result in the endless cycle advocated by the second respondent. Counsel submits that in terms of s 132(2)(c)(i) business rescue proceedings end when the plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner

[11] In reply, counsel for the second respondent submits that the practitioner acted to adjourn the meeting as expressed in peremptory terms of s 153(4) after an affected person made a binding offer and while the process to fix the value provided for in s 153 (1)(b)(ii) is attended to, the meeting had to be adjourned for no more than five business days to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the result of the offer. Counsel contends that the binding offer cannot be rejected before the fair and reasonable estimate of value is determined independently and expertly, because to do so would undermine the process and frustrate the purpose of the Act and the section in achieving that purpose. Put differently, it is part of the structure of the Act in business rescue proceedings for further things to be done in relation to the binding offer before it can be rejected.

[12] In support of this contention, counsel has cited *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) para 60, which aptly held:

'... The acceptance or rejection need only take place once the value has been finally determined. The independent expert is therefore obliged to reach a determination by the date of adjourned meeting.'

[13] In terms of s 132(2)(c) of the Act, business rescue proceedings end when:

'(c) a business rescue plan has been –

(i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or

(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.'

[14] In terms of s 151(1) of the Act, the practitioner 'must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the

purpose of considering the plan'. It provides in subsec (2) how such a meeting should be convened. In subsec (3) it further provides that such a meeting 'may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153'.

[15] Section 152 of the Act, which regulates the proceedings during consideration of the business rescue plan, provides:

'152 Consideration of business rescue plan

(1) At the meeting convened in terms of section 151, the practitioner must -

(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees' representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to –

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests', and satisfactory to the practitioner; or

(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph *(d)* (ii).

(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; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.

(3) If a proposed business rescue plan –

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

[16] Section 153 of the Act, regulates the proceedings in instances of failure to adopt the business rescue plan. The relevant provisions are captured below:

'153 Failure to adopt business rescue plan –

(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) advised 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.

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

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

(*aa*) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

(2) If the practitioner, acting in terms of subsection (1) (a) (ii), or an affected person, acting in terms of section 1 (b) (i) (*bb*), informs the meeting that an application will be made to the court as contemplated in those provisions, the practitioner must adjourn the meeting –

(a) for five business days, unless the contemplated application is made to the court during that time; or

(b) until the court has disposed of the contemplated application.

(3) If, on the request of the practitioner in terms of subsection (1) (a) (i), or a call by an affected person in terms of subsection (1) (b) (i) (*aa*), the meeting directs the practitioner to prepare and publish a revised business rescue plan –

(a) the practitioner must –

(i) conclude the meeting after that vote; and

(ii) prepare and publish a new or revised business rescue plan within 10 business days; and

(b) the provisions of this Part apply afresh to the publishing and consideration of that new or revised plan.

(4) If an affected person makes an offer contemplated in subsection (1) (b) (ii), the practitioner must-

(4) If an affected person makes an offer contemplated in subsection (1) (b) (ii), the practitioner must-

(a) adjourn the meeting for no more than five business days, as necessary to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer; and

(b) set a date for resumption of the meeting, without further notice, at which the provisions of section 152 and this section will apply afresh.

(5) If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings '

[17] On the facts which are common cause, the practitioner, on 19 May 2022, and at the meeting convened in terms of s 151, called for a preliminary approval of the proposed plan. The plan was rejected by creditors and neither the practitioner nor affected persons present sought a vote of approval in terms of s 153(1)(a)(i) or 153(1)(b)(i) to require the practitioner to prepare and publish a revised plan.

[18] Instead, Govender made a binding offer to purchase the applicant's voting interest for a nil amount, in terms of s 153(1)*(b)(ii)* which had been independently and expertly appraised and valued at the request of the practitioner (Annexure "FA12"). The offer was summarily rejected. Thereafter, the second respondent adjourned the meeting for five days to resume on 26 May 2022, and unilaterally

republished a revised plan and proposed a fresh vote. The plan was again rejected. At the second meeting, Govender again made a binding offer which was summarily rejected.

[19] It appears to be common cause that the first offer made by Govender, on 19 May 2022, constitutes a proper binding offer in terms of the provisions of s 153(1*)(b)(*ii) which was only binding on the offerer and not the offeree. Once the offer had been rejected, it was not necessary to afford an opportunity to the practitioner to proceed in terms of s 153(4), as there were no revisions to be made to the business plan, since the status quo remained the same. For all intents and purposes the business rescue ended in terms of s 132(2)*(c)(*i).

[20] What the second respondent did thereafter was ultra vires his statutory powers. Section 153(4)(a) of the Act, on a plain and/or purposive reading, only empowers the practitioner to make the necessary changes to the plan, and not to unilaterally effect substantive changes to it and put it to the meeting reconvened in terms of s 153(4)(*b)*. That means, the adjournment must be necessary to afford the practitioner an opportunity to make necessary revisions for the business rescue plan to appropriately reflect the results of the offer, only when the binding offer has been accepted. Otherwise, no revisions are required if the binding offer has been rejected, as such an interpretation opens a revolving gate with no stopper, and does not lead to sensible, business-like results. Such consequences would be untenable.

[21] Business rescue proceedings, by their very nature, must be conducted with maximum possible expedition. A business rescue plan should be developed and implemented within a reasonable period (*Alderbaran (Pty) Ltd and Another v Bouwer and Others* 2018 (5) SA 215 (WCC) paras 60 and 74; *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10).

[22] It follows, therefore, that on 26 May 2022, at the resumed meeting, at which on a fresh vote the revised plan was again rejected, and another binding offer made and also rejected, the second respondent was acting beyond the scope of his

functions. I consider that whatever happened after the meeting, on 19 May 2022 should be considered null and void.

[23] The second respondent deliberately disregarded his statutory duties in unlawfully adjourning the meeting, in the manner that he did, not once but twice, and improperly amended the plan in the manner he did, and thereafter sought a new vote for the amended plan at the resumed meetings, on 26 May 2022 and 1 June 2022. There can be no excuse for his unlawful conduct, in particular since the unlawfulness of his conduct had been brought to his attention, on several occasions, at those meetings, but was simply ignored. In these proceedings, he has sought to defend his reckless conduct, after having totally disregarded the boundaries of his statutory duties and displayed a clear bias or partial attitude against the applicant's interests (*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) para 38). I am of the view that the second respondent has to pay the costs of the application.

[24] The application to liquidate the first respondent satisfies the requirements for a winding-up order albeit on a provisional basis. The first respondent owes the applicant approximately R6 million plus interest and is undeniably unable to pay its debts, as contemplated ins 345 of the Companies Act 61 of 1973 ("the Companies Act").

[25] The court's power to grant a winding-up order is discretionary irrespective of the ground upon which the order is sought (*F&C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (N) at 844). This discretion must be exercised on judicial grounds; and in its exercise the court should have regard to the grounds and the reasons for the purposed winding-up (*Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd and Another* 1954 (1) SA 231 (E) at 244; *Leca Investments (Pty) Ltd v Shiers* 1978 (4) SA 703 (W) at 705). Section 347(1) of the Companies Act provides that 'the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets'.

[26] The first respondent currently operates its engineering business in business rescue, in attempts to trade itself out of its predicament. It is averred that the business is functioning productively, yet no payment has been tendered to the applicant to stave off liquidation. With business rescue having come to an end its liquidation has become unavoidable.

Order

[27] I therefore make the following order:

1. It is declared that:

1.1 the business rescue proceedings of the first respondent terminated in terms of section 132(2)(*c*)(i) of the Companies Act, 2008 on 19 May 2022; and

1.2 all actions taken by the second respondent and all proceedings in the business rescue of the first respondent, after 19 May 2022, are null and void:

2. A rule nisi is issued calling upon all persons interested to show cause to this Court on the 3rd May 2023 at 09h30 or so soon thereafter as the matter may be heard, why the first respondent should not be finally wound-up.

3. This order operates, with immediate effect, as a provisional order for the winding- up of the First Respondent.

4. Service of the order to be effected by:

4.1 Publication forthwith in both the Government Gazette and the Mercury;

4.2 Service on the South African Revenue Service;

4.3 Service on the registered address of the first respondent at 5[...] D[...] Street, Jacobs, Durban;

4.4 Service on the employees of the first respondent, if any; and

4.5 Service on every registered trade union that represent any of the employees of the first respondent, if any.

5. The second respondent is directed to pay the costs of this application personally.

Z P NKOSI J

CASE INFORMATION

DATE OF HEARING	**: 10 FEBRUARY 2023**
DATE JUDGMENT	**: 29 MARCH 2023**
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