IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **3058/2023**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant
(Registration Number: 1962/000738/06)

and

FRANLESE BOERDERY (PTY) LTD First Respondent
(Registration Number: 2018/387627/07)

SUMAIYA KHAMMISSA N.O. Second Respondent
[In her capacity as appointed Business Rescue Practitioner of **Franlese Boerdery (Pty) Ltd**]

ANY AFFECTED PERSONS RELATING TO FRANLESE BOERDERY (PTY) LTD Third Respondent

RUCA BOERDERYE (PTY) LTD Fourth Respondent

CORAM: HEFER AJ

HEARD ON: 12 OCTOBER 2023

DELIVERED ON: 09 NOVEMBER 2023

---

[1] With reference to Section 128(1)(b) of the Companies Act[1] (*"the Act"*), the following was said in **Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd**[2]:

> *"... business rescue means to facilitate rehabilitation which in turn means the achievement of one of two goals: (a) to return the company to solvency, albeit to provide a better deal for creditors and shareholders than what they would have received through liquidation".*

[2] In terms of Section 132(2), business rescue proceedings end when, *inter alia*, the Court has converted the proceedings to liquidation proceedings.

[3] In this matter, the Applicant approaches the Court to obtain an order in terms of which the business rescue proceedings in respect of Franlese Boerdery (Pty) Ltd (*"Franlese"*), to be converted into liquidation proceedings.

[4] In opposing the application, the First Respondent together with one of the creditors of the First Respondent, being Ruca Boerderye (Pty) Ltd (*"Ruca"*) launched a counter-application to the effect that in essence the vote by the Applicant against the adoption of the revised business rescue plan dated June 2023, which took place on 30 June 2023, be declared inappropriate and set

---

[1] 71 of 2008
[2] 2013 (3) All SA 303 (SCA)

aside in terms of Section 157(7) of the Companies Act 71 of 2008. I shall in this judgment refer to 1st and 4th Respondents as "Respondents".

Background facts:

[5] After the First Respondent defaulted on the terms and conditions of various accounts held by the First Respondent with the Applicant, the Applicant and amongst others the First Respondent, entered into a settlement agreement on 29 September 2022 in terms of which, amongst others, the First Respondent admitted being due to the Applicant the amounts of R1,031,991.67, R5,416,613.59 and R27,000,000.00 plus interest on all the aforesaid amounts.

[6] The aforesaid amounts were payable to the Applicant within 90 days from signature of the settlement. The settlement agreement was made an order of court on 14 October 2022.

[7] On the 6th of December 2022, the Plaintiff was informed by the Second Respondent that the First Respondent took a resolution through its board of directors on the 28th of November 2022 to put the First Respondent in business rescue and the application was duly registered by the Commissioner: CIPC on 2 December 2022. The Second Respondent was appointed by the Commissioner as business rescue practitioner.

[8] A sworn statement by the directors of the First Respondent, clearly determined that the First Respondent is financially distressed and will not be able to pay its debtors for at least six months. It is also the Applicant's submission that it is clear that the First Respondent is commercially insolvent and not capable of servicing its debtors in the normal course of business as they become due from day to day. The First Respondent's directors blame the Covid pandemic as well as agricultural conditions for the situation.

[9] The Applicant then received a notice by the Second Respondent that the first meeting of creditors of the First Respondent was to take place on the 15th of December 2022.

[10] In reaction to the notice, the Applicant sent an e-mail to the Second Respondent in order to, amongst others, prove the Applicant's claims against the company in business rescue. At that stage, the First Respondent was due to the Applicant on overdraft R7, 509,016.47, on medium term loan R27, 000,000.00 and on a vehicle and asset finance agreement R1, 041,564.90. The total being R34, 550,581.37.

[11] It was also brought to the attention of the Second Respondent in the same letter dated 9 December 2022 that the Applicant holds a cession of all book debts of the First Respondent and that the Applicant requires that all monies collected pursuant to the debts ceded to the Applicant, should be continued to

be paid to the current account of the First Respondent and that all existing debtors must be notified of this requirement forthwith by the practitioner.

[12] On the same date as the first meeting of creditors was held, 15 December 2022, it was pointed out by the Applicant to the Second Respondent that the vehicle and assets finance account was at that stage in arrears with R357,127.31 and the Applicant expected that account to be kept up to date with payments notwithstanding the business rescue, in order for the Applicant to make a decision whether to repossess the asset concerned and/or whether the practitioner will keep the account up to date, in other words to repay the arrears at least, and keep the instalments in place.

[13] From the minutes of the proceedings of the first meeting of creditors which was held on 15 December 2022, it was noted that the Second Respondent has already appointed at that stage, an independent person to run the day-to-day farming operations of the First Respondent, namely, Farm Rescue. It was requested that the business plan be published by the 17th of February 2023 for a vote by the creditors.

[14] At that stage, as far as the vehicle and asset finance account is concerned, the Second Respondent indicated that the arrears could not be settled as Applicant will be preferred above other creditors. It was agreed on same date that the business rescue plan was to be published on the 1st of February 2023.

[15] On the 31st of January 2023 the Applicant received an e-mail to the effect that the Second Respondent will not be able to publish the aforesaid plan by the 1st of February 2023 and requested an extension of time until the 7th of February 2023 which request was granted on same date.

[16] The business rescue plan was then published on the 7th of February 2023 and the Applicant through its attorneys, had various queries as to the published plan which was conveyed to the Second Respondent on 8 February 2023. These queries had been responded to by the First Respondent on the 16th of February 2023.

[17] On the 21st of February 2023 the Applicant, through its attorneys, indicated to the business practitioner that it is not satisfied with the business rescue plan as published and certain amendments to the plan were proposed, namely:

(i) The Applicant will, in respect of all his claims proved, be paid in full within six months of acceptance of the business rescue plan;

(ii) The payment of interest on all claims proved by the Applicant will be serviced monthly in advance;

(iii) That should the Applicant not be settled within three months, the Applicant proceed in terms of its power of attorney and perfect its notarial bond;

(iv) That no assets will be sold within the six month period prior to the written consent of the Applicant and that the full proceeds of such assets sold to be paid to the Applicant towards reduction of the claims against the First Respondent; and

(v) The business practitioner will not be entitled to any remuneration on any assets sold as, specified by the Applicant.

[18] The next meeting then arranged by the Second Respondent took place on the 27th of February 2023 for the adoption of the business rescue plan. Because the Applicant was not satisfied with the business rescue plan as published, it therefore voted against such plan at the meeting on the 27th of February 2023. The Applicant was then blamed by the Second Respondent as being obstructive in its stance and proposed amendments which were answered by the Applicant's attorneys why the Applicant cannot be regarded as obstructive specifically based on the history of the matter of which neither the practitioner nor the concurrent creditors are fully privy to.

[19] On the 31st of March 2023 an e-mail was received from the Second Respondent whereby amongst others she indicated that the Applicant's proposal that the Bank be repaid in a 12-month period will not be achievable. The latter was suggested in a previous e-mail on behalf of the Applicant by Mr Otto, the attorney acting on behalf of the Applicant after the Applicant previously held the view that the Applicant should be repaid in full within six months.

[20] On the 13th of April 2023 the Applicant received a notice from the Second Respondent that she proposed that the next meeting of creditors be held in the first week of May 2023. The Applicant through its attorney then attempted to arrange a meeting with the Second Respondent so that the Applicant's proposals can be discussed with the practitioner for the final amended plan to be published so that a following meeting can be arranged of creditors for the possible approval of such an amended plan. Various e-mail followed and it appears that such a meeting could not be arranged because a preliminary arranged meeting could not take place during the beginning of May 2023 when the Second Respondent informed the Applicant's attorney that she is in Saudi Arabia.

[21] On the 25th of May 2023 however the Applicant was informed that an amended business rescue plan will be published on 31 May 2023 and that the next meeting of creditors were to take place on the 14th of June 2023 to vote on the published plan.

[22] The Applicant's proposals as to how the plan should be amended was still subject to the meeting that would have taken place between the Applicant's attorney and/or the Applicant and/or the practitioner, which never materialised.

[23] On the 13th of June 2023 the Applicant's attorney received an e-mail to the effect that an amended plan had been published, that the creditors' meeting will

take place on 30 June 2023, during which meeting the Applicant voted against the revised rescue plan.

[24] The deponent to the founding affidavit in support of the counter-application, which also serves as answering affidavit in opposition to the application, is one Mr Lakhoo, in his capacity as director of Ruca Boerderye, one of the concurrent creditors of Franlese who seeks to be joined as a Fourth Respondent and be granted leave to intervene in the liquidation application by the Applicant against the First Respondent.

[25] In the same regard, there had been no opposition to Applicant's application to be granted leave to commence and proceed with the proceedings against the First Respondent in terms of Section 133(1) (b) of the Companies Act. There also did not appear to be opposition to the joinder of Ruca and subsequent intervention in the liquidation proceedings to follow.

[26] It appears that Ruca is a concurrent creditor of Franlese in the approximate sum of R5, 150,000.00 with a voting right of 11.90% in business rescue.

[27] According to Ruca it was confirmed that the first business rescue plan was rejected by the Applicant on 7 February 2023. According to Ruca further, between the rejection of the first business rescue plan and the development of the revised business rescue plan dated June 2023, the Applicant commenced with the drafting of its liquidation application against Franlese. At the meeting of 30 June 2023 the Applicant was, according to Ruca, the only creditor who

voted against the adoption of the revised rescue plan. Although the Applicant is a minority creditor in number, who voted against the business rescue plan, it has a majority in voting rights and according to its vote, caused the rejection of the business rescue plan. From the explanation as provided in reply by the Applicant, it does however appear that at the stage when the affidavit in support of the application had been drafted, the Applicant was already in possession of the revised business rescue plan.

Inappropriateness:

[28] It appears that it is First and Fourth Respondents' case that by voting against the business rescue plan on the 30th of June 2023, such vote by the Applicant constituted an inappropriate vote which is, according to the Respondents, to be set aside. In regards to the inappropriateness thereof, the Respondents' reasons can be summarised as follows:

[29] In terms of the revised business plan:

(i) The Applicant is to receive full payment of its bond facility over a period of 12 years, which payments being made bi-annually. The 12-year period may be shortened if cashflow allows for it;

(ii) In respect of the Applicant's overdraft facility, it shall be paid R230,000.00 per month from the end of July 2023 until it is settled in full;

(iii) The Applicant as far as the vehicle and asset finance agreement on the baler is concerned, will be paid in ordinary course of business according to the original agreement. (1 March and 1 October) without any reference to the arrears. The amount in arrears in approximately R357 000.00.

(iv) Farm Equity shall be paid in full over a period of 24 months in respect of post-commence finance;

(v) The concurrent creditors shall be paid in full over a period of 48 months commencing at the end of month 13.

[30] According to the Respondents, the effect of the revised business rescue plan is thus:

(i) Franlese will be rescued;

(ii) As a result of Franlese's rescue, Franlese will continue to be able to provide employment to persons in the community and/or area that is rife with unemployment and/or who are dependent on continued farming operations for the sustainable income to provide for them and their families;

(iii) The continued employment of the aforesaid persons as apparently informed by Mr Francois Wiid, the director of the First Respondent, will also ensure that their family members will not be left destitute;

(iv) The Applicant will receive full payment of its overdraft facility; will be paid in the ordinary course of business according to the original agreement: (1 March and 1 October) without any reference to the arrears. The amount in arrears is approximately R357 000.00;

(v) The Applicant will receive payment in full of its asset finance facility;

(vi) The concurrent creditors will also in due course receive full payment of what is due to them; and

(vii) The provider of the post-commencement finance will also in due course receive payment in full.

[31] According to the Respondents, the Applicant's rationale for rejecting the revised business plan can be summarised as follows:

(i) In liquidation in the Applicant will receive its full outstanding balance of its claim whereas with the business rescue it will have to wait 12 years before being fully paid;

(ii) The BRP is allowed to invoice the Second Respondent at the rate of R3000.00 per hour or 5% of the sale of all assets, the business or equity

of any part thereof whichever is the higher which, according to the Respondents, Applicant submits, is not to the advantage of the Applicant and not to the advantage of any of the creditors of Franlese;

(iii) The revised business rescue plan does not make provision for any dividend for the South African Revenue Services.

[32] According to the Respondents, the aforesaid complaints are ill-founded and demonstrates how little thought the Applicant has put into the consideration of the revised business rescue plan.

[33] For pragmatic reasons, I will deal with the alleged inappropriateness of the vote by the Applicant first.

[34] *Mr Charles Thompson*, counsel appearing on behalf of the Respondents, referred me to the matter of **Firstrand Bank Ltd v KJ Foods CC**[3] in regards to the proper interpretation of Section 153(1) (a) (ii) and 153(7). In this judgment the court referred to the matter of **Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC 2015 JDR 0558 (GP)** where Tuchten J said:

> *"A court considering an attack on a vote under section 153(7) must first determine whether the vote was inappropriate. Only if it finds that the vote was inappropriate, can the court proceed to consider whether, taking this into account, it would be reasonable and just to set the vote*

[3] 2017 (5) SA 40 (SCA)

aside. In Ex Parte Target Shelf 284 CC (Commissioner for the South African Revenue Services and Business Partners Ltd Intervening Parties) 2015 JDR 2219 (GP), Kubushi J agreed with Tuchten J on the two stage enquiry but held that the court should proceed to the second stage even if it had come to the conclusion that the vote was not inappropriate.

[35] According to Sereti JA in the KJ Food matter, a court must first determine whether or not the vote was inappropriate and if so, invoke the provisions of section 153(7). The court's discretions and powers afforded by section 153(7) become applicable once the jurisdictional fact of inappropriateness has been found or established. Sereti JA further came to the conclusion that *'inappropriate' refers to or means an act which unduly undermines the achievement of the purpose of the act which is stipulated in section 7(k). Any vote which unduly undermines the achievement of the rescue of a financially distressed company will be inappropriate*. Furthermore, according to Sereti JA, the test to be applied is an objective test and not subjective.

[36] In the majority judgment of Schoeman AJA, though it was held that the determination that a vote was inappropriate is therefore a value judgment made after consideration of all the facts and circumstances. The SCA held that it is clear when taking the appellant's interest into consideration, that the only negative feature for it would have been that it would not be paid its full claim immediately, but payment would be in terms of the contracts entered into between the parties. Therefore, it would still be paid in full albeit not

immediately. Taking all these factors into consideration, being the interest of Firstrand, the employees of KJ Foods and other creditors, the court held that it is indeed just and reasonable to set aside the vote against the approval."

[37] In the **KJ Foods**-matter, the Court further held that on a business-like interpretation, the vote rejecting the business rescue plan having been set aside, it follows by operation of law that the business rescue plan would be considered to have been adopted for no further voting is envisaged. At the next meeting of creditors, it would only be necessary for the business rescue practitioner to report on the implementation of the business rescue plan.

[38] According to the Respondents, Ruca is a concurrent creditor of First Respondent in the approximate amount of R5, 150,000.00. Ruca is Franlese's second largest creditor with the voting right of 11.90% in business rescue.

[39] According to the Respondents, the revised business plan dated June 2023 was voted upon on 30 June 2023 and the only creditor who voted against its adoption was indeed the Applicant. Although the Applicant is the minority creditor in number who voted against the business rescue plan, it is the majority in voting rights and accordingly its vote caused the rejection of the business rescue plan.

[40] It is further the Respondent's case that whereas the founding affidavit in support of the main application was disposed to on 15 June 2023, the Applicant

rejected the revised business rescue plan already prior to the business rescue meeting of June 2023.

[41] In **DH Brothers Industries (Pty) Ltd v V Gribnit – 2014(1) SA 103 KZP** Govern J said the following dealing with business rescue, with reference to chapter 6 of the Act:

> *"I respectfully agree that the chapter is aimed at the restoration of viable companies rather than their destruction" but only at viable companies, not at all companies placed under business rescue".*

[42] In the **KJ-Foods**-matter the Court took further into account that the concurrent creditors would receive 100 cents in the rand if the proposed BRP was adopted whereas they would receive 51 cents in the rand if KJ Foods were to be liquidated.

[43] In **Ferrostaat GNBH and another v Transnet SOC Ltd & another 2021(5) SA 493 (SCA)],** Molemela JA said that the relatively low dividend that can be yielded on liquidation must not be considered in isolation.

[44] In **Oakdene Square Properties (Pty) Ltd & Others v Farm Bothas Fontein (Pty) Ltd and Others** (Supra) it was said that the legislature has accepted that is a legitimate object of business rescue if the plan envisages a better dividend for creditors.

[45] In **Collard v Jatara Connect (Pty) Ltd and Others 2018(5) SA. 238 (WCC)**, with reference to Oakdene Square, (Supra), Dlodlo J, said the following: in respect of Business Rescue: *"A primary goal is to facilitate the continued existence of the company in a state of solvency. Indeed a secondary goal (provided for as an alternative in the event that the achievement of the primary goal proves not to be viable is to facilitate a better return for the creditors or shareholders of the company then would result in immediate liquidation."* par 11

[46] Sec 153(7) at the Act reads as follows:

"(7) In an application contemplated in subsection (1)(a)(ii) or 1(b)(i)(bb) a court may order that the vote 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 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 is to be liquidated."

[47] It must be kept in mind that it appears that at the meeting where the questioned vote was taken, the Applicant at that stage already referred to the affidavit in the liquidation proceedings as the reason for voting against the revised business plan.

[48] That means that one should in effect consider the reasons as advanced in the Applicant's Founding Affidavit in respect of the vote against the revised business plan.

[49] It is evident that the revised business rescue plan was published on 13 June 2023. This was almost seven months after the commencement of the Business Rescue process..

[50] *Mr. Paul Zietsman SC*, appearing on behalf of the applicant, pointed out that right from the beginning, after the resolution was taken, the Applicant pointed out to the practitioner that the vehicle and finance agreement (with reference to the "haler") are in arrears in the amount of R357, 127, 31, which should at least be paid before further instalments can be kept in place.

[51] Furthermore the Applicant has also pointed out to Second Respondent that it has a notarial bond over the movable assets of the First Respondent and that it is not satisfied with the fact that such assets are being utilized in order to continue farming on the properties concerned, which were obviously diminishing in value.

[52] The Applicant has also specifically referred to the Notarial Bond registered over the movable assets to the value of R20 and that, as far as the Second Respondent is concerned, no other assets are referred to by the practitioner

besides the "baler." This either means, according to the Applicant that the company alienated those assets since 2019 or that the practitioner did not even bother to enlighten the creditors of such assets.

[53] On the 28 March 2023, the Applicant through its attorney, proposed that the business rescue practitioners fee be amended to a reduced hourly fee of R2000, 00 per hour and that the percentage of the scale of assets should be reduced to 3%. The Second Respondent subsequently conceded to an hourly rate of R2750-00 and the fee for the realization of assets to be set at 4%. This concession was however not contained in the revised rescue plan.

[54] The question was also raised, on more than one occasion, who is the real driving force to the counter application, whereas the founding affidavit was deposed to by a director of Ruca and not 1st Respondent

[55] The submission on behalf of the Applicant is further to the effect it is not correct to argue that the Bank is put in the same position as if the credit agreements in any event would have ran their course. The Applicant has already called up the outstanding balances during 2022 because of the failure by the First Respondent to comply with the terms and conditions thereof. Why should the Applicant then be put back in the situation as if the credit agreements should run its normal course in the process taking the risk over the next five years, whilst concurrent creditors are paid in full, including the post commencement finance creditor within 48 months from the date of the adoption of the plan.

[56] I was also referred to a decision in this division by Justice Daffue being **Standard Bank of SA v Remitto (Pty) Ltd and 2 Others** unreported, **case 20 3538/2022** delivered on 3 February 2023, where the following was said:

> *"The idea with the introduction of business rescue proceedings is surely to facilitate the rehabilitation of a financial distressed company within relatively short space of time as it cannot be in the interest of affected persons to drag out the procedure over a year or even several years"*

[57] **In Koen and Another v Wedgewood Village Golf & County Estate Pty Ltd 2012 (2) SA 378 WCE par 10** the following was said:

> *"it is axiomatic that business rescue proceedings, by their nature, must be conducted with the maximum possible expedition. The legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted."*

[58] In **Forty Squares (Pty) Ltd v Noris Fresh Produce Pty Ltd 2023(5) SA 249 WWC par 34 the WWC** regarded the proposed duration of a plan, in other words the implementation thereof (*my emphasis*) a fixed three years by the business rescue practitioner, as an extraordinary long time where the court said *"this is an extraordinary long time given that business rescue is meant to be a*

speedy procedure aimed at a so called "quick fix solution." In this regard it is to be noted that Section 132(3) of the Companies Act contemplates the completion of business rescue proceedings within three months of commencement, failing which the BPP must approach the Court on a month-by-month basis for an extension of the process."

[59] Mr. Thompson, submitted that upon the business rescue of the first respondent, the applicant will receive the indebtness due to it over a period of 12 years, which is very much commune with the time period within which the monies for the applicant would in any event have been payable in terms of the initial agreements.

[60] It is further the Respondent's case that in liquidation concurrent creditors will receive 0 cent in the Rand, opposed to the fact that in business rescue, the concurrent creditors will receive payment of the debts in full.

[61] Another point raised by the Respondents is that the adoption of the business plan will ensure that the present employees employed by the Respondent will remain to be gainfully employed.

[62] I have considered all the factors which were considered in the KJ-Foods matter in which the court came to a finding in favour of the setting aside of a vote against as being inappropriate. I associate myself fully with the reasoning of the SCA in coming to its conclusion in regards to inappropriateness of the vote in

that matter. The facts of the present matter is however distinguishable, as will be dealt with below.

[63] In the words of Schoeman AJA, the **KJ-Foods – matter**, in respect of the question whether it will be just and reasonable to set aside a vote as being inappropriate, "*entails a single enquiry and value judgment.*"

[64] It is clear from the provisions of Section 153(7) that the paramount consideration in deciding whether a vote is to be set aside, is the interests of the party who voted against the proposed business plan, in this instance the Applicant.

[65] What the applicant has shown in the present matter is First of all that the second respondent has indeed been dragging her feet, to say the least, in the business rescue process. The publication of the first business rescue plan was late, she did not meet with the attorney at a set time to discuss the proposals in respect of the first business plan and then eventually, the publication of the rescue business plan was also late.

[66] By the time the revised plan had been established the three months period as envisaged in Section 132(3), has been exceeded by almost another 3 months yet second Respondent failed to take the steps as envisaged in Section 132(3).

[67] The present counter application was brought in terms of Section (1) (b) (i) (bb) by a concurrent creditor of Franlese and (with a 90% vote) together purportedly with the 1st Respondent. This same creditor, being Ruca will have received its full amount within 48 months.

[68] Now we get to the interests of the Applicant.

[69] The First Respondent has already in September 2022 signed a settlement Agreement with Applicant in respect if its indebtness towards Applicant in the total amount of approximately, R34 million. The agreement was made an order of court.

[70] Then follows the resolution by 1st Respondent in respect of Business Rescue, approximately only two months after the conclusion of the deed of settlement.

[71] The first business rescue plan:

(i) set out the Applicant's indebtness to be settled in 20 years;

(ii) dealt with the assets of the 1st respondent in respect of which a notarial bond was registered in favour of the Applicant, on the basis to be utilized in future by First Respondent and therefore diminishing the value thereof;

(iii) save for the "baler", Second Respondent did not deal with any other movables (the whereabouts cannot be ascertained).

[72] The Revised Business plan now provides for the Applicant to be paid in full in 12 years. This is in respect of a secured creditor who concluded an agreement with first Respondent in respect of the amount due, being approximately R34 million and, who holds a voting right in the Business Rescue of almost 80%.

[73] It is obvious that "reverberating" effects of the revised business rescue plan will have a 12 year lifespan, in particular in respect of the Applicant.

[74] In view of all these factors, coupled with the manner in which Second Respondent has been conducting the process up to date, with reference to Section 153(7) of the Act, I am not satisfied that it will be reasonable and just on the basis of being inappropriate, that Applicant's vote against the revised business rescue plan be set aside.

[75] The counterapplication therefore stands to be dismissed as far as the relief sought in terms of Sec 153(7) is concerned and the First and Fourth respondents are to pay the costs thereof.

[76] Whereas the counterapplication was in essence for the vote by the applicant to be declared inappropriate, I deem it appropriate that the costs in regards to the counterapplication be amended on a punitive scale. The Respondents, being First and Fourth Respondents, actions appear to be *mala fide* in that it has chosen to instigate the counterapplication and oppose the main application with primary consideration at the intervening creditor with a 11,9% vote as opposed

to the majority vote of the Applicant. Coupled with this is the fact that the Applicant in good faith has signed a settlement agreement with First Respondent which was made an order of court a mere two months later, the First Respondent, in corroboration with Ruco, then decided to "defeat" the consequences of the settlement agreement and order of Court.

[77] Furthermore, how the Respondents can argue that the Applicants vote is deemed to be inappropriate, taken into account all the factors referred to is beyond relief.

[78] I find in view of all the factors referred to, especially the manner in which the Business Rescue Practitioner, has conducted the Business Rescue process that the Business Rescue process be converted into liquidation proceedings.

[79] The Applicant dealt with the advantage further of placing the Applicant in liquidation namely:

(a) dividend of an estimated 80%;

(b) the appointment of a liquidator to ascertain the whereabouts of the movable assets as well as;

(c) the preservation of such assets;

[80] Whereas the Applicant has made out a case for the liquidation of the First Respondent, I make the following order

ORDER:

(1) Applicant is granted leave to commence and proceed with its application against the First Respondent in terms of Section 133(1)(b) of the Companies Act 71 of 2008;

(2) 2.1 Prayers 1, and 2 of the counterapplication are granted.

2.2 Prayer 3 of the counterapplication is dismissed.

2.3 First and Fourth Respondents are to pay the costs of the counter application on an attorney client scale jointly and severally, payment by the one to absolve the other.

(3) The business rescue proceedings in respect of the First Respondent are converted into liquidation proceedings in terms of Section 132(2)(a)(ii) of the Companies Act 71 of 2008;

(4) The Second Respondent is ordered to provide a copy of this application to the Third Respondent;

(5) The First Respondent is placed under provisional liquidation in the hands of the Master of the High Court, Bloemfontein;

(6) A rule nisi is issued calling upon all interested parties to furnish reasons, if any, to this Honourable Court at 9h30 on **21 December 2023** , why a final order of liquidation should not be granted against the First Respondent;

(7) That this order be served forthwith on the First Respondent at its registered address and to be published in THE CITIZEN and the GOVERNMENT GAZETTE;

(8) A copy of the provisional winding-up order must be served upon:

(8.1) The employees of the First Respondent (if any) and every registered Trade Union (if any) which as far as the Sheriff can reasonable ascertain represents any of the employees of the First Respondent (if any);

(8.2) The South African Revenue Services;

(8.3) The Master of the High Court, Bloemfontein;

(9). The costs of this application is costs in the liquidation.

J J F HEFER, AJ

On behalf of the Applicant: Adv P Zietsman SC
Instructed by: Phatshoane Henney Attorneys
BLOEMFONTEIN

On behalf of the Respondent:	Adv C. Thompson
Instructed by:	Martin Van Vuuren Attorneys
	C\O Du Toit Lamprecht Inc
	BLOEMFONTEIN