IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO.: 5009/2023P

Reportable.

In the matter between:

JBSA PROPS (PTY) LTD	**First Applicant**
WILMEG INVESTMENTS (PTY) LTD	**Second Applicant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	**First Respondent**
NEDBANK LIMITED	**Second Respondent**
INVESTEC BANK LIMITED	**Third Respondent**
KURT ROBERT KNOOP N.O.	**Fourth Respondent**
JOHAN LOUIS KLOPPER N.O.	**Fifth Respondent**

JUDGMENT

Olsen J:

[1] The first applicant, JBSA Props (Pty) Limited, is the sole shareholder of the second applicant, Wilmeg Investments (Pty) Limited. The first applicant bought the second applicant out of business rescue for a sum of about R600 million.

[2] The second applicant went into business rescue on 26th May, 2020. The appointed business rescue practitioners (the fourth and fifth respondents in these proceedings, who have taken no part in them) delivered a business rescue plan to creditors on 14th December 2020, and a meeting was held to consider the plan on 23rd

December 2020. The South African Revenue Services ("SARS"), the first respondent in these proceedings, was at all material times a creditor of the second applicant in respect of value added tax ("VAT"). SARS did not attend the meeting on 23rd December 2020, and did not appoint a proxy to vote in favour of or against the approval of the plan.

[3] The plan proposed two options, the first of which involved the purchase of the shares in the second applicant by the first applicant. It received the overwhelming support of the creditors who did vote.

[4] The business plan provided for conditions which had to be fulfilled before the plan could be regarded as having been implemented, as a result of which the business rescue of the second applicant only terminated on 13th December 2021. The second applicant continued to conduct its business (principally the letting of immovable property) throughout the period during which it was in business rescue. It was (and remains) a VAT vendor. It rendered its VAT returns through the period of business rescue. Almost all of its self-assessments for VAT reflected an obligation on its part to pay SARS. However no payments were made, whether before or after the approval of the business plan. The second applicant only resumed payment of the amounts of VAT declared by it when its business rescue ended.

[5] The correspondence which has been put up with the papers reveals that after the second applicant emerged from business rescue a dispute arose between the second applicant and SARS over whether the former was obliged to pay the VAT which had been generated as a result of trading during business rescue. (The applicants' founding papers suggest that the dispute extended to the question as to whether the VAT debt owing at the commencement of business rescue was payable. It is not clear to me that SARS ever contended that it was; but the issue can be ignored as SARS has not pursued that contention in these proceedings.) The second applicant contended that the effect of the business plan was that, save for an inconsequential dividend, the claims of SARS for post-commencement VAT incurred up to 13th December 2021 had been extinguished. SARS rejected that contention.

[6] In March 2023 SARS issued notices directed at each of Nedbank Limited and Investec Bank Limited (the third and fourth respondents in these proceedings, who

have taken no part in them) appointing them as agents in terms of section 179 of the Tax Administration Act, 28 of 2011. As a result some R286 000 was extracted from the second applicant's Nedbank account and paid to SARS, and R5000 was extracted from the second applicant's Investec account and paid to SARS. That led to the launch of the present application.

[7] The applicant seeks an order that, pending the final determination of proceedings to be brought by SARS to set aside the second applicant's business rescue plan, or pending the final determination of proceedings to be brought by the first and second applicants seeking a declaratory order enforcing the business plan as the applicants interpret it, SARS is interdicted from pursuing the VAT debt it claims from the second applicant and from making any agency appointments entitling it to be paid monies lodged in the second applicant's accounts with the second and third respondents.

[8] SARS has made it clear that it has no intention of seeking an order setting aside the approval of the business plan. In the circumstances the central issue in this case is whether the applicants have established *prima facie* that the second applicant's obligations to pay VAT generated by its trading during the course of business rescue were compromised in terms of the approved business plan. Mr Bhana SC, who appeared for the applicants, has argued that the low-level test for interim relief (a *prima facie* case open to some doubt) applies. His submission is theoretically correct. But where the facts relied upon by an applicant for interim relief are undisputed, and the issue between the parties turns on the question as to whether, as a matter of law, those undisputed facts generate or support the rights contended for by an applicant, the benefit to an applicant of the low-level test may be more illusory than real. Upon the assumption that the other requirements for an interim interdict are satisfied, where the legal consequences of the admitted facts have been dealt with in argument, a court asked to grant an interim interdict must grant the relief if it decides that the law supports a conclusion that the right sought to be protected is established; but, in my view, refuse it if it decides that the law does not recognise the right asserted by the applicant. The issue of what is to be done when pressing urgency, and a lack of time for full argument on the law, is an obstacle to an immediate decision on the case does not arise here. (See the discussion in *Zulu v Minister of Defence and others* 2005 (6) SA 446 (T) at

paras 37 to 42.) SARS provided an interim undertaking, and the case proceeded at a normal pace. The issues were fully argued.

[9] The provisions of the business plan which had a bearing on the position of SARS were sparse indeed. They may be summarised as follows.

a) Paragraph 14.3 provided as follows.
"The sale of shares proposed herein contemplates a full extinction of all creditor claims by payment and/or compromise against final adoption of this plan".
b) The situation post-commencement of the business rescue was dealt with in paragraph 17 of the plan. Paragraph 17.4 recorded that the practitioners had continued trading the business as a going concern and without interruption. Paragraph 17.5 read as follows.
"All current expenses (save for the South African Revenue Service VAT liability) have been paid for in the normal course of business."
c) It was apparent from various provisions of the plan that the fulfilment of a number of conditions would delay the company's exit from business rescue.
d) Paragraph 15 recorded that the sale of shares option would result in the outcome tabulated in paragraph 5.6.
e) Paragraph 5.6 recorded that the proposals would result in the payment of dividends (expressed in cents in the Rand) reflected in the table incorporated in the paragraph. The third row in the table is headed "PCF creditors". It records in the column dealing with the sale of shares option that SARS would receive 0.0265 cents in the rand.
f) Paragraph 5.7 reads as follows.
"Should the creditors vote for approval of this plan as envisaged by s 153 (2) of the Act then the company will continue to trade and discharge the appropriate dividend to the aforementioned creditors against the effective date."

[10] There is no evidence of any prior consultation by the applicants or the business rescue practitioners with SARS on the subjects of the business rescue plan or the Vat which had been, and would continue to be incurred during business rescue. The plan was sent to creditors by email on 14th December 2020 and the meeting was held remotely on 23rd December 2020.

[11] The post-commencement VAT debt in issue in these proceedings amounts to about R24 million. About R9 million was incurred between the commencement of business rescue and the approval of the plan on 23rd December 2020. A further R15 million was incurred between the date of approval of the plan and the second applicant's exit from business rescue on 13th December 2021.

[12] The case SARS was called upon to meet in the founding papers is that SARS is precluded from claiming anything beyond the tendered dividend (which it rejected) "by virtue of section 152(4) of the Companies Act 71 of 2008 read with section 154". (I quote from the founding affidavit of Mr Alexander, the sole director of each applicant.) Mr McCabe, the general manager of the second applicant, points out that the first respondent did not react to any of the emails concerning the proposed plan sent to it (as they were to all creditors) in advance of the meeting, and chose not to attend. He says: "SARS by this conduct signified its consent to the business plan which was implemented".

[13] In his supplementary answering affidavit Mr Makhathini, who is employed by SARS as an Operational Specialist: Business Rescue, answered these allegations by pointing out that the amount now claimed against the second applicant did not include monies owing before business rescue commenced, and denied that SARS "acquiesced to the discharge, either in whole or in part, of the debt owing to it by the applicant."

[14] The issue to be decided in this case is accordingly confined. The cornerstone of the applicant's argument is section 152(4) of the Companies Act, 2008 which reads as follows.

> "A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person-
> (a) was present at the meeting;
> (b) voted in favour of adoption of the plan; or
> (c) in the case of creditors, had proven their claims against the company."

[15] Section 154 of the Companies Act, which must be read with s152(4), provides as follows under the heading "Discharge of Debts and Claims".

"(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan."

[16] The facts of this case highlight a crucial difference between ss 154(1) and (2) of the Companies Act. Subsection (1) speaks to any debt owing to a creditor. Subsection (2) deals only with debts owed before the commencement of the business rescue process.

[17] Both ss 154 (1) and (2) deal with the loss of a right to enforce a debt. The automatic loss of the right dealt with in ss (2) is confined to pre-commencement debts. Approval of the plan brings about that all pre-commencement creditors lose the right to enforce their pre-commencement claims "except to the extent provided for in the business rescue plan". A creditor does not have to accede or agree to that outcome. It is imposed on a creditor even in the face of objection. Section 152(4) is to that effect.

[18] Section 154(1) operates quite differently. It applies to a specific creditor who has acceded to the discharge of the whole or part of a debt owed to the creditor by the company. The scope of its operation is not confined to pre-commencement debts. Accordingly, if a creditor accedes to the discharge of the whole or part of a post-commencement debt the business rescue plan may provide that, if it is duly implemented, the creditor will lose the right to enforce that debt or the relevant part of it. The inevitable conclusion must be that a business rescue plan may not provide that a creditor loses the right to enforce in whole or in part a post-commencement debt if the creditor has not acceded to the discharge of that debt in whole or in part.

[19] The applicants argue against this analysis of s 154, relying essentially on the judgment in *Tuning Fork (Pty) Limited t/a Balanced Audio vs Greeff and another* 2014 (4) SA 521 (WCC) at paragraph 77.

> "[77] Section 154(1) provides that a plan may stipulate that, if it is implemented in accordance with its terms and conditions, "a creditor who has acceded to the discharge of the whole or part of the debt owing to that creditor will lose the right to enforce the relevant debt or part of it". Section 154(2) provides that if a plan has been approved and implemented, "a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan". The two subsections appear to me to some extent to overlap. Both of them, in turn, might be considered unnecessary in the light of section 152(4), which states that a duly adopted plan is binding on the company and on all of its creditors, whether or not the creditor was present at the meeting, voted for or against the plan or proved a claim. The use of the word "acceded" in section 154(1) also strikes me as inapt, because the lawmaker could surely not have intended that the discharge contemplated in that subsection would depend on whether or not the creditor had agreed to the term in question; that individual agreement is not necessary appears from section 152(4)."

[20] However, in *Van Zyl vs Auto Commodities (Pty) Limited* 2021 (5) SA 171 (SCA) the Supreme Court of Appeal reconsidered the analysis of s 154 of the Companies Act in a judgment co-written by the learned Judge who penned the judgment in *Tuning Fork*. The enquiry in *Van Zyl* concerned the liability of a surety for a compromised debt. Nevertheless the analysis, especially of section 154(1), is significant in the present context. I quote from paragraphs 22 and 24 of the judgment.

> "[22] The subsection commences by saying that a business rescue plan 'may provide' that, if it is implemented in accordance with its terms, a creditor who has 'acceded' to the discharge of the whole, or part, of a debt owing to it will lose the right to enforce the relevant debt. The permissive language, and the fact that it is concerned with the terms that may be included in a business rescue plan, is consistent with it being in the first instance an empowering provision enabling the business rescue plan to contain a provision that operates to discharge the company's indebtedness to particular creditors. ..."

"[24] It is unclear what is required for a creditor to 'accede' to the discharge of the debt. Does it mean that they must have agreed to it? If so, is the agreement constituted by voting in support of the plan, or merely by accepting the benefits under the plan, or in some other way? The answers to these questions are by no means clear-cut. The most obvious way for a creditor to 'accede' to the discharge of a part or all of the company's indebtedness would be by voting in favour of a business rescue plan providing for such discharge. We need not explore whether there are other ways in which such accession may take place. We are inclined to agree with Gorven J in *DH Brothers* [*DH Brothers Industries (Pty) Limited vs Gribnitz N.O. and Others* 2014 (1) SA 103 (KZP)] that the section contemplates a discharge brought about by the voluntary action of the creditor, or consented to by way of an overt act, rather than a compulsory deprivation of rights against the company. That approach would be consistent with the principle that language is not ordinarily to be construed as depriving people of their existing rights. It would also be consistent with the constitutional protection against the deprivation of property."

[20] In my view the position is as follows.

(a) Section 152(4) deals generally with the provisions of a business plan. It renders all the provisions of an approved business plan binding on all creditors and all holders of the company's securities, irrespective of whether any of those persons do not support the plan. The section deals only with the enforceability of an approved plan. It says nothing about the content of a plan.

(b) The subject of that section must be the enforcement of business plans which have been drawn up in accordance with law, which do not contain unlawful provisions, and which do not infringe the constitutional rights of any affected person save to the extent that such a course is sanctioned by law.

(c) Section 154 of the Companies Act serves a different purpose. It addresses the permissible content of a plan on the crucial issue of debt enforcement.

(d) Section 154(2) allows a plan to provide for the deprivation of a creditor's right to enforce its claim (in full or in part) against a company. But the deprivation

of a creditor's right to enforce a debt through the compulsion exerted by a vote in favour of a plan is expressly confined to pre-commencement debts.

(e) Otherwise the loss of a right to enforce a debt can only be included in a business plan if the affected creditor accedes to such a measure. Section 154(1) is to that effect.

(f) Such provisions, which regulate what may lawfully be made part of a business plan, do not contradict the general provision of section 152(4), that an adopted business plan is binding.

(g) In the result, a proposed business plan which depends for its viability on a compromise of post-commencement debts is futile unless all the affected post-commencement creditors accede to the compromise required of them under the plan.

[21] I am in respectful agreement with the proposition that at least some overt act must be performed by the creditor in order to convey that it accedes to the discharge of a post-commencement debt owed to it. There is no evidence of any such act, or of any verbal expression of agreement, on the part of SARS.

[22] It will be recalled that it is the applicants case that the failure of SARS to attend the meeting of creditors signified its acceptance of the business plan. That is a claim of acquiescence. What section 154(1) requires is that the creditor should have acceded to the discharge of the debt; not that it should have acquiesced in the discharge of the debt. The term 'acquiesce' is used more often than not to signify a tacit acceptance. Be that as it may, in my view there is no room for a contention that there was acquiescence in this case. At the time that the business plan was sent to creditors, some nine days before the meeting, SARS had not received a request that it should compromise its post-commencement claims. The absence of SARS from the meeting was equally consistent with, for instance, its officers taking the view that what was proposed with regard to its post-commencement claim was unenforceable in law, as a result of which it was not necessary to vote against the plan.

[23] Furthermore, SARS had played no part in the formulation of the plan. It had not created a situation which rendered it duty-bound to register its dissent. The situation was of the making of the business rescue practitioners and, presumably, the first

applicant in its capacity as offeror for the shares. The principle is as stated in *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422.

> "Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon such other a condition to that effect."

Neither does s 154(1) of the Act create an obligation to express dissent. It does not provide that a creditor who fails to object shall be taken to have acquiesced in the discharge of its claim.

[24] The above considerations aside, SARS is a special case. It is common cause that at the time that the business plan was to be voted upon the second applicant owed a post-commencement VAT debt to SARS. Section 154(1) required SARS to accede to the compromise of that debt if it was to be rendered unenforceable and discharged in terms of the business plan. Part D of chapter 14 of the Tax Administration Act lays down the circumstances in which a senior SARS official may authorise the compromise of a portion of a tax debt. The process is dealt with in sections 200 to 203 of the Tax Administration Act, and section 204 then provides that to compromise a tax debt a written agreement must be signed by a senior SARS official and the taxpayer. There is no evidence at all that any of this was done. What these provisions illustrate is that there is no room for a contention that SARS tacitly acceded to the compromise of the post-commencement tax debt which had accrued up to the date of the meeting at which the business plan was approved.

[25] The situation with regard to the sum of R15 million which accrued thereafter up to the date of termination of the business rescue process is more than a little different. At the time the compromise was allegedly reached between the second applicant and SARS (i.e. upon approval of the business plan) there was no post-compromise tax debt. In reality what the applicants contend for is an agreement in terms of which the second applicant could continue to collect VAT from its debtors as though it was legally obliged to do so under the Value Added Tax Act, but keep 99.97 % of that money for itself, instead of accounting to SARS for it. I was not referred to a provision of any law which would permit that to be done by SARS. That is unsurprising for more than one reason, amongst which is the fact that every tax invoice issued under such an arrangement would be a false tax invoice.

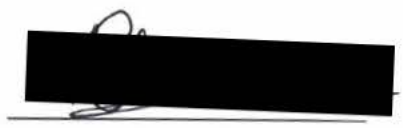
[26] There are perhaps other routes to the conclusion to which I have come, but they have not been raised by SARS.

[27] For the reasons stated above I make the following findings.

(a) There could in law be no compromise of the claim against the second applicant for post-commencement VAT unless SARS acceded to that compromise.
(b) On the evidence placed before me, which is undisputed save for the inferences sought to be drawn from it, SARS did not accede to that compromise.
(c) The applicants have accordingly failed to establish the *prima facie* case they require in order to justify the relief they seek.

[28] I make the following order.

1. **The application is dismissed.**
2. **The costs of the application shall be paid by the applicants, their liability being joint and several. Scale C shall apply to the taxation of counsel's fees.**



Olsen J

Case Information:

Date of Hearing:	18 October 2024
Date of Judgment:	10 January 2025
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