

SOUTH AFRICA / JUDGMENT

Mahomed Mahier Tayob N.O and Another v Standard Bank of South Africa Ltd and Others (078256/2023) [2024] ZAGPJHC 1158 (14 November 2024) [2024] ZAGPJHC 1158

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally

CASE / FILE NUMBER

078256/2023

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RREPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Reportable:

No

Of

Interest to other Judges: Yes

14 Nov

2024 Vally J

In

the matter betwee

CASE NO: 078256/2023

In the matter:-

MAHOMED

MAHIER TAYOB N.O.

First

Applicant

S

SURTEE ESQUIRE (PTY) LTD (in business rescue)

Second

Applicant

and

THE

STANDARD BANK OF SOUTH AFRICA LTD

First
Respondent
ABSA
BANK LTD
Second
Respondent
AIRPORTS
COMPANY SOUTH AFRICA SOC LTD
Third
Respondent
LIBERTY
GROUP LTD
Fourth
Respondent
V&A
WATERFRONT (PTY) LTD
Fifth
Respondent
VIVIDEND
INCOME FUND LTD
Sixth
Respondent

JUDGMENT

Vally J

Introduction

- [1] The second applicant is a family owned retail business that retails high end fashion clothes. It has operated in this industry for several decades now. It owned 29 stores around the country. According to the first applicant, the business rescue practitioner (BRP), it suffered a severe decline in turnover during the lockdown period imposed by government in 2020 when the world experienced the Covid-19 pandemic. At the same time, management was poor, and the business had weak internal controls, resulting in theft of goods. It lost its supply agreement with a major fashion house, Hugo Boss. Hugo Boss was its premier brand. In response to the loss of the Hugo Boss brand it ‘embarked upon an expansive strategy to open more stores and generate more revenue, [which] resulted in further debt and trading losses.’ The second applicant was at the time heavily indebted to various financial institutions, the first respondent being the primary one. It was also indebted to various landlords from whom it had rented space to conduct its operations. According to the BRP these problems caused severe liquidity difficulties, which imperilled the very existence of the business.

- [2] In response to these difficulties, the directors, on 17 February 2023, resolved to place the second applicant in business rescue (BR). They nominated the first applicant to be the BRP. He accepted the nomination. In the meantime, a number of the creditors had commenced with litigation against the second applicant.
- [3] The second applicant's debt to the first respondent is split into two parts: secured and unsecured. The secured portion is split into five parts, the total of which is R55 878 446.02 (R59m). The unsecured portion amounts to R19 003 014,93 (R19m). The sum total of debts is R74 881 460.95 (R75m). The debts are interest bearing and therefore increasing by the day.
- [4] On 3 March 2023 the BRP called the first meeting of creditors. He requested and was granted an extension until 19 May 2023 to publish a business rescue plan (Plan). At this meeting the BRP reminded all those present that BR remains a creditor driven process. Having secured the extension of time, the BRP published the Plan as promised on 19 May 2023. The second meeting of the creditors scheduled for 2 June 2023 had to be postponed because of, amongst others, an urgent application brought in this Court by the first respondent to perfect its general notarial bond. On 18 July 2023 the Plan (now revised) was published. On 31 July 2023 the second meeting of creditors took place, where the Plan was presented and the creditors asked to vote for its adoption. The Plan contained two proposals, both designed to restore the health of the second applicant. The first respondent's debt translated into 37% of the eligible votes. It, as well as the other five respondents, voted against the adoption of the Plan.
- [5] It bears mentioning that prior to the second meeting taking place representatives of the first and second respondents wrote to the BRP and voiced their concerns with the Plan. They detailed their concerns, raised questions about the business of the second applicant, indicated that in their opinion the implementation of the Plan would not achieve the objective set out in the Plan, and stated why both proposals were unacceptable to the first and second respondents. The BRP did not respond to these communications. Nor did he bring them to the attention of the Court.
- [6] The BRP instituted the present application in response to the respondents voting against the adoption of the Plan. He seeks to have their votes set aside on the grounds that they are inappropriate. The application is sanctioned by s153(1)(a)(ii) of the Companies Act 71 of 2008 (Act). The first and fourth respondents opposed the application, but the fourth respondent withdrew its opposition just prior to the commencement of the hearing.

The Plan, its benefits and risks

- [7] At the commencement of the BR there were approximately 90 creditors who were owed a total amount of R254 251 099.57 (R254m). However, only claims totalling R236 677 281.99 (R237m) were received by the BRP. Later, in his founding affidavit the BRP said the total is R207 746 604.41 (R207m). Nothing really turns on the fact that they are different, and given the fluidity of a BR process it is understandable that the actual amounts will change over time.

[8] Pre-commencement, the second applicant owned 29 stores throughout the country. Upon taking control of the business the BRP found most of the stores were uneconomical to operate. He decided that 22 (76%) of them had to be closed, and only seven (24%) should be allowed to continue operating. However, only five of them remain at the moment. Two of the stores were closed as the landlord, the fourth respondent, refused to extend their leases – this is elaborated upon below.

[9] The projected income and expenditure for the five stores is:

Store 1 Amount Date Opening Balance Sales Expenditure Profit/Loss June 2023 R 0,00 R 700 000,00 R 497 670,00 R202 330,00 July 2023 R 202 330,00 R 700 000,00 R 497 670,00 R404 660,00 August 2023 R 404 660,00 R 700 000,00 R 497 670,00 R606 990,00 September 2023 R 606 990,00 R 700 000,00 R 497 670,00 R809 320,00 October 2023 R 809 320,00 R 700 000,00 R 497 670,00 R1 011 650,00 November 2023 R 1 011 650,00 R 700 000,00 R 497 670,00 R1 213 980,00 December 2023 R 1 213 980,00 R700 000,00 R 497 670,00 R1 416 310,00 February 2024 R 1 618 640,00 R 700 000,00 R 497 670,00 R1 820 970,00 March 2024 R 1 820 970,00 R 700 000,00 R 497 670,00 R2 023 300,00 April 2024 R 2 023 300,00 R 700 000,00 R 497 670,00 R2 225 630,00 May 2024 R 2 225 630,00 R 700 000,00 R 497 670,00 R2 427 960,00 Store 2 Amount Date Opening Balance Sales Expenditure Profit/Loss June 2023 R - R 575 000,00 R 464 776,42 R110 223,58 July 2023 R 110 223,58 R 575 000,00 R 464 776,42 R220 447,16 August 2023 R 220 447,16 R 575 000,00 R 464 776,42 R330 670,74 September 2023 R 330 670,74 R 575 000,00 R 464 776,42 R440 894,32 October 2023 R 440 894,32 R 575 000,00 R 464 776,42 R551 117,90 November 2023 R 551 117,90 R 575 000,00 R 464 776,42 R661 341,48 December 2023 R 661 341,48 R 575 000,00 R 464 776,42 R771 565,06 January 2024 R 771 565,06 R575 000,00 R 464 776,42 R881 788,64 February 2024 R 881 788,64 R 575 000,00 R 464 776,42 R992 012,22 March 2024 R 992 012,22 R 575 000,00 R 464 776,42 R1 102 235,80 April 2024 R 1 102 235,80 R575 000,00 R 464 776,42 R1 212 459,38 May 2024 R 1 212 459,38 R 575 000,00 R 464 776,42 R1 322 682,96 Store 3 Amount Date Opening Balance Sales Expenditure Profit/Loss June 2023 R 0,00 R 175 000,00 R 166 551,92 R8 448,08 July 2023 R 8 448,08 R175 000,00 R166 551,92 R16 896,16 August 2023 R 16 896,16 R175 000,00 R 166 551,92 R25 344,24 September 2023 R 25 344,24 R 175 000,00 R 166 551,92 R33 792,32 October 2023 R 33 792,32 R 175 000,00 R 166 551,92 R42 240,40 November 2023 R 42 240,40 R 175 000,00 R 166 551,92 R50 688,48 December 2023 R 50 688,48 R 175 000,00 R 166 551,92 R59 136,56 January 2024 R 59 136,56 R 175 000,00 R 166 551,92 R67 584,64 February 2024 R 67 584,64 R 175 000,00 R 166 551,92 R76 032,72 March 2024 R 76 032,72 R 175 000,00 R 166 551,92 R84 480,80 April 2024 R 84 480,80 R 175 000,00 R 166 551,92 R92 928,88 May 2024 R 92 928,88 R 175 000,00 R166 551,92 R101 376,96 Store 4 Amount Date Opening Balance Sales Expenditure Profit/Loss June 2023 R - R 185 000,00 R 138 390,66 R46 609,34 July 2023 R 46 609,34 R 185 000,00 R 138 390,66 R93 218,68 August 2023 R 93 218,68 R 185 000,00 R 138 390,66 R141 631,18 September 2023 R 141 631,18 R185 000,00 R 138 390,66 R190 043,68 October 2023 R 190 043,68 R 185 000,00 R 138 390,66 R238 456,18 November 2023 R 238 456,18 R 185 000,00 R 138 390,66 R286 868,68 December 2023 R 286 868,68 R 185 000,00 R 138 390,66 R335 281,18 January 2024 R 335 281,18 R 185 000,00 R 138 390,66 R383 693,68 February 2024 R 383 693,68 R 185 000,00 R 138 390,66 R432 106,18 March 2024 R 432 106,18 R 185 000,00 R 138 390,66 R480 518,68 April 2024 R 480 518,68 R185 000,00 R 138 390,66 R528 931,18 May 2024 R 528 931,18 R 185 000,00 R 138 390,66 R577 343,68 Store 5 Amount

Date Opening Balance Sales Expenditure Profit/Loss June 2023 R - R 150 000,00 R 121 914,44 R28 085,56 July 2023 R 28 085,56 R 150 000,00 R 121 914,44 R56 171,12 August 2023 R 56 171,12 R 150 000,00 R 121 914,44 R84 256,68 September 2023 R 84 256,68 R 150 000,00 R 121 914,44 R112 342,24 October 2023 R 112 342,24 R 150 000,00 R 121 914,44 R140 427,80 November 2023 R 140 427,80 R 150 000,00 R 121 914,44 R168 513,36 December 2023 R 168 513,36 R 150 000,00 R 121 914,44 R196 598,92 January 2024 R 196 598,92 R 150 000,00 R 121 914,44 R224 684,48 February 2024 R 224 684,48 R 150 000,00 R 121 914,44 R252 770,04 March 2024 R 252 770,04 R 150 000,00 R 121 914,44 R280 855,60 April 2024 R 280 855,60 R 150 000,00 R 121 914,44 R308 941,16 May 2024 R 308 941,16 R 150 000,00 R 121 914,44 R337 026,72

- [10] The BRP claims to have secured a potential funder for post-commencement finance (PCF), who at the time the Plan was published wished to remain anonymous. The post-commencement financier, he says, ‘may be’ willing to put up R2 291 951, 88 (R2.3m), conditional upon the Plan being accepted by all the creditors, and he ‘may be’ willing to buy out certain creditors as well as inject further working capital into the overall business. Just prior to the hearing the identity of this potential financier was revealed. He shares the same surname as that of the BRP. Nothing is said as to whether they are related or not. The first respondent took issue with this silence. Its counsel contended that it raised serious questions about the bona fides of both the potential financier and the BRP. He asked that an adverse inference be drawn therefrom. In view of the conclusion I have arrived at, this is not necessary.
- [11] Of the two proposals to the creditors, only the second one is relevant. This proposal promises all creditors that they will receive 100% of the capital sum owed to them over a period of eleven years and four months, and with a nine-month repayment holiday. No creditor will receive any interest on the monies owed to them. The second applicant would remain in BR all this time under the stewardship of the BRP, who will earn R2000 per hour with no indication of, or limitation on, the number of hours the BRP is to spend during these eleven years and four months.
- [12] The benefits of the Plan, according to the BRP, are that (i) a more favourable return could be achieved for the creditors should the Plan be implemented than if the second applicant is immediately liquidated, (ii) the period for completion of the BR would be shorter than the period it would take to liquidate it, and (iii) 57 employees will retain their employment. The case for declaring the votes of the respondents inappropriate is pivoted on these three allegations.
- [13] The BRP identifies three risks of the Plan: (i) creditors terminating their working relationship, (ii) adverse litigation (no details are given as to what is envisaged here), and (iii) ‘(m)aterial non-fulfilment of the assumptions and conditions’ of the Plan.

- [14] Despite this he opines that: (i) ‘there is a reasonable prospect that the [second applicant] can be rescued’; (ii) ‘the Plan balances the rights and interests of all relevant stakeholders’; and, (iii) should the Plan not be adopted, the BR ‘proceedings would have to be converted to liquidation proceedings immediately.’

The first, second and fourth respondents’ concerns with the Plan

- [15] Prior to the second meeting the first respondent’s attorney wrote to the BRP informing him that the first respondent was not satisfied with the Plan in its current form, and that it would be voting against its adoption. She also informed him that the first respondent had sight of an email sent by the attorneys of the second respondent to the BRP, and that the first respondent fully agreed with the contents of the email.
- [16] In the email the second respondent voiced its concerns with the Plan. These are: (i) the Plan was vague in many respects, (ii) it asked for further clarity, which was not provided, and (iii) the duration of the proposed moratorium was unsupported by the tenor of Chapter 6 the Act, (iv) it was unacceptable for the Plan to be voted on before the issues of the PCF were settled,
- (v) it was not acceptable that the fees already charged by the BRP were not revealed, and (vi) the fees the BRP anticipated earning over the period of eleven years and four months had to be revealed. However, despite its misgivings about the Plan and voting against it, the second respondent did not oppose the application.
- [17] The fourth respondent is the owner of two properties where the second applicant had leased premises for two of its flagship stores. The leases terminated on 29 February 2024. It made its position clear at the second meeting of the creditors, that it would not under any circumstances have a business relationship with the second applicant in the future. Thus far, it has had a ‘toxic’

relationship caused by the second applicant’s ‘unbusinesslike’ behaviour. Accepting the Plan is equivalent to committing ‘commercial suicide’. Under normal circumstances it will not enter into any lease agreements with a tenant for more than five years, as it is necessary to investigate the market forces and the impact of rentals every five years. According to it, the second applicant is hopelessly insolvent and the Plan, even on the most optimistic of expectations, will not solve the second applicant’s problems. It voted against the Plan.

The second meeting of the creditors where the voting was conducted

- [18] At the meeting, an employee representative informed those present that since the BRP has taken over the businesses, there were ‘numerous’ positive changes in them, such as ‘stock balancing and less excuses from staff and employees getting paid on time’. She also mentioned the obvious that the ‘job is important to employees.’

- [19] The representative of the fourth respondent informed the meeting it would not be renewing the leases held by the second applicant. The two flagship stores would, therefore, have to close. The BRP responded by saying that this matter is 'sub-judice' and closed the discussion on the issue.
- [20] All the respondents voted against the second proposal. The BRP notified the meeting that he would be instituting the present application within five days of the meeting. He kept his promise.

Latest developments

- [21] An application to file a supplementary affidavit was made by the first respondent about two months prior to the hearing of the matter. The BRP did not oppose the application, but responded by affidavit two weeks before the hearing took place where he presented his version of the latest facts. Both affidavits were admitted into evidence.
- [22] The first respondent calls attention to the more recent financial situation of the second applicant, which is revealing of the achievements of the BRP since he took control of the business. The financial records from June 2023 to July 2024 (the same period referred to in projections of the BRP in the table at [9]) show that the consolidated turnover of all the stores fell significantly short of what was expected by the BRP as reflected in his Plan, and that it made losses for six of the twelve months. And, in some of the months, where no loss is shown, the amount reflected as turnover is incorrect as it includes loans from an unknown third person. The financial record tabulated reads:

Month Turnover According to Plan Available to Pay Creditors Actual Turnover Actual Net Profit
June '23 R2 985 000.00[1] R529 563.89 R2 164 955.69 R57 812.79 July '23 R2 985 000.00 R529 563.89
R2 381 690.33 R171 402.01 Aug '23 R2 985 000.00 R529 563.89 R2 281 231.29

- R32 593.04 Sep '23 R2 985 000.00 R529 563.89 R1 871 373.04
- R158132.27 Oct '23 R2 985 000.00 R529 563.89 R1 775 545.13
- R140 457.61 Nov' 23 R2 985 000.00 R529 563.89 R2 417 148.70 R230 727.01 Dec ' 23 R2 985 000.00 R529 563.89 R2 575 969.31 R84 357.05 Jan '24 R2 985 000.00 R529 563.89 R2 605 013.03
- R633 816.20 Feb '24 R2 985 000.00 R529 563.89 R2 352 085.48 R239 954.33 March '24 R2 985 000.00 R529563.89 R1 682 406.96 R201 224.28 April '24 R2 985 000.00 R529 563.89 R2 356 307.12 R506 464.76 May '24 R2 985 000.00 R529 563.89 R2 027 082.67 R72 833.44 June '24 R2 985 000.00 R529 563.89 R1 082 816.51 -R223 276.23 July '24 R2 985 000.00 R529 563.89 R1 469 457.33 -R28 731.72

- [23] The first respondent has access to some of the bank accounts of the second applicant. It found that the cash flow reflected in these accounts did not reconcile with the amounts reflected as turnover in the above table. It has asked the BRP if there are accounts with other banks, and if so, could he furnish it with copies of those bank statements. The BRP did not respond.
- [24] More importantly, the BRP accepts that the turnover has fallen short of the expectations reflected in the Plan, and admits to concluding short-term loan agreements with the directors, which he says was necessary to meet some of the monthly expenses of the business. The loans were unsecured, interest free and have now been repaid. They would not have been taken had the first respondent not rejected the Plan thus delaying the PCF. The noteworthy fact though, is that the BRP is not able to run the business without seeking short-term loans on a regular basis.
- [25] The first respondent has received payments, called dividends, during some of these months, but they are insufficient to cover even the monthly interest due to it. The BRP responded to the contentions of the first respondent as follows: despite the projections not being met, and that the payments received by first respondent may well be below the monthly interest due to it, it is more than it would receive if the second applicant is liquidated.

The PCF

- [26] The Plan incorporates a potential PCF of R2 291 951, 88 (R2.3m). The financier 'may be' willing to invest this amount but only after the Plan has been accepted by all the creditors. He also 'may be' willing to buy out certain of the debts of the second applicant. As there is no firm commitment by this individual to provide the PCF, it has to be accepted that the BRP is wrong to say in the Plan that he has secured PCF funding. It is also wrong for him to attribute blame for his failing to the respondents because they have voted against the adoption of the Plan. The respondents cannot assume responsibility for the equivocation of the potential provider of the PCF. Even if the PCF had been secured, it is such a paltry sum in relation to the debt that it is unlikely to have a meaningful impact on the business. It is unrealistic to expect that a once-off sum of R2.3m would be the only amount of working capital the second applicant would require in order to run the business and produce a sufficient profit to pay off a debt of over R236m, even over eleven years and four months.

Comments on the Plan

- [27] The benefits of the Plan for creditors, claims the BRP, is two-fold: firstly, the BR process will be shorter than a liquidation and secondly, they will achieve a better dividend from the BR process than they would under liquidation.
- [28] On the first claim, he says the liquidation process would take 'two years to complete, whereas the envisaged [BR] Proceedings is expected to be completed in a shorter time ... with a favourable outcome [for] the Affected Persons.'^[2] This claim is very strange to say the least. On his own account the BR process is to last eleven years and four months and the

liquidation would last two years. How he comes to the conclusion that the period for the liquidation would be longer than that of the BR is difficult to fathom.

[29] On the second claim, he says that if they were willing to allow him to run the business at a cost of R2000.00 per hour

- how many hours he would be working each week, month or year is not revealed - for eleven years and four months, with a nine-month repayment holiday, they will each be re-paid the full amount of capital owed to them. The claim is without merit. It cannot seriously be disputed that the business is not rescuable. The BRP's opinion to the contrary is not rational.

[30] That 76% of the business had to be closed in the five months that the BRP had taken control is indicative of how dire the problems of the second applicant were when BR commenced. Since the BRP's intervention nothing radical has changed to the advantage of the second applicant, its creditors or even its employees. In fact, it has worsened. He has voluntarily closed 22 of the 29 stores and been forced to close two more. Only five stores are operating. A mere 17% of the business remains. This tiny fraction of the business is now expected to repay a huge debt of over R236m. And it is expected to achieve this without having the benefit of retailing a brand, Hugo Boss, which was crucial to its business. On the most optimistic expectations of the BRP its most important store of the five remaining ones is expected to produce a monthly turnover – not profit - of R700 000.00 only (R8,4m per annum) while the other four together are expected to produce a monthly turnover of R1 085 000.00 (R13,02m per annum). The total expected annual turnover would be R21,42m. The BRP does not explain how a turnover of R21,42m would be able to repay the R236m. He simply says, given eleven years and four months with a nine-month repayment holiday, he would be able to repay the entire amount of R236m, but without any interest. The annual expected turnover is less than 10% of the debt. Anyone with a basic knowledge of commerce would know that such a business is unsustainable. Even if the expected turnover was realised and paid over in its entirety to the creditors, which of course is unrealistic, it would take the second applicant just over eleven years to repay the R236m without interest. The situation is, of course, worse for the second applicant as we are referring to turnover and not to profit. Optimistically, the BRP projects a net profit for each month. The combined total expected profit for all five stores over the twelve-month period – the month of January 2024 is inexplicably left out in the case of Store 1 – is

R4 766 390.32 (R4.7m). This profit amount earned over a eleven year and four month period comes to R54 019 090.29

(R54m) only. This is on the most optimistic projection of the BRP. It is well short of the R237m (or even R207m) owed to the creditors. It is also far short of that which is owed to the first respondent, which is R75m without the interest. Thus, on the best case scenario of the BRP there is no hope that all the creditors would receive 100 cents in the Rand. All this - dire as it may be - is based on the expectation of the BRP.

- [31] The experience over the same months as referred to in the Plan shows that the situation is much worse. The actual consolidated turnover during the period referred to falls significantly short of the BRP's expectations. Losses were incurred for six months and the claimed profit in the other six months is exaggerated as the turnover amounts include short-term loans granted by the directors. The BRP accepted in his Plan that there was a risk of the 'material non-fulfilment' of his expectation. It can now be safely said on the available evidence, that the risk is high and very real.

Is the vote of the first respondent inappropriate?

- [32] It is necessary to have regard to the interests of the first respondent, the provision made in the Plan with respect to its interests, and a fair and reasonable estimate of the return it would receive if the business is liquidated.[3]
- [33] The first respondent would have to wait eleven years and four months, with no payment for the first nine months, to recover the present amount owed to it. Its rejection of the Plan in these circumstances is the only sensible thing it could do. It is a financial institution that, inter alia, borrows monies from and lends monies to third parties. It pays interest on the monies it borrows and charges interest on the monies it lends. The difference between the two interest rates is referred to as the spread. For obvious business reasons the latter interest needs to be higher than the former, resulting in a positive spread. If the situation was reversed and the spread is negative, the first respondent's business could be compromised, and possibly fatally so.
- [34] The Plan we know from [27] – [31] above will not yield any material benefit for the first respondent. Thus far the first respondent has been paid some money each month but this is short of the interest due to it. There is no hope that in the following eleven years and four months it would receive anything close to what it is owed. In the meantime, the debt continues to grow, as does the debt of all the other creditors.
- [35] The BRP says that there were 57 employees employed at the seven stores he intended to keep operating. We know that there are only five stores left. No information is furnished- not even in the very latest affidavit of the BRP which was filed a week or two before the hearing- as how many employees remain.
- [36] It is correct that the liquidation of the second applicant would negatively impact these employees. This is most unfortunate. There is at the same time no guarantee that their employment would be protected for the proposed eleven years and four months. On the facts established, the probability that they will be retrenched sooner are very high. Allowing the BR process to continue does not make much sense when so much uncertainty prevails. The adverse consequences inflicted upon the employees by the circumstances is not weighty enough to declare the vote of the first respondent inappropriate.

[37] The first respondent takes issue with having to wait for eleven years and four months, as well as having to accept a nine-month repayment holiday before it is paid, whether in full or not. To allow a BR process to last this long is untenable, prejudicial to its business and fundamentally unfair to it as a creditor. There is much merit in its argument.

[38] It needs be said that a BR process that is to last for eleven years is contrary to the spirit and tenor of the Act. As Plasket AJA (as he then was) observed:

‘[BR] 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.’[4]

And:

‘A business rescue process is designed to have a limited timespan. It is not ‘intended to continue indefinitely.’[5] It is designed to address the issue of the financial distress experienced by the company expeditiously,[6] and to eventually conclude with a resolution that either rescues the company, or with a termination of the business rescue process.’[7]

[39] A court should not, I hold, allow an entity to remain in BR for eleven years and four months unless there are exceptional

circumstances and very little uncertainty that it would succeed. It must be one that will show that the prospect of the creditors getting all that is due to them, including the accumulated interest on the amounts owed to them, is near certain.

[40] In conclusion, I hold that the first respondent did not act selfishly, irrationally or even unreasonably by voting against the adoption of the Plan. Its vote was not inappropriate. The application stands to be dismissed.

[41] It is normal in matters such as this, for a respondent to bring a counter-application to place the company in winding-up. There is no such application here.

Costs

[42] The first respondent is entitled to its costs. The applicants engaged two counsel, a senior and a junior. The first respondent has only engaged a senior counsel for part of the time. It should at least be reimbursed accordingly. The C scale would be appropriate.

Order

[43] The following order is made:

1. The application is dismissed.
2. Costs to be taxed on the C scale are to be paid by the second applicant, including the costs of senior counsel where employed.

Gauteng High Court, Johannesburg

Dates of hearing: Date of judgment: 22 October 2024 14 November 2024 For the applicants:
Instructed by: For the first respondent: Instructed by: P Louw SC with T Mathopo (heads of
argument drawn by J Scheepers) A Mothilal Attorneys A Botha SC (heads of argument drawn by
M De Oliveira) Jason Michael Smith Incorporated Attorneys

- [1] These figures are for the original seven stores that the BRP intended to continue operating, but two of them have closed as a result of the fourth respondent terminating their leases.
- [2] The Plan, para 4.9.3.
- [3] Section 153(7) of the Act.
- [4] Diener NO v Minister of Justice and Others 2018 (2) SA 399 (SCA) at [28].
- [5] Gupta v Knoop NO and Others 2020 (4) SA 218 (GP) at [27].
- [6] Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others 2012 (2) SA 378 (WCC) at [10].
- [7] Absa Bank v Gravitare Multi Video Content (Pty) Ltd and another 2023 JDR 4608 (GJ) at [28].
This is my judgment.

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