REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 15080/12

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
MARK BRADLEY BEGINSEL N.O.	First Respondent
ALLAN McKINLEY RENNIE N.O.	Second Respondent
MAKHUBA LOGISTICS (PTY) LTD (UNDER SUPERVISION)	Third Respondent
THE CREDITORS OF MAKHUBU LOGISTICS (PTY) LTD	Fourth Respondent

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JUDGMENT DELIVERED: 31 OCTOBER 2012

FOURIE, J:

INTRODUCTION

[1] The Companies Act 71 of 2008 ("the Act") which came into operation on 1 May 2011, has introduced several new concepts to the South African corporate landscape, including business rescue provisions which are dealt with in Chapter 6 of the Act. 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 all relevant stakeholders (section 7 (k)).

[2] On a practical level, Chapter 6 caters for proceedings to facilitate the rehabilitation of a company that is financially distressed, by providing, *inter alia*, for the temporary supervision and management of the company and its affairs, whilst imposing a temporary moratorium on the rights of creditors to enforce their claims against the company. At the heart of business rescue proceedings, is the preparation of a business rescue plan by a business rescue practitioner for consideration and possible adoption by the relevant stakeholders. This plan should set the course for rescuing the company by achieving the goals set out in section 128 (1) (b) of the Act.

[3] In the present matter the validity of a decision taken at a meeting of creditors of a company in financial distress, to adopt a business rescue plan, is challenged. Further, the court is called upon to consider whether the business rescue proceedings should continue, or be terminated by ordering the business rescue practitioners to apply for an order discontinuing same and placing the company in liquidation.

THE FACTUAL BACKGROUND

[4] The background facts are largely common cause.

[5] Third respondent ("the company") conducts the business of road transport, in particular transport of fuel. During 2011, the company experienced financial difficulties and was unable to pay its debts as and when they fell due. This resulted in creditors taking legal action against the company and on 26 July 2011, an order was made by the South Gauteng High Court placing the company under provisional liquidation.

[6] On 14 October 2011, pursuant to an application by three shareholders of the company, who together own 95% of its shares, this court ordered that the company be placed under supervision and that business rescue proceedings

commence, as contemplated in the Act. First and second respondents ("the BRPs") were appointed as business rescue practitioners to conduct the business of the company with all powers and duties entrusted to them in terms of the Act.

[7] The primary objective of the business rescue proceedings, stated in the application, was to restore the company to solvency and to rescue the business as a going concern. It was not anticipated, at that juncture, that the second aim highlighted in section 128 (1) (b) (iii) of the Act, namely to implement a business rescue plan that would result in a better return for the company's creditors or shareholders than would result from the immediate liquidation thereof, would have to be pursued, although it was recognised as a possibility.

[8] At the first meeting of creditors of the company it was resolved that the BRPs should take the necessary steps to prepare and publish a business rescue plan for the company. At that stage applicant ("SARS") had provided the BRPs with proof of the company's indebtedness to it, which then amounted to R11 194 677-39, for outstanding value added tax, employees' tax, skills development levy, unemployment insurance contributions, penalties and interest. Subsequent thereto the BRPs made several unsuccessful attempts to reach a compromise with SARS. At all material times during these negotiations,

the BRPs were of the view that SARS is a preferent creditor in the business rescue proceedings.

[9] Thereafter several informal meetings of creditors were held and the BRPs brought applications to court for the extension of the period within which to file the business rescue plan. During this period, the BRPs initially reported that the company was experiencing a continuing increase in turnover and that it was trading on the basis that it was breaking even, even making a small profit. The prospects to improve profitability without having to sell or encumber the substantial free assets of the company, remained good.

[10] However, at subsequent meetings of creditors held during March and April 2012, the BRPs advised the creditors that, mainly as a consequence of the coming into operation of Transnet's new multi-product pipeline between Durban and Johannesburg during January 2012, which was earlier than anticipated, the company was experiencing problems in securing work and that it had suffered a loss of approximately R300 000-00 in February 2012. Later the creditors were informed that the company's estimated loss in March 2012 amounted to R2,9 million, mainly due to a significant decline in the volumes of fuel to be transported. A further extension for the publication of the business

rescue plan was applied for and granted and eventually the proposed business rescue plan was circulated under cover of a letter dated 18 June 2012.

[11] The proposed business rescue plan informed interested parties of the following:

(a) The unexpected opening of the Transnet oil pipeline, earlier than anticipated, had a significant adverse effect on the company's trading operations, resulting in a reduction in the company's turnover in excess of R1,5 million per month and a corresponding loss of profitability. As it had not been possible to replace the lost business or restore the trading operations of the business to profitability, there was no prospect of turning around the company's fortunes in the short to medium term. Thus the business operations of the company should be wound down to avoid further losses.

(b) As a result of the changed circumstances of the company, it had not been possible to obtain a purchaser for the entire business of the company as a going concern, or to present a business rescue plan which would trade the company out of its difficulties. The company would accordingly cease trading on 31 July 2012.

(c) If the company is liquidated, the sale of its assets would yield R23 413 400.91 for distribution and the secured and preferent creditors would receive dividends, but concurrent creditors would receive no dividend. However, if the proposed business rescue plan is adopted, the sale of three parts of its operations, as well as the sale of its assets through releasing them into the market in a controlled manner until the end of 2012, and thereafter by placing them on public auction without reserve, would yield R34 266 552. 60. In such event, the concurrent creditors would receive an initial dividend of 2c/R and a final dividend of 13c/R.

(d) The BRPs expressed the view that, having taken legal advice, SARS is not a preferred creditor in terms of business rescue proceedings. SARS was consequently reflected as a concurrent creditor in the annexures to the business rescue plan, SARS' claim being valued at R12 392 706. 26. It is further apparent from the business rescue plan that, if the distributions it envisaged were made, SARS would not enjoy preference over any of the other creditors- in this regard the business rescue plan states that claims would be made in the *"usual order of preference"*, ie payment of any secured claims, followed by preferent claims of employees in agreed amounts and thereafter payment of the concurrent claims, as contemplated in section 150 (2) (b) (v) of the Act.

[12] In a subsequent letter to the BRPs, SARS insisted that it should be ranked as a preferent creditor and that, consequently, the meeting of creditors scheduled for 17 July 2012, should be postponed so that the BRPs could submit a revised business rescue plan for consideration by all affected parties, taking into account the attitude of SARS regarding its status as a preferent creditor.

[13] In a letter dated 16 July 2012, the BRPs refused this request for a postponement of the meeting of creditors and informed SARS that they had taken senior counsel's advice, to the effect that the classification of creditors in the Insolvency Act 24 of 1936 ("the Insolvency Act"), was not applicable to Chapter 6 of the Act, which contains no statutory preferences such as are to be found in sections 96-102 of the Insolvency Act. The BRPs added that, irrespective of whether SARS was a preferent or concurrent creditor, it did not impact on SARS' voting on the proposed business rescue plan and that the implementation of the plan should not be interrupted.

[14] At the creditors' meeting of 17 July 2012, sixteen creditors, having claims in aggregate amounting to R102 391 092. 41, were present. There were no secured creditors, as the only secured claims were a number of repairers' liens, for the payment of which security had been posted. SARS, with a claim of

R12 392 706. 26, voted against the adoption of the business rescue plan, while UTATU, whose claim amounted to R484 279. 44, abstained from voting. The remaining fourteen concurrent creditors, with claims in aggregate amounting to R89 514 106. 71, voted in favour of the adoption of the business rescue plan. This translated into 87% of creditors' voting interests in favour of the adoption of the proposed business rescue plan, 12% against and 1% abstaining.

THE RELIEF SOUGHT

[15] On 2 August 2012, SARS applied urgently for the following substantive relief:

(a) An order declaring unlawful and invalid the decision taken at the meeting of creditors of the company held on 17 July 2012, to approve the business rescue plan of the company proposed by the BRPs.

(b) An order interdicting the BRPs from distributing any monies of the company pursuant to the business rescue plan.

(c) An order declaring that the BRPs are obliged to take the steps as specified in section 141 (2) (a) (i) and (ii) of the Act, viz to apply to court for an order discontinuing the business rescue proceedings and placing the company in liquidation.

[16] The court, by agreement between SARS and the BRPs, issued a *rule nisi* calling upon respondents to show cause, if any, why the relief sought by SARS should not be granted. The order also included certain interim relief which would operate pending the final determination of the matter. The relief sought is opposed by the BRPs.

THE ADOPTION OF THE BUSINESS RESCUE PLAN

[17] SARS, firstly, claims that, on the strength of its interpretation of the provisions of section 145 (4) (a) and (b) of the Act, the decision taken to adopt the business rescue plan is unlawful and invalid. This section reads as follows:

"(4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests-

(a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and

(b) *a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.*"

[18] SARS accepts that Chapter 6 of the Act does not oblige the BRPs to propose a business rescue plan which confers on SARS a preference upon the

distribution of the free residue over the other unsecured creditors. However, SARS submits that Chapter 6 of the Act also does not oblige the BRPs to treat SARS as a concurrent creditor. In this regard, SARS contends that section 150 (2) (b) (v) of the Act permits a business rescue plan to create and specify the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted, subject to the preferences conferred by section 135 of the Act on the different classes of post-commencement finance creditors, described in that section. Therefore, SARS contends, there is no reason why it could not have been specified as a preferent creditor. In such event, SARS says, it would obviously have voted for the business rescue plan as its interests would have remained protected.

[19] SARS further maintains that its status as a preferent creditor under section 99 of the Insolvency Act, has an important implication for the voting on a business rescue plan. It contends that, because SARS is a preferent creditor whose claim ranks ahead of ordinary concurrent creditors under section 103 (1) (a) of the Insolvency Act, it is an unsecured creditor referred to in section 145 (4) (a) of the Act and as such had a voting interest at the creditors' meeting on 17 July 2012, equal to the value of its claim against the company. SARS also contends that ordinary concurrent creditors under section 103 (1) (a) of the Insolvency Act, are included in the class of concurrent creditors who would be

subordinated in a liquidation, referred to in section 145 (4) (b) of the Act, and because they would receive nothing on liquidation of the company in the instant matter, they had no voting interest at the meeting of 17 July 2012.

[20] In sum, SARS contends that, by treating its voting power as the same as that of the concurrent creditors, who would get nothing if the company was liquidated, despite section 145 (4) of the Act, and by ranking its claim as the same as those of the concurrent creditors, despite the possibility of giving it preference under section 150 (2) (b) (v) of the Act, the business rescue plan was adopted and facilitates what amounts to a liquidation of the company, in which SARS is deprived, against its will, of the statutory preference to which it is entitled when companies are liquidated. In the result, SARS concludes, that the adoption of the business rescue plan by the creditors on 17 July 2012, was unlawful and invalid.

[21] Simply put, the issue to be determined is whether or not SARS is to be treated as a preferent creditor in business rescue proceedings. As appears from the above, SARS contends that all preferent creditors, as contemplated by sections 96 to 102 of the Insolvency Act, are to be categorised as unsecured creditors under section 145 (4) (a) of the Act, while all other concurrent

creditors, as envisaged by section 103 of the Insolvency Act, are concurrent creditors who would be subordinated on liquidation, as envisaged by section 145 (4) (b) of the Act. This would mean that, at the meeting of creditors held on 17 July 2012, SARS, as a "preferent" unsecured creditor under section 145 (4) (a) of the Act, would have had a voting interest equal to the value of its claim against the company. On the other hand, the remainder of the ("non-preferent") concurrent creditors, representing 87% of the value of all creditors present at the meeting, would have been disenfranchised concurrent creditors in terms of section 145 (4) (b). In such event, the vote of SARS would have carried the day and the business rescue plan would have been rejected, contrary to the wishes of the lion's share of the company's creditors.

[22] In my view, SARS' construction of the provisions of section 145 (4) of the Act, is not only contrary to the ordinary grammatical meaning of the words used in the said section, but also leads to an illogical result that fails to balance the rights and interests of all relevant stakeholders, as envisaged in section 7 (k) of the Act.

[23] The business rescue provisions contained in Chapter 6 of the Act, do provide for certain preferences in respect of claims of creditors. Thus, section

135 of the Act, creates preferent claims in respect of post-commencement finance obtained by the company and specifies the ranking of such claims. Also, with regard to the rights of employees of the company, section 144 (2) of the Act stipulates that, to the extent that any remuneration relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a *"preferred unsecured creditor"* of the company for the purposes of Chapter 6.

[24] However, no statutory preferences are created in Chapter 6 of the Act, such as are contained in sections 96 to 102 of the Insolvency Act. I would have expected that, if it were the intention of the legislature to confer a preference on SARS in business rescue proceedings, it would have made such intention clear. This could easily have been done, but no trace of such an intention on the part of the legislature is found in the Act. In my view, the language of the aforesaid provisions of the Act, read in context, and having regard to the purpose of business rescue proceedings, justifies only one conclusion, namely that SARS is not, by virtue of its preferent status conferred by section 99 of the Insolvency Act, a preferent creditor for purposes of business rescue proceedings under the Act.

[25] In my opinion, the wording of section 145 (4) is clear and unambiguous and leaves no room for the artificial and strained interpretation that SARS wishes to place on it. Section 145 (4) (a) refers to secured or unsecured creditors who have a voting interest equal to the value of the amount owed to them by the company. This categorisation of creditors is uncontentious and well-known in legal parlance. Secured creditors are those who hold security over the company's property, such as a lien or mortgage bond. Unsecured creditors are those whose claims are not secured, including concurrent creditors. The unsecured creditors are either preferent or concurrent creditors. The term *"preferent creditor"*, used in the wide sense, refers to any creditor who has a right to receive payment before other creditors. To this extent, a secured creditor also qualifies as a preferent creditor. However, the term *"preferent creditor"* is normally reserved for a creditor whose claim is not secured, but who nevertheless ranks above the claims of concurrent creditors (whose claims are also unsecured). Such preferent creditors are commonly referred to as *"unsecured preferent creditors"* and are mentioned in sections 96-102 of the Insolvency Act.

See Bertelsmann *et al*, **Mars, The Law of Insolvency in South Africa**, 9th edition at 434 and **Henochsberg on the Companies Act 71 of 2008**, Volume I, page 508.

[26] It follows from the aforesaid, that our insolvency law in practice recognises unsecured creditors as comprising, *inter alia*, unsecured preferent creditors and unsecured non-preferent, or concurrent, creditors. There is, accordingly, no reason to interpret the phrase *"unsecured creditor"* in section 145 (4) (a), as including only unsecured preferent creditors, but not unsecured non-preferent, or concurrent, creditors. Such an interpretation is clearly contrary to the ordinary meaning of the phrase *"unsecured creditor"*, which, according to its ordinary meaning, includes all concurrent creditors, whether preferent or non-preferent.

[27] As submitted on behalf of the BRPs, the term *"unsecured creditor"*, should be read as including non-preferent concurrent creditors, since the legislature must be assumed to have intended the term to bear its ordinary meaning in circumstances where there is no indication at all in the Act that a different meaning is to be assigned to it.

[28] It is to be noted that Henochsberg *supra* at 508, advances the same interpretation as SARS. However, at 509, Henochsberg readily concedes that this interpretation is grossly unfair to concurrent creditors who may be deprived of their voting rights in this way, especially as they have more of an interest in

the company being rescued than secured creditors, as the latter still have their security to fall back on should the company eventually be wound up.

[29] The interpretation contended for by Henochsberg and SARS, requires the phrase, *"a concurrent creditor who would be subordinated in a liquidation..."* in section 145 (4) (b) of the Act, to be a reference to all concurrent creditors, as their claims would upon liquidation be subordinate to the payment of all the other claims. Henochsberg, at 508, concedes that, in South African insolvency law, one does not normally refer to concurrent creditors' claims being subordinated in a liquidation. As mentioned earlier, Henochsberg also accepts that the interpretation contended for, is grossly unfair to the concurrent creditors who would often be deprived of their voting rights in business rescue proceedings.

[30] I am in agreement with the submission on behalf of the BRPs, that the reference in section 145 (4) (b), to a concurrent creditor *"who would be subordinated in a liquidation"*, does not attach to all concurrent creditors, but only to those concurrent creditors who have subordinated their claims in a liquidation in terms of a subordination or back-ranking agreement. This is the ordinary meaning of the concept of subordination, which is similarly

uncontentious and well-known in South African law, and, in particular, in our insolvency law.

[31] The general effect of a subordination agreement is that a subordinated debt against the debtor, may only be enforced if the debtor is solvent and after payment of its debts to other creditors. The enforceability of the subordinate creditor's claim against the debtor, is subject to the condition that it may only be enforced when the value of the debtor's assets exceeds its liabilities, excluding the subordinated debt. The debt will not normally survive the debtor's insolvency.

See **Ex Parte De Villiers and Another NNO: In Re Carbon Developments** 1993 (1) SA 493 (A) at 504 F-505C.

[32] I agree with the submission made on behalf of the BRPs, that, on the plain wording of section 145 (4) (b) of the Act, the intention was to refer to a particular category of concurrent creditors, namely, those who have agreed that their claims can only be enforced if and when the value of the company's assets exceeds its liabilities. There certainly is a discernible logic to provide for a mechanism whereby such back-ranked claims should not enjoy the same weight as the claims of other creditors in business rescue proceedings. Conversely, it

seems wholly inconsistent for the purpose and scheme of the Act, to include all concurrent creditors under section 145 (4) (b) of the Act, thereby almost certainly having their voting interest reduced, and quite possibly entirely emasculated.

[33] Finally, in regard to the interpretation of section 145 (4), I should mention that Henochsberg at 508 seems to rely on section 144 (2) of the Act as justification for its interpretation of section 145 (4). The following is said: *"Since Chapter 6 uses the term 'preferred unsecured creditor' to denote an unsecured claim that is to receive preferential treatment (see eg section 144 (2) where employees who have claims against the company for amounts owing prior to the commencement of the business rescue proceedings, are classified as being 'preferred unsecured creditors' of the company), subsection 4 (a) could have been stated more clearly by using the same terminology. Perhaps this was just an oversight by the legislature, as clearly the subsection is only intended to cover 'preferred unsecured creditors'"*.

[34] In my view, section 144 (2) of the Act does not lend any support to the interpretation contended for by Henochsberg. What this section does, is to expressly single out employees as preferred unsecured creditors of the

company, in contradistinction to section 145 (4) (a), where, on the plain wording of the section, the legislature only intended to cover unsecured creditors and not preferred unsecured creditors. This clear language can certainly not be overlooked, as suggested by Henochsberg, as being an oversight by the legislature. The fact of the matter is that, in section 144 (2), employees are expressly classified as preferred unsecured creditors, whereas there is no provision in the Act which suggests that SARS is to be regarded as a preferred unsecure creditor for business rescue purposes.

[35] In the result, I conclude that, in terms of section 145 (4) of the Act, each concurrent creditor, save for the category of concurrent creditors who would be subordinated in a liquidation by virtue of a prior existing subordination agreement, has a voting interest equal to the value of the amount owed to that creditor by the company. Therefore, in my view, SARS would enjoy no greater voting interest than the other concurrent creditors of the company, with the result that there is no basis upon which to impeach the voting procedure followed in the adoption of the business rescue plan.

THE CONTENT OF THE BUSINESS RESCUE PLAN

[36] In its quest for an order declaring unlawful and invalid the decision taken at the meeting of creditors held on 17 July 2012, to approve and adopt the relevant business rescue plan, SARS has added a second string to its bow. In this regard, SARS argues that the content of the proposed business rescue plan did not comply with certain requirements prescribed by section 150 of the Act. Therefore, SARS contends, the decision to adopt the business rescue plan is invalid and unlawful.

[37] Section 150 (2) of the Act, provides that a proposed business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan. To this end, the section details certain background information, proposals, assumptions and conditions which the business rescue plan should contain. SARS argues that the requirements of section 150 (2) of the Act are peremptory, requiring exact compliance therewith, failing which, the adoption of the plan is rendered invalid and a nullity. Alternatively, SARS submits that, if substantial compliance with the requirements of section 150 (2) is permissible, there was not substantial compliance either.

[38] A perusal of section 150 (2) of the Act shows that the legislature has prescribed the content of a proposed business rescue plan in general terms. The content can, by its very nature, not be exactly and precisely circumscribed, as it would differ from case to case, depending on the peculiar circumstances in which the distressed company finds itself. It follows, in my view, that, upon a proper construction of section 150 (2), substantial compliance with the requirements of the section will suffice. This would, in my view, mean that, where sufficient information, along the lines envisaged by section 150 (2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected, there would have been substantial compliance.

[39] As mentioned previously, SARS contends that there has not been substantial compliance with the requirements of section 150 (2) of the Act. Firstly, I believe that, in the instant case, the proof of the pudding is in the eating. The proposed business rescue plan was circulated to all interested parties and no objection was raised that the content thereof is inadequate to enable the parties to arrive at an informed decision. At the meeting of creditors held on 17 July 2012, no objection to the content of the plan was forthcoming and 99% of the interested parties present, including SARS, cast their votes without any complaint regarding the sufficiency of the proposed plan. Surely, those best

placed to judge the adequacy or not of the proposed business rescue plan, are the creditors who attended the meeting as interested parties and voted for or against the adoption of the plan. In these circumstances, the belated objection to the content of the business rescue plan, rings hollow.

[40] I do, however, proceed to deal briefly with the grounds of the objection raised by SARS. In so doing, I refer to the specific provisions of section 150 (2) of the Act, upon which SARS relies:

Section 150 (2) (a) (ii)

[41] SARS contends that, despite the requirement in this sub-section that there be an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the law of insolvency, annexures F1 – F3 to the plan do not contain this information. Whilst it is so that the said annexures do not specifically identify the creditors falling in the different categories in terms of the laws of insolvency, annexures D and E to the business rescue plan, set out the essence required by the interested creditors, based on the known claims of creditors at the commencement of the business rescue proceedings.

[42] Annexure D shows that, on liquidation, concurrent creditors would receive nothing while SARS and the Workmen's Compensation Commissioner would receive the full free residue. As mentioned earlier, secured creditors would not come into play as security had been posted for their claims.

[43] Annexure E shows that, on implementation of the business rescue plan, concurrent creditors would receive 15c/R and preferred employee creditors would be paid in full. Based on this information, SARS voted against the plan, while the other concurrent creditors, except for one abstention, voted in favour. It accordingly seems to me that, although the detail regarding the identity of the creditors referred to in this sub-section of the Act, may not have been provided, there has been substantial compliance, in the sense that the information provided in the annexures, read with the plan, enabled the interested creditors to decide whether to accept or reject the business rescue plan.

Section 150 (2) (c) (iv) (aa) and (bb)

[44] SARS complains that a projected balance sheet and statement of income and expenses for the ensuing three years, as required by these sub-sections, were not included in the proposed business rescue plan.

[45] The short answer to this complaint is that, where the business rescue plan does not contemplate the continuation of the business of the company as a whole, these requirements are neither necessary nor possible. In fact, as submitted on behalf of the BRPs, to insist upon these requirements would, in the circumstances, be manifestly absurd. In any event, the business rescue plan, read with the annexures thereto, indicates with sufficient particularity the BRPs' estimates, based on known facts, as to the likely benefit to all affected parties if the plan is implemented.

Section 150 (2) (b) (vi)

[46] This sub-section provides that the proposed business rescue plan must include the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation. SARS contends that, in furnishing information in the plan comparing the situation under business rescue with that which would prevail on liquidation, the BRPs were obliged to postulate a liquidation date as at the date of the business rescue plan, ie June 2012. As the proposed business rescue plan compares the situation under business rescue with that which would have prevailed on liquidation at the date of the commencement of business rescue proceedings, ie October 2011, SARS argues that the plan contains a material

misrepresentation precluding the creditors from properly comparing the business rescue scenario with the liquidation scenario.

[47] The BRPs maintain that there is no merit in this submission of SARS and that they were in no way remiss in reflecting the liquidation position in Annexure D to the business rescue plan, as at the commencement of business rescue, ie in October 2011. In fact, the BRPs argue, this is the only date at which the Act contemplates that this can be done. They refer to section 150 (2) (a) (iii) of the Act, which states that the business rescue plan, as part of the background, must include information concerning the probable dividend that would be received by creditors in their specific classes, if the company were to be placed in liquidation. This, the BRPs' submit, must be read in conjunction with section 150 (2) (a) (ii) which makes it clear that the specific classes of creditors on liquidation, are those which are extant *"when the business rescue proceedings began"*.

[48] It seems to me that the BRPs are correct in their submission. Section 150 (2) (a) (ii) and (iii) appears to be dispositive of the question of the comparison date. It has to be the former date, namely when the business rescue proceedings began.

[49] The BRPs also point out that, in terms of section 131 (6) of the Act, the order granted by this court on 14 October 2011, was to suspend liquidation proceedings. If the business rescue proceedings were to end by the conversion to a liquidation, in accordance with section 132 (2) (a) (ii), the winding-up of the company would be revived on the application of the BRPs in accordance with section 141 (2) (a) (ii) of the Act. The commencement of the winding-up would have to be a date prior to 14 October 2011, as the company was already in liquidation at that date. I therefore agree that there is no substance in the contention by SARS that a liquidation date in June 2012 should be postulated.

[50] I accordingly find that there is no merit in the submission that the business rescue plan is invalid and unlawful due to the alleged non-compliance with the requirements of section 150 of the Act.

SHOULD BUSINESS RESCUE PROCEEDINGS CONTINUE?

[51] As indicated earlier, SARS also seeks a declarator to the effect that the BRPs are obliged to apply to court in terms of section 141 (2) (a) (i) and (ii) of the Act, for an order discontinuing the business rescue proceedings and placing the company in liquidation. The section reads as follows:

"(2) If, at any time during business rescue proceedings, the practitioner concludes that-

(a) There is no reasonable prospect for the company to be rescued, the practitioner must-

(i) so inform the court, the company and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation."

I should add that section 141 (3) of the Act provides that the court to which this application is made, may make the order applied for, or any other order that the court considers appropriate in the circumstances.

[52] As explained earlier, the initial prognosis was that the company would continue to be run as a going concern and managed to financial soundness. However, subsequent events had an adverse effect on the company's operations and profitability, which resulted in the decision to wind the company down to avoid further losses. In the result, the proposed business rescue plan included the recommendation that the company cease trading on 31 July 2012, and in essence provided that thereafter it be liquidated and its affairs be wound up by the BRPs.

[53] The question posed by section 141 (2) (a) of the Act, is whether or not there is a reasonable prospect for the company to be rescued. Section 128 (1) (h)

of the Act defines the expression *"rescuing the company"* in Chapter 6 of the Act, as meaning achieving the goals set out in the definition of *"business rescue"* in section 128(1) (b). The third of those goals, set out in section 128 (1) (b) (iii), is the following:

"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."

[54] As it is not possible for the instant company to continue in existence on a solvent basis, the question, for purposes of the implementation of section 141 (2) (a) of the Act, is whether the business rescue plan which has been adopted by the creditors, would, if implemented, result in a better return for the company's creditors than would result from the immediate liquidation of the company.

[55] At the outset I raised the question whether a court is entitled, in circumstances where the BRPs have concluded that the implementation of the business rescue plan, as adopted by the creditors, would result in a better return

for the company's creditors, to override such conclusion by granting the declarator sought by SARS.

[56] As I understood the submission on behalf of SARS, the court has this power as the overseer of the business rescue proceedings which it has authorised, particularly in circumstances where the BRPs (according to SARS), have committed a material mistake in failing to conclude that the implementation of the business rescue plan would not result in a better return, as envisaged by section 128 (1) (b) (iii) of the Act.

[57] In view of the conclusion that I have reached on the factual question, whether or not the business rescue plan would result in a better return for the company's creditors than the immediate liquidation of the company, it is not necessary for me to prolong the debate on whether the court, in the present circumstances, has the power to intervene in terms of section 141 (2) of the Act. I accordingly accept, without deciding, that the court has the power to intervene where it is shown that the BRPs have 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 section 128 (1) (b) (iii) of the Act.

[58] In argument, SARS and the BRPs were basically in agreement that "*a better return*" means that there is more money overall to be distributed to creditors, with the result that they would receive a greater distribution than would be the case in a liquidation. Whilst agreeing on the test to be applied, the parties differed materially on the application thereof to the facts of this matter. SARS, through its expert witness, Mr. Pfaff, took the view that there is no material difference in the return the assets of the company will generate after statutory costs have been deducted, between the business rescue option and the liquidation process. The BRPs, on the other hand, were of the view that there would be a definite duplication of costs in the event of a liquidation, with the result that the continued implementation of the business rescue plan would yield significantly more than would be achieved if the company was placed in liquidation. SARS, in an alternative submission, suggested that the court should even consider referring the dispute of fact in this regard for the hearing of oral evidence.

[59] On reflection, I do not believe that it is necessary to conduct a detailed analysis of the evidence produced by the respective parties in support of their opposing views. It appears to me that, in deciding this issue, a practical common sense approach is called for. It is clearly not possible to arrive at an exact financial calculation in comparing the two scenarios. Therefore, little will be

achieved by referring the dispute to oral evidence, which will result in a further waste of time and money, to the detriment of the creditors of the company.

[60] I am further of the view that, in deciding this issue, one should not lose sight of the events as they have unfolded since October 2011. This is a case where business rescue was accepted as a viable prospect at the time of the granting of the order placing the company under supervision. After the granting of the order on 14 October 2011, the BRPs took control of the business and succeeded in reducing the company's trading losses. It was only as a result of the unexpected opening of the Transnet oil pipeline earlier than anticipated, that the termination of the company's business became inevitable. This is not a case where a liquidation was from the outset disguised as a business rescue.

[61] Moreover, the implementation of the business rescue plan is far-advanced. It is not disputed that the prices obtained by the BRPs for assets already sold pursuant to the business rescue plan, have exceeded expectations. Planning for the sale of three parts of the company's operations, as well as the sale of its assets through releasing them into the market in a controlled manner, and thereafter by placing them on public auction without reserve, has begun. Also, as part of the background circumstances, I should reiterate that the business rescue plan and its implementation was supported by 87% of the value

of creditors present at the meeting of 17 July 2012. It is only SARS who takes the opposite view.

[62] I accordingly incline to the view that, in practical terms, nothing will be achieved if the business rescue proceedings are now to be converted into a liquidation. On the contrary, it appears to me to be inevitable that, by placing the company in liquidation, all that will be achieved is to add the costs of liquidation to those already incurred in the business rescue proceedings.

[63] If the business rescue proceedings are now terminated, the liquidation process will have to be re-introduced in terms of section 131 (6) of the Act. This would entail, *inter alia*, the appointment of liquidators, the proof of claims by some two hundred creditors, meetings of creditors and the preparation of a liquidation and distribution account. All of this will take time and result in the incurring of additional costs. It appears to me that this will not only cause the payment of the claims of the company's creditors to be delayed, but due to the increased costs, their return will be reduced. Put differently, I am satisfied that the continuation of the business rescue proceedings will result in a better return for the company's creditors as a whole, than would result from the re-introduction of the liquidation process.

[64] In my opinion, there is no practical reason for the conversion of the business rescue proceedings to liquidation. It seems to me that, on a conspectus of the evidence as a whole, there is much to be said for the BRPs' contention, that the only purpose of converting this business rescue to liquidation, would be to ensure that SARS is treated as a preferent creditor.

[65] I therefore find that the BRPs should not be ordered to take the steps specified in section 141 (2) (a) (i) and (ii) of the Act.

CONCLUSION

[66] In the premises, the application falls to be dismissed. The BRPs as the successful parties are entitled to their costs. I am satisfied that the employment of two counsel was justified.

[67] In the result, the *rule nisi* issued on 3 August 2012, is discharged and the application is dismissed with costs, including the costs consequent upon the employment of two counsel.

P B Fourie, J