



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

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

Case no: **3538/2022**

In the matter between:

THE STANDARD BANK SOUTH AFRICA LTD
(Registration no. 1962/000738/06)

Applicant

and

REMITTO (PTY) LTD
(Under Business Rescue Supervision)
(Registration no. 2005/012357/07)

1st Respondent

BARRY CLAUDE URBAN N.O.
(in his capacity as appointed Business Rescue Practitioner
of REMITTO (PTY) LTD)

2nd Respondent

**THE AFFECTED PERSONS RELATING TO
REMITTO (PTY) LTD**

3rd Respondent

AND

Case no: **3540/2022**

In the matter between:

THE STANDARD BANK SOUTH AFRICA LTD
(Registration no. 1962/000738/06)

Applicant

and

DNA PLANT SCIENCE (PTY) LTD
(Under Business Rescue Supervision)
(Registration no. 2013/220477/07)

1st Respondent

BARRY CLAUDE URBAN N.O.
(in his capacity as appointed Business Rescue Practitioner
of DNA PLANT SCIENCE (PTY) LTD)

2nd Respondent

**THE AFFECTED PERSONS RELATING TO
DNA PLANT SCIENCE (PTY) LTD**

3rd Respondent

CORAM: JP DAFFUE, J

HEARD ON: 24 NOVEMBER 2022

DELIVERED ON: 03 FEBRUARY 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 17h00 on 03 February 2023.

ORDER

In application 3538/2022

1. Leave is granted to the applicant to commence and proceed with its application against the first respondent company in terms of s 133(1)(b) of the Companies Act 71 of 2008;
2. The business rescue proceedings in respect of the first respondent company are converted into liquidation proceedings in terms of s 132(2)(a)(ii) Companies Act 71 of 2008;
3. The first respondent company is placed under provisional liquidation in the hands of the Master of this court.
4. A provisional liquidation order is hereby issued calling upon all interested parties to show cause, if any, to the court on the **16th day of MARCH 2023** at **09h30** why a final order of liquidation should not be granted against the first respondent company.
5. Service of this rule *nisi* and a copy of the notice of motion and annexures shall be effected on the first respondent company at its registered office or its principal place of business within the court's jurisdiction.
6. This order shall, without delay, be published in the Citizen and the Government Gazette.
7. The sheriff shall ascertain whether the employees of the first respondent company are represented by a trade union and whether there is a notice board on the premises to which the employees have access.
8. A copy of the provisional liquidation order shall be served on -
 - 8.1 Every registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the first respondent company.

- 8.2 The employees of the first respondent company by affixing a copy of the application and provisional liquidation order on any notice board to which the employees have access inside the first respondent company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the first respondent company conducts any business.
- 8.3 The South African Revenue Services.
9. The applicant shall pay the first and second respondents' wasted costs occasioned by the set down of the matter on the roll of 29 September 2022 as well as the postponement thereof.

AND

In application 3540/2022

1. Leave is granted to the applicant to commence and proceed with its application against the first respondent company in terms of s 133(1)(b) of the Companies Act 71 of 2008;
2. The business rescue proceedings in respect of the first respondent company are converted into liquidation proceedings in terms of s 132(2)(a)(ii) Companies Act 71 of 2008;
3. The first respondent company is placed under provisional liquidation in the hands of the Master of this court.
4. A provisional liquidation order is hereby issued calling upon all interested parties to show cause, if any, to the court on the **16th** day of **MARCH 2023** at **09h30** why a final order of liquidation should not be granted against the first respondent company.
5. Service of this rule *nisi* and a copy of the notice of motion and annexures shall be effected on the first respondent company at its registered office or its principal place of business within the court's jurisdiction.
6. This order shall, without delay, be published in the Citizen and the Government Gazette.
7. The sheriff shall ascertain whether the employees of the first respondent company are represented by a trade union and whether there is a notice board on the premises to which the employees have access.
8. A copy of the provisional liquidation order shall be served on -

- 8.1 Every registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the first respondent company.
 - 8.2 The employees of the first respondent company by affixing a copy of the application and provisional liquidation order on any notice board to which the employees have access inside the first respondent company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the first respondent company conducts any business.
 - 8.3 The South African Revenue Services.
9. The applicant shall pay the first and second respondents' wasted costs occasioned by the set down of the matter on the roll of 29 September 2022 as well as the postponement thereof.
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JUDGMENT

[1] Standard Bank of SA Ltd is the applicant in two similar applications in terms whereof it seeks leave to commence and proceed with applications against the companies in business rescue in terms of subsec 133(1)(b) of the Companies Act 71 of 2008 (the 2008 Act), that the business rescue proceedings of the companies be converted into liquidation proceedings in terms of subsec 132(2)(a)(ii) and that the companies be placed under provisional liquidation in the hands of the Master of this court, together with the further customary orders.

[2] In application 3538/2022 Remitto (Pty) Ltd (Remitto) is the first respondent. In application 3540/2022 DNA Plant Science (Pty) Ltd (DNA Plant Science) is the first respondent. In both matters Mr Barry Claude Urban, the business rescue practitioner, (the practitioner) is cited as second respondent. The affected persons relating to the two companies are cited as third respondent in both applications.

[3] The applicant successfully applied for leave to serve the notice of motion and founding affidavit together with annexures on the affected persons collectively by way of substituted service. This was done. Nothing turns on this and none of the affected persons filed notices to oppose or any answering affidavits in these proceedings.

[4] The two applications were set down for hearing on 29 September 2022 as the first and second respondents in both matters failed to file answering affidavits although notices of opposition were filed. On that day the applications were postponed by agreement to the opposed roll of 24 November 2022, the wasted costs to be reserved for later adjudication. I shall return to the issue of wasted costs.

[5] Mr Smit on behalf of the first and second respondents submitted that the outcome of the two applications should be the same as the companies are inextricably bound. According to him the applications should be dismissed with costs. He drafted one set of heads of arguments in respect of both applications. Although Mr Els, appearing for the applicant filed two sets of heads of argument, the one set is to a large extent a mirror image of the other. The practitioner filed one answering affidavit on 28 September 2022 in respect of both applications to which the applicant responded with one replying affidavit on 13 October 2022. Thereafter, and a mere three days before the hearing of the opposed application, the practitioner filed one supplementary affidavit on 21 November 2022 totally out of sequence and without prior leave of the court. Mr Els did not object to the filing of this document and also indicated that in order to prevent a postponement, his client will not insist on an opportunity to respond. The nature of the proceedings is the same in respect of the two applications although some factual differences are apparent. I heard argument on the same day and consequently one judgment will be delivered dealing with both matters. Insofar as there are factual differences, I shall herein later refer thereto.

[6] In adjudicating these two applications I shall keep in mind that the legislature earnestly tried to avoid the problems experienced with judicial management provided for in the Companies Act 61 of 1973. I also accept that the 2008 Act must be interpreted and applied in a manner that gives effect to all those purposes set out in s 7, one being relevant in this case, to wit to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of relevant stakeholders.¹

[7] 'Business rescue' is defined as follows in subsec 128(b):

'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- i) the temporary supervision of the company, and of the management of its affairs, business and property;
- ii) the temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

¹ Section 5 read with subsec 7(k) of the Act.

iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

'Financially distressed' is defined as follows in subsec 128(1)(f):

'it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months or it appears to be reasonable likely that the company will become insolvent within the immediately ensuing six months.'

[8] It is common cause that the two companies were indeed financially distressed at the time the resolutions were taken to be placed under voluntary business rescue. Nothing has changed to arrive at a different conclusion.

[9] Although the court is not faced with applications to place the companies in business rescue, it is instructive to remind ourselves of what Brand JA stated several years ago in *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others*,^(Oakdene)² dealing with an argument that all the applicant for business rescue has to show is that a plan to rescue the respondent is capable of being developed and implemented, regardless of whether or not it may fail:

'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(1)(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. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b).'

[10] In *Oakdene* the court continued as follows, emphasising that it is not the purpose of business rescue proceedings to achieve a winding-up of a company and thereby avoiding the consequences of liquidation proceedings:³

'My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution..... *A fortiori*, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.'

² 2013 (4) SA 539 (SCA) at para 31

³ *Ibid*, para 33

[11] The idea with the introduction of business rescue proceedings is surely to facilitate the rehabilitation of a financially distressed company within a 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. Section 132 stipulates as follows concerning the duration of business rescue proceedings:

'132. Duration of business rescue proceedings.

- (1)
- (2) Business rescue proceedings end when—
 - (a) the court—
 - (i) sets aside the resolution or order that began those proceedings; or
 - (ii) has converted the proceedings to liquidation proceedings;
 - (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or
 - (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.
- (3) If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must -
 - (a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
 - (b) deliver the report and each update in the prescribed manner to each affected person, and to the -
 - (i) court, if the proceedings have been the subject of a court order; or
 - (ii) Commission, in any other case.' (Emphasis added.)

[12] The court confirmed that business rescue proceedings should be dealt with expeditiously in *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* as follows:⁴

'[10] It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight time lines 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. There is also the consideration that the mere institution of business rescue proceedings — however dubious might be their prospects of success in a given case — materially affects the rights of third parties to enforce their rights against the subject company.'

⁴ 2012 (2) SA 378 (WCC) para 10.

The Supreme Court of Appeal accepted this dictum with approval in *Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others*.⁵

[13] In *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd*⁶ the Supreme Court of Appeal commented as follows:

'[22] ... It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals, a punitive costs order is appropriate.'

[14] The Supreme Court of Appeal recently stated the following in *Diener v Minister of Justice*:⁷

'[28] Business rescue is not an open-ended process. Its very rationale is that it must end, either when its aim has been attained or when the realisation arises that rescue is not attainable. To this end, s 132(3) provides that if business rescue proceedings have not ended within three months of commencement or a longer period sanctioned by a court, the BRP must prepare a progress report which he or she must update monthly until the end of the business rescue proceedings, and deliver the report and each update to each affected person and to either the court (if the proceedings were the subject of a court order) or the Commission.'

[15] As mentioned, one of the declared purposes of the Act is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of relevant stakeholders. If business rescue proceedings are carried out correctly and the spirit and purpose of the 2008 Act are given effect to, these proceedings will not become redundant as was the case with judicial management under the 1973 Companies Act. If a purposive approach to interpretation of the Act is undertaken as one should do, there can be little doubt that companies, being vehicles to obtain economic and social well-being, should be rescued if at all possible, rather than 'killed' in a winding-up process. However all stakeholders will have to participate *bona fide* all the time and within the prescripts of the law.

⁵ 2019 (3) SA 97 (SCA) para 25.

⁶ 2019 (4) SA 532 (SCA) para 22.

⁷ 2018 (2) SA 399 (SCA) para 28.

[16] In *Commissioner, South African Revenue Service v Beginzel NO and Others (Beginzel)*⁸ the Commissioner challenged the validity of a decision taken at a meeting of creditors to adopt a business plan and sought a conversion of the business rescue into winding-up proceedings. The court found that the implementation of the business plan was far advanced, there was already planning for the sale of some of the respondent's operations and the business rescue plan was supported by 87% of the value of creditors present at the meeting of creditors whilst only SARS took an opposite view. Consequently, the court found that nothing would be achieved if the business rescue proceedings would be converted into liquidation, bearing in mind the extra costs to be incurred. The court was also satisfied that the continuation of the business rescue proceedings would result in a better return for the company's creditors as a whole than would result from the reintroduction of the liquidation process. However, the court accepted without having to decide the issue that it has the power to intervene where it is shown that a business rescue practitioner has committed a material mistake in concluding that the continued implementation of the business rescue plan would result in a better return for the creditors of the company as envisaged in subsec 128(1)(b)(iii).⁹ In refusing the application the court stated that to convert the business rescue proceedings to liquidation proceedings the claims of creditors would be delayed and the dividends would be reduced as a result of increased costs.¹⁰

[17] The facts in *Beginzel* are clearly distinguishable. There has been non-compliance with the 2008 Act as will be shown and the business rescue proceedings have not been completed as projected in the business rescue plans. It cannot avail the two companies and the practitioner to argue that all these should be disregarded and business rescue be allowed to proceed. In *Beginzel* the implementation of the business rescue plan was far advanced, but *in casu* it cannot be implemented as will be shown. Also, liquidation will not cause any delay in the payment of claims, especially bearing in mind the litigation that may take years to finalised as I shall point out later.

[18] The following facts are common cause although I shall in some instances make certain comments:

a. Business rescue plans were approved for both companies on 17 March 2021.

Remitto

⁸ 2013 (1) SA 307 (WCC)

⁹ *Ibid* para 57.

¹⁰ *Ibid* para 63.

b. In the case of Remitto the business rescue plan had in mind a structured winding down of Remitto's business.¹¹ The practitioner noted that in the absence of working capital a structured winding down was the only option. He undertook to liquidate the assets within a period of six months from the effective date which would include 'trading out of all current stockholding and inventory to generate revenue; collection of debtors; placing all the assets on auction...' and 'auction of assets cannot be guaranteed to be completed within 6 months as the current economic restrictions may hamper the proses.' It was also emphasised by the practitioner that secured creditors would receive payment of 90 cents in the rand whilst they would have received only 65 cents in the rand in the case of a liquidation.¹²

c. Remitto's business rescue plan anticipated "agterskot" payments to concurrent creditors which would provide them with a dividend of 100 cents in the rand. The date of substantial implementation of the business rescue plan was 28 December 2021.¹³ By then the applicant would have been paid. Contrary to the statements in the business rescue plan, the practitioner's statement attached to the plan *inter alia* reads as follows: 'we believe that this business can be rescued and return to profitability.'¹⁴

d. According to the report of the practitioner dated 30 October 2021 all the motor vehicles have been sold and the secured creditors in respect of these claims have been paid in full. By then the immovable properties, being plots 47 and 48 Vrischgewaagd, had not been auctioned off. The practitioner stated that the sale of these two properties would enable Remitto to settle the amounts owed to the applicant as secured creditor.¹⁵ It was also stated that a large and well-resourced investor had shown interest in the company and that negotiations were ongoing. This statement is clearly wrong as it could only relate to DNA Plant Science and not Remitto. Notwithstanding this report, noting has been forthcoming from the practitioner in this regard ever since. The practitioner also reported that the claim against the BASF was served on 27 August 2021 and that the legal process was ongoing.

e. This claim against BASF is for an amount in excess of R35 million based on damages as a result of alleged defective products delivered to Remitto. In the first answering affidavit filed on 28 September 2022 the practitioner alleged that this claim would be finalised in 2023. In the supplementary affidavit he stated that the matter would probably be in court during 2026. There is no indication who will finance the litigation and whether there is a reasonable possibility of success. It is

¹¹ Record pp 131 and 174 with reference to paras 1.1 and 3.1.1.

¹² Record p 178: para 7 of the business rescue plan.

¹³ Record p 144 and the definition set out in the plan.

¹⁴ Record p 220 para 5.7, appendix 7.

¹⁵ Record p 237.

apparent that BASF will not lie down easily. The case is defended and pleadings have been closed. It can be expected that the trial will run over several days, if not weeks, bearing in mind that several expert witnesses will probably have to testify. Ironically, the practitioner also issued summons on behalf of Remitto against attorney Coetzee in the North West Division of the High Court for alleged defamation. According to him, he intends to consolidate this matter with the BASF matter which was instituted in the Gauteng High Court. He apparently does not realise the different causes of action against different defendants in different divisions of the High Court. Consolidation will in all probabilities never be granted.¹⁶

f. The applicant informed the practitioner that it would be willing to assist with the sale of the two immovable properties, but the practitioner was not prepared to accept that offer.¹⁷ More than one attempt was made to sell the two immovable properties on auction, but they were eventually put on auction on 16 November 2022 and long after the present proceedings were instituted. An offer was received in respect of plot 47 for R870 000.00 and an increased offer in respect of plot 48 for R750 000.00. These offers are much lower than the amounts for which the mortgage bonds were registered, the amounts of the applicant's claim as well as the valuations of the properties. There is no indication whether the practitioner accepted these offers, but it would be a real risk, bearing in mind the institution of the present applications and the possibility of winding-up orders being granted eventually against the two companies and Remitto in particular.

g. Remitto's debt due to the applicant in the amount of R2 581 837.78 and its security are not in contention.¹⁸ The practitioner indicated in the business rescue plan that the secured creditors would be paid an amount of R2 574 029.00 during October 2021 and a further amount of R764 557.00 during January 2022.¹⁹ The total amount of the secured creditors is R3 338 586.00 which includes the applicant's claim. They would receive dividends equal to 90 cents in the rand. No payments have been received.

h. The practitioner has not submitted any reports according to the record pertaining to the sale of stock and how this was accounted for by him.

DNA Plant Science

i. DNA Plant Science admittedly owes the applicant R1 549 986.28.²⁰ The bank holds security for its claim, inter alia a guarantee by Remitto, limited to the amount of R2.2 million as well as a cession of book debts.²¹

¹⁶ Record pp 320 and 321 paras 5 – 8.

¹⁷ Record pp 43 – 45 para 36.

¹⁸ Record p 32 read with the reply on p 321.

¹⁹ Record p 39: paras 33.12 and 33.13 and the business rescue plan record 177 and 178.

²⁰ Record p 24: para 19 read with p 321.

²¹ Record p 24 and 25, annexures "FA8" and "FA10".

j. In the case of DNA Plant Science, the practitioner was more optimistic. According to him the company could be traded out of distress and returned to solvency. According to his opinion product registrations owned by the company made it an attractive investment opportunity and the business rescue plan forshadowed an approval of the plan whereupon R1.5 million would be raised against equity to be used for working capital.²² By April 2022, that is more than a year after the business rescue plan was approved, the practitioner was still trying to find a suitable investor.²³

k. According to the three year projection of income forecasts the practitioner expected a gross profit of R3.75 million by March 2022 and a nett profit for the period of R269 494.00. There is no indication that this was achieved or that there is any realistic prospect of a recovery of DNA Plant Science. If an investor was found who was willing to invest R1.5 million or any other amount, I would have expected the practitioner to record this, but he failed to do.

l. The practitioner stated in his business rescue plan that the applicant's claim of R1 375 018.00 would be paid in full during July 2021. Although this amount is about R200 000.00 less than the claim of the applicant admitted in the proceedings before me, the practitioner indicated in the business rescue plan that payment of this full amount would be made during July 2021.²⁴ No payment was received.

m. In the business rescue plan of DNA Plant Science reference is again made of the claim instituted against BASF and the so-called "agterskot" to be paid. Although there is a cession of book debts in favour of the applicant, no proper reporting has been done as to the total amount of book debts, what was collected and how it was accounted for. It is just not good enough to state, as the practitioner has done, to say that there are no collectable debtors bearing in mind what he submitted in the business rescue plan. It appears from his supplementary answering affidavit that further debtors were generated post commencement of business rescue in the amount of R3.9 million.²⁵ The practitioner's initial observation pertaining to the company's financial position was recorded in his business plan.²⁶ He reported a lack of cash and an inability to purchase products to sell, specifically because of Remitto's financial problems. Remitto was DNA Plant Science's main distributor of products.

n. The practitioner attached to his supplementary affidavit an email of a person alleging that DVA Chemicals objected to liquidation. According to him this entity is a major creditor with a claim valued at 41.9% of all the claims. I have perused both the

²² Record pp 128 and 167: paras 1.1 and 3.1.1 of the business rescue plan.

²³ Page 32 para 25 read with annexures "FA12.1 - FA12.4".

²⁴ Record p 170 read with record p 31 para 23.11.

²⁵ Record of Remitto application p 428.

²⁶ Record 147 business rescue plan para 2.1.15.

business rescue plans and could not find any evidence of a creditor identified as DVA Chemicals. It is apparent from the Remitto application that DVA Chemicals is actually a debtor of Remitto, owing it R584 075.00.²⁷ This alleged creditor did not intervene in the application and did not even file a confirmatory affidavit.

o. The practitioner failed to file monthly reports to affected persons. The last report according to the documents in front of me was circulated in April 2022. The practitioner did not deny the applicant's version in this regard.²⁸ No reports have been forthcoming for the period May to November 2022, bearing in mind that the belated supplementary affidavit of the practitioner was filed on 21 November 2022 only. I do not have to make a finding in this regard, but if it is indeed the case that no such reports were forthcoming, the practitioner has failed to comply with s 132.

p. This application was heard on 24 November 2022. By then a period of 20 months has lapsed since approval of the business rescue plans in March 2021. The payments promised to secured creditors in both matters have not been forthcoming, but over and above that, it is apparent that the practitioner intends to carry on as such until finalisation of the two actions instituted against attorney Coetzee and BASF. The last action will not be heard in the Gauteng High Court before 2026 and even if that is the case, there is no indication as to the reasonable prospects of success and whether the case will in fact be finalised during that year. It is also important to note that the practitioner failed to state who will be funding this expensive litigation.

q. I have referred to the business rescue reports of the practitioner attached as Annexures "FA12.1 – FA 12.4" to the founding affidavit. It is apparent that inventory in excess of R700 000.00 has been sold. In this regard the applicant referred in the replying affidavit to the fact that the practitioner has not made any payments to it as the cessionary of book debts, but has paid the amounts collected into a different FNB account, apparently to the disadvantage of the applicant.²⁹

[19] It is apparent from the papers that the practitioner has in mind the liquidation of the respondents, not in terms of the provisions of Chapter 14 of the 1973 Act, but in his own time and in accordance with his own processes and procedures. He is utilising an informal kind of winding-up in the words of Brand JA in *Oakdene* which should not be tolerated.

[20] It may be accepted that at the beginning of 2021 the companies have established grounds for the reasonable prospect of achieving one of the two goals

²⁷ Record p 163:

²⁸ Record p 32, para 25 read with annexure "FA12.1 – 12.4"

²⁹ Record in Remitto application p 373, para 11.

contemplated in subsec 128(1)(b)(iii), to wit the primary goal which is to facilitate their continued existence in a state of solvency and if it is not possible to so continue in existence, the secondary goal, to obtain a better return for their creditors and shareholders than would result from their immediate liquidation. But, now two years later the question to be answered is whether these goals are achievable. If not, the business rescue proceedings should be terminated and provisional winding-up orders should be issued. Both business rescue plans should have been amended for approval by affected persons in light of the changed circumstances and that no substantial implementation thereof is possible. This did not happen. Clearly, if the applicant was fully appraised with the events as they turned out, it would never have consented to the business rescue plans.

[21] Insofar as the applicant relies on the companies' inability to pay their debts and that it is just and equitable to be wound up, subsecs 344(f) and (h) of the 1973 Act should be considered. Unpaid creditors who cannot obtain payment and who bring their claims within the parameters of subsec 344(f), read with s 345, are entitled to relief, subject to the limited discretion of the court.³⁰

[22] In *Moosa NO v Mavjee Bhawan (Pty) Ltd*³¹ the court held that the just and equitable principle, 'postulates not facts, but only a broad conclusion of law, justice and equity, ...' This expression and ground for liquidation have been considered in numerous judgments since then. Several other examples, for example the disappearance of a company's substratum can be provided, but in essence, if its business has closed down and/or if there are no prospects to become viable in future, the necessary conclusion should be arrived at that winding-up is just and equitable.

[23] It has been said that business rescue provides a shield that, absent the delivery of the proverbial mortal blow by an unsympathetic creditor, can be rescued. However, I agree with the sentiment that the procedure was never intended to provide a sword to be used by the directors and/or business rescue practitioners to keep the creditors at bay in all circumstances.³²

³⁰ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440 - 441 and Meskin, *Henochberg on the Companies Act* vol 1 at 698 - 700.

³¹ 1967 (3) SA 131 (T) at 136; see also *Sunny South Cannery (Pty) Ltd v Mbangxa* [2001] 1 All SA 474 (SCA) at 481, a case where the respondent company suspended its business, has not been trading for three years and was factually hopelessly insolvent.

³² *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (in provisional liquidation) And Others* 2022 (5) SA 179 (GP) para 84.

[24] In weighing up the advantages and disadvantages of business rescue proceedings versus liquidation proceedings I take cognisance of the co-operation between business rescue practitioners and directors and managers of companies in business rescue on the one hand and liquidators acting on the instructions of creditors on the other hand. I do not point fingers to the practitioner, but I am satisfied that liquidators to be appointed in the case of a winding-up will be able to utilise ss 417 and 418 of the 1973 Companies Act in order to do interrogations. There are several related companies involved in casu and there are many aspects that need proper investigation, for example the reason why book debts cannot be collected and the transactions between various related companies.

[25] In conclusion I am satisfied that the applicant has made proper cases for the relief claimed in both applications. Remitto and DNA Plant Science are hopelessly insolvent, if not actually insolvent, clearly commercially insolvent. They are not in a position to carry on with any business activities and it is therefore also just and equitable that they be wound-up.

[26] The last issue to be considered is the wasted costs of 29 September 2022. I do not intend to deal with all the allegations made in this regard by the parties, save to say the following:

- a. On 29 August 2022 the first and second respondents duly gave notice to oppose the applications.
- b. Settlement negotiations were conducted, initiated by the practitioner on 22 August 2022. Having received no reply, the practitioner sent an email to the applicant's attorney on 6 September 2022.
- c. The attorney for the applicant did not respond immediately, but eventually made a counter proposal, but the parties could not come to an agreement.
- d. Pending these settlement negotiations, the first and second respondents did not file any answering affidavit.
- e. The applicant's attorney sent an email on 21 September 202 with his client's counter proposals for consideration. However, in the same email the practitioner was informed that as no answering affidavits had been filed, the applications would be enrolled for 29 September 2022.
- f. The practitioner's attorney responded on 27 September 2022 wherein he explained the reasons why answering affidavits have not been filed and requested that the matter be postponed to a later date. The applicant's attorney responded the

next day, refusing to adhere to the request. As a result, the practitioner caused an affidavit to be drafted and deposed to on the same day, to wit 28 September 2022.

g. In my view, there were bona fide attempts to settle the dispute and it is acceptable for parties in such a case not to proceed with the filing of pleadings or affidavits in the hope that a settlement can be reached. I am satisfied that the conduct of the applicant's attorney to set the matter down in the manner which he did, warrants a costs order against his client. He should have known better, especially insofar as he was the one delaying settlement negotiations and bearing in mind the complexity of the applications and the serious consequences that may follow.

[27] The following order is issued:

In application 3538/2022

7. Leave is granted to the applicant to commence and proceed with its application against the first respondent company in terms of s 133(1)(b) of the Companies Act 71 of 2008;
8. The business rescue proceedings in respect of the first respondent company are converted into liquidation proceedings in terms of s 132(2)(a)(ii) Companies Act 71 of 2008;
9. The first respondent company is placed under provisional liquidation in the hands of the Master of this court.
10. A provisional liquidation order is hereby issued calling upon all interested parties to show cause, if any, to the court on the **16th day of MARCH 2023 at 09h30** why a final order of liquidation should not be granted against the first respondent company.
11. Service of this rule *nisi* and a copy of the notice of motion and annexures shall be effected on the first respondent company at its registered office or its principal place of business within the court's jurisdiction.
12. This order shall, without delay, be published in the Citizen and the Government Gazette.
7. The sheriff shall ascertain whether the employees of the first respondent company are represented by a trade union and whether there is a notice board on the premises to which the employees have access.
8. A copy of the provisional liquidation order shall be served on -

- 8.1 Every registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the first respondent company.
- 8.2 The employees of the first respondent company by affixing a copy of the application and provisional liquidation order on any notice board to which the employees have access inside the first respondent company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the first respondent company conducts any business.
- 8.3 The South African Revenue Services.
9. The applicant shall pay the first and second respondents' wasted costs occasioned by the set down of the matter on the roll of 29 September 2022 as well as the postponement thereof.

AND

In application 3540/2022

1. Leave is granted to the applicant to commence and proceed with its application against the first respondent company in terms of s 133(1)(b) of the Companies Act 71 of 2008;
2. The business rescue proceedings in respect of the first respondent company are converted into liquidation proceedings in terms of s 132(2)(a)(ii) Companies Act 71 of 2008;
3. The first respondent company is placed under provisional liquidation in the hands of the Master of this court.
4. A provisional liquidation order is hereby issued calling upon all interested parties to show cause, if any, to the court on the **16th** day of **MARCH 2023** at **09h30** why a final order of liquidation should not be granted against the first respondent company.
5. Service of this rule *nisi* and a copy of the notice of motion and annexures shall be effected on the first respondent company at its registered office or its principal place of business within the court's jurisdiction.
6. This order shall, without delay, be published in the Citizen and the Government Gazette.
7. The sheriff shall ascertain whether the employees of the first respondent company are represented by a trade union and whether

there is a notice board on the premises to which the employees have access.

8. A copy of the provisional liquidation order shall be served on -
 - 8.1 Every registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the first respondent company.
 - 8.2 The employees of the first respondent company by affixing a copy of the application and provisional liquidation order on any notice board to which the employees have access inside the first respondent company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the first respondent company conducts any business.
 - 8.3 The South African Revenue Services.
9. The applicant shall pay the first and second respondents' wasted costs occasioned by the set down of the matter on the roll of 29 September 2022 as well as the postponement thereof.

J P DAFFUE, J

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