SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 734/2015

In the matter between:

FIRSTRAND BANK LTD **APPELLANT**

and

KJ FOODS CC (IN BUSINESS RESCUE) **RESPONDENT**

Neutral citation: *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* (734/2015) [2015] ZASCA 50(26 April 2017).

Coram: Mpati AP, Theron, Seriti, Van Der Merwe JJA and Schoeman AJA

Heard: 7 September 2016

Delivered: 26 April 2017

Summary: Companies Act 71 of 2008 : proposed business rescue plan : proper interpretation of section 153(1)*(a)*(ii) and 153(7) : the determination whether a vote by a creditor against the adoption of a proposed business rescue plan was inappropriate and ought to be set aside entails a single enquiry : a court will set aside a vote on the ground that its result was inappropriate if it is reasonable and just to do so : thus entails a value judgment : effect of the court setting aside vote : once vote is set aside, proposed business plan considered to have been adopted *ex lege* : no further vote envisaged by the Act.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J sitting as court of first instance):

1 Paragraph 1 of the order of the court a quo is amended to read:
'In terms of the provisions of section 157(7) of the Companies Act 71 of 2008 the vote of the respondent against the adoption of the revised business rescue plan exercised on 2 December 2013 is set aside.'
2 Paragraph 2 of the order of the court a quo is set aside.
3 The appeal is otherwise dismissed.

JUDGMENT

Seriti JA (dissenting):

[1] This is an appeal against a judgement and order of the Gauteng Division of the High Court, Pretoria (Mavundla J) setting aside in terms of s 153(7) of the Companies Act 71 of 2008 (the Act), a vote against the adoption of a proposed revised business rescue plan. The court a quo found that the vote of the appellant against the proposed business rescue plan was inappropriate and consequently granted an order in terms of which the voting result of rejection was set aside. The court further ordered that the proposed revised business rescue plan be adopted by the affected parties in terms of the Act. Finally, it ordered the respondent to pay the costs of the application, which costs were to include the

reasonable expenses and disbursements of the joint business rescue practitioners. The appeal is before this court with leave of the court a quo.

[2] The principal issue in this appeal is the proper interpretation of section 153(1)*(a)*(ii) and 153(7) of the Act. In particular, the questions that arise are (i) whether the court a quo was correct in finding that the appellant's vote against the proposed business rescue plan was 'inappropriate' (ii) whether the court a quo was correct to set aside the voting result of the rejection of the proposed business rescue plan and (iii) whether the court a quo had any power to refer the rejected plan to the affected persons 'to be adopted' by them.

Factual Background

[3] The relevant facts of this case are briefly the following. The main business of KJ Foods CC is the production and supply of bread to cash and carries and the informal market. The respondent has been in existence for a period exceeding 20 years and employs approximately 220 employees. It is managed by its sole member, Mr S C B Tuna who has managed and maintained the respondent for a period exceeding 20 years.

[4] The respondent started to experience financial distress towards the end of 2012. On 15 July 2013 the respondent resolved to be placed under business rescue proceedings in terms of s 129 of the Act. One of the reasons advanced for the respondent's financial distress was that the respondent was in arrears with its payments towards its account with one of its major supplier of flour, Pioneer Foods, which negatively affected the respondent's business. The respondent, on the same date approached two business rescue practitioners (practitioners) namely Messrs W Cawood and J C Beer and requested them to accept appointments as its

practitioners. They both accepted the appointments, and business rescue commenced on 17 July 2013. On 24 July 2013 the appointed practitioners informed the respondent's creditors about their appointment.

[5] The practitioners investigated the affairs of the respondent. It was established that the financial distress was caused by various factors, which included the down turn in the bread baking industry since September 2012 due to lower consumer demands and an increase in direct and indirect input costs. The situation was exacerbated by a persisting accounting error which occurred in the books of the respondent. This resulted in an outstanding tax liability of approximately R4 million. At the beginning of 2013 the respondent paid the tax liability in full and that placed further pressure on the respondent's cash flow.

[6] The first meeting of creditors took place on 6 August 2013. Various creditors of the respondent attended the meeting. Pioneer Foods was also represented. Representatives of the appellant arrived at the meeting after the meeting had been concluded and adjourned. However they were allowed to provide the practitioners with their claim, which was subsequently included in the respondent's business rescue plan. The minutes of the said meeting recorded that 'all affected parties present at the meeting were in agreement that the respondent's business can be successfully rescued subject to a brief moratorium being put in place in the proposed business rescue plan'.

[7] Following the first meeting of creditors a business rescue plan was published on 28 August 2013. The initial plan was revised in the light of new claims that had not been included in the initial rescue plan and, furthermore the existing creditors of the respondent required certain

amendments to be effected.

[8] A second meeting of creditors took place on 10 October 2013. The purpose of the meeting was to discuss and vote on the revised business rescue plan. That meeting was adjourned and after certain adjustments were made, a final business rescue plan was published on 21 November 2013.

[9] The third meeting of creditors (a continuation of the adjourned meeting of 10 October 2013) took place on 2 December 2013. An annexure which was prepared by the practitioners and presented to the meeting indicated that the respondent owed different creditors a total amount of R40 992 192.42. First National Bank (FNB) and Wesbank, both secured creditors, were owed R6 337 587.37 in respect of a loan and R5 645 948.20 for financing a number of vehicles respectively. The annexure further indicated that Pioneer Foods which was not a secured creditor was owed an amount of R12 884 850. The combined value of the concurrent claims against the respondent represented an amount of approximately R 28 million.

[10] Creditors were invited to make proposals with regard to possible further amendments to the plan but no proposals for possible further amendments were made. At the third meeting of creditors the appellant held a voting interest of 29.81 per cent and the remainder of the creditors held a voting interest of 70.19 per cent.

[11] When no further amendments were made to the business rescue plan and no new proposals were made, the creditors proceeded to the voting stage. All the creditors in attendance at the meeting voted in favour

of the business rescue plan except the appellant who voted against its adoption. Section 152(2) of the Act requires 75 per cent of the creditors voting interest to vote in favour of the business rescue plan for it to be adopted. The requisite 75 per cent of the creditors voting interests was not obtained with the result that the final business rescue plan was rejected. The appellant voted against the adoption of the rescue plan because in its view the plan was vague and that the appellant had no faith in the plan. The appellant raised various criticisms of the plan. Among others, the appellant stated that the amended business rescue plan provided no basis that consumer demands would increase, that the direct and/or indirect input costs would decrease and/or that the respondent's cash flow would increase. Furthermore, the appellant was of the view that the proposed plan would not achieve the postulated results due to erroneous arithmetic and assumptions. The appellant was also of the view that the respondent's revenue will be less and/or its costs of sales will be higher and/or its monthly expenses would be more – with the consequences that the predicted figures in the forecasted figures were wrong and not workable.

[12] The amended business rescue plan postulated that if the plan was adopted, the secured and statutory preferent creditors and concurrent creditors would receive 100 cents in the rand, but in the event of immediate liquidation, the secured and statutory preferent creditors would receive 100 cents in the rand and the concurrent creditors would receive 51 cents in the rand. The business rescue plan also stipulated that 'all liabilities in terms of instalment agreements and covering bonds with Wesbank, FNB and ABSA would be repaid in terms of the original finance agreements'.

[13] The final business rescue plan envisaged full payment to all

creditors over certain periods. All creditors (excluding secured creditors) would be repaid over a period of 52 months, secured creditors would have to wait slightly longer as their repayments were to be made in the instalment amounts and time periods reflected in the original financing agreements. The appellant as secured creditor of the respondent would receive 100 cents in the rand in liquidation and in the business rescue scenario. The appellant would also receive interest on its claim in the business rescue scenario which interest would not necessarily be received by the appellant in liquidation. The amended business rescue plan stipulated that the implementation of the business rescue plan will be monitored for a period of two to four months subsequent to the adoption thereof.

[14] As stated earlier, the appellant voted against the adoption of the proposed business rescue plan. The practitioners regarded the vote of the appellant as inappropriate and consequently the practitioners issued an application in terms of s153 of the Act seeking the setting aside of the vote by the appellant.

[15] As at 18 November 2013 FNB's claim was R6 337 587.37. By July 2016 the outstanding amount had been reduced to R5 294 272.57. Wesbank was one of the secured creditors of the respondent. It had provided vehicle asset finance to the respondent for the purchase of 56 motor vehicles. Its claim as at 18 November 2013 amounted to R5 645 948.20. The respondent continued making payments to Wesbank and as at 13 June 2014, 11 of the 56 vehicles purchased by the respondent had been paid for in full.

[16] The position by the time of the hearing of the application was that

the respondent had maintained all payments due to the appellant in terms of the existing agreements between the parties. The monthly payments were honored as provided for in the business rescue plan. As at 1 February 2016, taking into account the payments made by the respondent to the appellant, the claims of the appellant had dropped in value, and they represented a voting interest of approximately 20.73 per cent. The claim of FNB will be settled in full in terms of the original finance agreement by November 2022. This claim is secured.

[17] In a report dated 26 July 2016 and prepared by the practitioners at the request of Mpati AP, it is stated that the business rescue plan has been implemented. As at 21 July 2016, Absa, which was one of the secured creditors was paid in full. Wesbank and FNB were also secured creditors and as at date of business rescue they were owed R5 645 948.20 and R6 337 587.37 respectively. As at 21 July 2016, Wesbank's claim was reduced to R402 430.30 and FNB's claim was reduced to R5 294 272.57.

[18] As at the inception of business rescue the claims of unsecured creditors were R18 145 448.83 in total and as at 21 July 2016 that amount had been reduced to R8 933 795. According to the said report as at the commencement of business rescue the debts of the respondent amounted to R30 265 457.05 and as at 21 July 2016 the debts had been reduced to R14 630 498.03. The report further states that the respondent company was performing in line with the projected income and expenditure levels as predicted in the business rescue plan.

Legal Framework

[19] Section 152(2) of the Act states that in a vote for the proposed business rescue plan same will be approved on a preliminary basis if:

'(*a*) it was supported by the holders of more than 75% of the creditors' voting interest that were voted; and

(*b*) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interest, if any, that were voted.'

[20] As stated earlier the appellant held approximately 29 per cent of the voting interest and consequently the business rescue plan could not be approved as the appellant voted against its adoption. The proposed revised business rescue plan was accordingly rejected.

[21] Section 152(3) provides that:

'If a proposed business rescue plan -

(*a*) is not approved on a preliminary basis . . . the plan is rejected, and may be considered further only in terms of s 153.'

[22] Section 153(1)*(a)* states that:

'If a business rescue plan has been rejected . . . the practitioner may –

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the ground that it was inappropriate.'

[23] Section 153(7) provides the following:

(i) ' On an application contemplated in subsection (i) *(a)* (ii), . . ., a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to –

(a) the interests represented by the person or persons who voted against the proposed business rescue plan;

(b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and

(c) a fair and reasonable estimate of the return to that person, or those persons, if the

company were to be liquidated.

[24] Section 5(1) stipulates that the Act must be interpreted and applied in a manner that gives effect to the purposes as set out in s 7. Section 7(*k*) stipulates that the purpose 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.'

Discussion

[25] The remedy of s 153(1) may only be employed when the business rescue plan has been rejected. The business rescue practitioner invokes the provisions of s 153(1)*(a)*(ii) when he or she is of the view that the result of the vote was inappropriate. The provisions of s 153(1)*(a)*(ii) target the result of the vote which a business rescue practitioner considers to be inappropriate.

[26] The appellant's counsel contended that there are two stages in the enquiry. First, the court must establish whether the vote was inappropriate (s 153(1)*(a)*(ii)) and if so, then the court must consider whether it would be reasonable and just to set aside the result of the vote, taking into account the factors listed in s 153(7). The respondent's counsel submitted that the principal issue on appeal concerns the meaning and proper interpretation of s 153(1)*(a)*(ii) and 153(7) of the Act.

[27] In *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC (Murray NO, Mitateko, Shirelele NO Intervening Parties)*(47327/2014) [2015] ZAGPPHC 255; 2015 JDR 0558 (GP) para 40 Tuchten J said that 'a court considering an attack on a vote under s 153(7) must first determine whether the vote was inappropriate. Only if it finds that the vote was inappropriate, can the court

proceed to consider whether, taking this into account, it would be reasonable and just to set the vote aside.'

[28] In *Ex Parte Target Shelf 284 CC (Commissioner for the South African Revenue Service and Business Partners Ltd Intervening Parties)* (21955/14; 34775/14) [2015] ZAGPPHC 740; 2015 JDR 2219 (GP), Gauteng Division, Pretoria Kubushi J agreed with Tuchten J on the two stage enquiry but held that the court should proceed to the second stage even if it had come to the conclusion that the vote was not inappropriate. In that case she found the vote of Business Partners against the adoption of the business rescue plan was not inappropriate and thereafter examined whether the court can set aside the vote in terms of s 153(7) of the Act. (See also P Delport & Q Vorster *Henochsberg on the Companies Act 71 of 2008* (Service Issue 12, 2016) at 536(2)).

[29] The court a quo followed the same reasoning. It first enquired whether the vote of the appellant was inappropriate, and after finding that the vote was inappropriate, it invoked the provisions of s 153(7). In my view a court must first determine whether or not the vote was inappropriate and if so, invoke the provisions of s 153(7). The court's discretionary powers afforded by s 153(7) become applicable once the jurisdictional fact of inappropriateness has been found or established.

[30] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 Wallis JA while dealing with the approach to interpretation of documents said:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the

circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective'. (See also *Cloete Murray & another NNO v Firstrand Bank Ltd t/a Wesbank* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 30).

[31] In the present matter the appellant's counsel contended that the test to be applied in order to determine whether the vote is 'inappropriate' or not is a subjective test. A vote cannot be held to be inappropriate so it was argued, if the creditor's reasons for voting against adoption of the proposed business rescue plan reflect a bona fide vote to advance or protect that creditor's interests. Counsel further contended that having regard to the language used in the relevant section and in its immediate context, this suggests that an inappropriate vote is a dissenting vote that does not honestly reflect the creditor's perception of its own interests. He submitted further that the exercise of a right, such as the right to vote against the adoption of the business rescue plan will be mala fide and therefore inappropriate, if it is used for a purpose for which it was not primarily intended, but also intended to achieve an improper result. In his view, the test to be applied is a subjective test and not an objective test. A creditor has no duty so the argument, continued to consider the position of other persons and therefore the vote cannot be inappropriate if it was intended to advance that specific creditor's interests.

[32] On the other hand, the respondent's counsel submitted that the word 'inappropriate' does not mean that something was unlawful or improper. In the current context, it simply means that the vote gave rise to

a result that is not suitable to the situation at hand. He further contended that the inappropriateness pertains to the result of the vote having regard to merits of the matter. The inappropriateness of the vote relates to the manner in which the company or other creditors perceive the vote against the plan. An appropriateness of the vote is not viewed at application stage from the perspective of the dissenting creditor.

[33] In order to determine the meaning of the word 'inappropriate' the intention of the legislature must be determined by giving the word its ordinary grammatical meaning which the context dictates. The apparent purpose of the Act assists in the process of interpreting or ascertaining the meaning of the word inappropriate. The *Shorter Oxford English Dictionary* 6ed (2007) defines the word 'inappropriate' as unsuitable, improper, wrong, inadvisable, misguided, undesirable, misplaced, etc. As mentioned, s 7(*k*) stipulates that the purpose 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. In my view, the word inappropriate refers to or means an act which unduly undermines the achievement of the purpose of the Act, which is stipulated in s 7*(k).* Any vote which unduly undermines the achievement of the rescue of a financially distressed company will be inappropriate.

[34] In the present matter, the vote of the appellant resulted in the rejection of the proposed business rescue plan, which rejection was to the detriment of the respondent and other affected creditors. The vote of the appellant had the ability to frustrate the efficient rescue and recovery of the financially distressed respondent. In my view, the test to be applied is an objective test and not a subjective test. In this matter the vote against the adoption of the business rescue plan was inappropriate. The adoption

of the amended business rescue plan would not have prejudiced the appellant in any manner whatsoever as the business rescue plan stated that '[a]ll liabilities in terms of the instalment agreements and covering bonds with Wesbank, First National Bank and ABSA will be repaid in terms of the original finance agreements'. The provision made in the proposed business rescue plan for the payments to the appellant does not deviate from any payment that the appellant stood to receive in terms of the initial agreement between the parties. The appellant is a secured creditor and if, for any reason the business rescue plan does not yield the anticipated results, the appellant can fall back on its security to recover the balance of the money owed to it. If the proposed business rescue plan is successfully implemented all the affected creditors will benefit. In my view the vote of the appellant against the adoption of the proposed amended business rescue plan was 'improper' or 'misplaced.'

[35] As stated earlier s 153(7) of the Act provides that a court may order that the vote on a business rescue plan be set aside, if the court is satisfied that it is reasonable and just to do so. The subsection further provides that when making its decision, the court must have regard to the interests represented by the person or persons who voted against the business rescue plan, the provision made in the proposed business rescue plan with respect to the interests of that person or persons and a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

[36] The appellant is a secured creditor of the respondent. The respondent never defaulted on any payments due to the appellant, neither before nor after the commencement of the business rescue. Provision made for payments to the appellant in the proposed business rescue plan

does not differ from any payment that the appellant stood to receive in terms of the initial agreements between the parties. The appellant, as secured creditor of the respondent, will receive 100 cents in the rand in liquidation and will also receive 100 cents in the rand in a business rescue. The interests of the appellant will therefore not be compromised in the business rescue scenario.

[37] Furthermore the business rescue has certain obvious advantages to other affected persons. In a business rescue, the concurrent creditors will receive 100 cents in the rand and in liquidation the concurrent creditors will receive 51 cents in the rand. The business rescue, as compared to liquidation benefits both secured and concurrent creditors.

[38] Section 136(1) of the Act provides that during a company's rescue proceedings, employees of the company continue to be so employed on the same terms and conditions. The only exception to this provision is where changes to the employee's status occur in the ordinary course of attrition or where the employees and the company agree to different terms and conditions. On the other hand s 38(1) of the Insolvency Act 24 of 1936 provides that the contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order. The suspended contracts of employment, depending on certain circumstances, may be terminated during the sequestration or liquidation process. In the business rescue scenario, the employees of the company will retain their employment whereas in the sequestration or liquidation scenario employees may lose their employment.

[39] The facts of this case clearly indicate that it is reasonable and just

that the vote on the business rescue plan should be set aside.

[40] The appellant's counsel contended that s 153 of the Act does not give the court any power (expressly or impliedly) to order that a rejected plan be adopted by an affected person. On the other hand the respondent's counsel contended that once the court sets aside the dissenting vote, the business rescue plan is deemed to have been 'adopted.'

[41] I agree with the contention that the court has no powers to refer back the business rescue plan to the affected parties for adoption thereof. The vote on the business rescue plan, which was set aside was substituted by the court order. The business rescue plan was deemed approved and there was no need to refer the business rescue plan to the affected parties for adoption.

[42] The respondent has succeeded substantially in this appeal. If there was no settlement agreement referred to hereunder the respondent would have been entitled to its cost.

[43] However, after the matter was argued in this court a judgement was prepared. Before the judgment was ready for delivery the parties informed the Registrar of this court that the matter had been settled. It appears that Mr and Ms Tuna were sued by the appellant in their capacity as sureties for payment of the amounts owed by the respondent to the appellant. In terms of the settlement agreement, the two sureties undertook to pay the sum of R12 million on or before 5 December 2016, in full and final settlement of the respondent's indebtedness to the appellant. However, in paragraph 5 of the settlement agreement it is stated that –

'[Appellant] and KJ Foods (in business rescue) agree as follows: (a) (Appellant) does not withdraw the appeal and judgement will be delivered by the Supreme Court of Appeal;
(b) This agreement of settlement be noted.'

The Settlement

[44] The settlement agreement reached between the parties means that there is no longer a *lis* between the parties to this appeal. However, in a letter from Koster Attorneys accompanying the copy of the agreement, it is argued on behalf of both parties that 'the industry can greatly benefit from a judgement dealing with section 153 (1) read with section 153 (7) of the Act, and the Honourable Court is with the greatest respect requested to, notwithstanding the settlement reached, deliver judgement in the matter….'Although the merits of the case are now no longer relevant , I agree with the submission that this court's interpretation of section 153(1) and (7) of the Act will benefit the industry. It is for that reason that judgement will be delivered despite the settlement agreement.

[45] In terms of the settlement reached each party ' is liable for payment of its own costs'. No costs order will be therefor be made.

[46] Save for paragraph (ii) of the order of the court a quo, which is hereby set aside, the appeal is otherwise dismissed.

[47] In the result, I would have made the following order:

1 Paragraph 1 and 3 of the order of the court a quo are confirmed.
2 Paragraph 2 of the order of the court a quo is set aside.

W L SERITI
JUDGE OF APPEAL

Schoeman AJA (Mpati AP, Theron and Van der Merwe JJA concurring)

[48] This appeal concerns the question whether it was reasonable and just, in terms of s 153(7) of the Companies Act 71 of 2008 (the Act) for the Gauteng Division of the High Court, Pretoria (Mavundla J) to set aside a vote by the appellant, Firstrand Bank Ltd (Firstrand) against the adoption of a business rescue plan in respect of the respondent, KJ Foods CC (KJ Foods). Firstrand's vote against the adoption of the business rescue plan had resulted in the rejection of the plan. The ancillary question is: what are the consequences for business rescue proceedings, once the result of such a vote had been set aside.

[49] After the matter was argued in this court a judgment was prepared. Events however overtook the delivery of the judgment: the parties informed the Registrar of this court that the matter had been settled due to a settlement that had been reached between Mr and Ms Tuna, who signed as sureties for KJ Foods' indebtedness to Firstrand. KJ Foods and Firstrand however agreed that Firstrand did not withdraw the appeal and that a judgment 'will be delivered by the Supreme Court of Appeal.' In an attorneys' letter accompanying a copy of the settlement agreement both

parties expressed a view that '. . . the industry can greatly benefit from a judgement dealing with section 153 (1) read with section 153 (7) of the Act, and the Honourable Court is with the greatest respect requested to, notwithstanding the settlement reached, deliver judgement in the matter . . .'. I agree.

[50] I have read the judgment of Seriti JA but unfortunately I disagree with his finding that a two pronged approach is necessary to determine whether the result of a vote should be set aside. Furthermore, the effect of the setting aside of the vote has not been addressed with sufficient detail in my colleague's judgment. Due to the view I take in this matter it is necessary to set out the background facts.

Background

[51] KJ Foods has been a producer and supplier of bread to the informal sector of the community and cash and carry wholesalers and a customer of Firstrand for more than 20 years. On 17 July 2013 KJ Foods commenced business rescue proceedings after it had experienced financial distress that I will elaborate on later. Messrs Cawood and De Beer were appointed as the business rescue practitioners (the practitioners) on 24 July 2013. A first meeting of creditors took place on 6 August 2013 and on 28 August 2013 a business rescue plan was published. The second meeting of creditors was postponed and after further claims were proved and claim figures revised, the final revised business rescue plan was published on 21 November 2013.

[52] In terms of this business rescue plan KJ Foods owed a total amount of R40 992 192.42. The secured creditors were Absa Bank Ltd and Firstrand. The latter's claim consisted of a secured loan by First National

Bank (FNB) to KJ Foods in an amount of approximately R6 million and motor vehicle finance agreements between the latter and Wesbank in a total amount of approximately R5.5 million. Absa's claim was for an amount of R141 541.95. The main concurrent creditor was Pioneer Foods (commonly known as Sasko) whose claim was in excess of R12 million. The total claims of the independent concurrent creditors were R17 152 435.30.

[53] The revised business rescue plan, made provision for secured creditors to be paid in full, in terms of the instalment agreements and covering bonds in their favour. It was postulated that concurrent creditors would also be paid in full, but if KJ Foods were to be liquidated, the secured creditors would be paid in full, while the concurrent creditors would only receive 51 per cent of the money owing to them.

[54] Firstrand held 29 per cent of the creditors' voting interests. It voted against the adoption of the plan and due to its vote, the business rescue plan could not be approved on a preliminary basis, as 75 per cent of creditors' voting interests that had voted had to approve the business rescue plan.[1] The practitioners advised the meeting that application will be made to court in terms of s 152(3)*(a)* to set aside the result of the vote, on the grounds that it was inappropriate. Thereafter the meeting was adjourned.

[55] On 13 December 2013 an application was launched for a declaratory order that 'the result of the vote by the holders of voting

[1] In terms of s 152 (2) of the Act, a proposed business rescue plan will be approved on a preliminary basis if, in a vote called for its approval, (a) it was supported by the holders of more than 75 per cent of the creditors' voting interests that were voted; and (b) the votes in support of the proposed plan included at least 50 per cent of the independent creditors' voting interests, if any, that were voted.

interests . . . rejecting the revised business rescue plan, be set aside' on the grounds that it was inappropriate and that the business rescue plan be adopted. On 10 October 2014 the high court ordered that the result of the vote be set aside 'on the grounds that the voting against the plan was inappropriate'; that the revised business rescue plan be adopted by the parties and that the costs of the application, including the costs of the practitioners, be paid by Firstrand. On 23 April 2015 reasons were given for the mentioned order and subsequently leave to appeal to this court was granted on 12 August 2015.

The Financial Position of KJ Foods

[56] Before September 2012 KJ Foods sold approximately five million loaves of bread per month. However, the input costs of the bread baking industry increased sharply with a concomitant increase in the price of bread and a downturn in consumer demand. Therefore, in September 2012, due to a sharp decline in market demand, sales volumes decreased to 2.8 million loaves per month. KJ Foods was also indebted to the South African Revenue Service in the amount of approximately R4 million due to an accounting error by a bookkeeper. This amount was paid at the beginning of 2013 and this resulted in further cash-flow problems.

[57] Prior to the commencement of business rescue proceedings, the only member of KJ Foods, Mr Tuna, informed representatives of Firstrand that he contemplated commencing business rescue proceedings due to difficulties with one of the suppliers, Pioneer Foods. This resulted in Firstrand immediately freezing KJ Foods' trading account, which was approximately R1 million overdrawn.

The Creditors' Meetings

[58] At the first creditors' meeting the practitioners refused to admit three further claims totalling R 16 430 923 which included a claim where KJ Foods bound itself as surety for the obligations of Nancefield Properties towards Firstrand in the amount of R13 867 281.13. Following the first meeting of creditors, a rescue plan was duly published.

[59] On 10 October 2013, the second meeting of creditors was held. At this meeting, the initial rescue plan was considered. Firstrand raised certain issues with the plan, including the fact that it excluded the surety liability in respect of Nancefield Properties and that the plan was vague and provided no basis upon which KJ Foods could be rescued. The meeting was, thereafter, duly adjourned and a decision taken to publish an adjusted plan within 21 business days.

[60] Prior to the publishing of the revised business rescue plan the Department of Trade and Industry (the DTI) deposited an amount of approximately R2,7 million into K J Foods' then frozen account held with Firstrand. The deposit represented a non-repayable grant by the DTI in favour of KJ Foods. Firstrand used this amount to pay off the value of
The overdraft held on KJ Foods' account. Firstrand retained R1 006002.17 of the amount paid by the DTI, and refused to release this amount. A further amount of approximately R20 000 was paid into the frozen account of the KJ Foods on or during 16 November 2013. A revised business rescue plan was published incorporating the payment of the R2.7 million by the DTI. The revised business rescue plan was aimed at substantially improving the creditors' ability to recover their debt and to rescue the company as opposed to immediate liquidation.

[61] The practitioners envisaged that concurrent creditors would be repaid over a period of 52 months and that the liabilities in respect of instalment agreements and covering bonds of Firstrand and ABSA would be repaid in terms of the original finance agreements.

[62] The amended business rescue plan was voted upon during the second meeting of creditors on 2 December 2013. It did not include the approximately R13 million liability for which KJ Foods stood surety for Nancefield Properties. The business rescue plan stated that the reason for exclusion of the surety liability was that the obligation of the principal debtor was up to date. The practitioners opined that the surety claim did not fall under the definition of 'affected party' for purposes of the alleged claim.

The Rescue Plan

[63] According to the plan, the elected practitioners were required to get the cash flow to the optimal level while simultaneously negotiating and restructuring the repayment terms of the debt. With regards to the employees, the practitioners did not envisage any changes in their number or the terms and conditions of employment if the business rescue plan was adopted. In relation to the benefits of adopting the plan as opposed to liquidation of the entity, it noted that creditors stood to receive a substantially better return, while KJ Foods stayed in business and 220 employees retained their jobs.

The Financial Position after Implementation of the Plan

[64] As from the date of the launching of the application, the practitioners implemented the business rescue plan. The parties were requested to provide details regarding the implementation of the plan

before the hearing of the appeal. From the information provided on 26 July 2016 it is apparent that (a) the secured debt of Firstrand regarding the commercial property finance loan had diminished from R6 337 587.37 to R5 294 272.57 and the business rescue practitioners had kept up with payments in terms of the original agreements; (b) Wesbank's debt in respect of vehicle financing had been reduced from the disputed amount of R5 645 948.20 to R402 430.30 with KJ Foods keeping up with payments in terms of the agreements; (c) ABSA's secured debt of R141 541.95 had been paid in full; and (d) the unsecured debts had been brought down from R18 145 448.83 in November 2013 to R8 933 795.16 in July 2016.

[65] From the above it is apparent that business rescue has benefitted all the creditors. The agreements between the company and Firstrand have been strictly adhered to and payments have been made in compliance with those agreements.

The Parties' Contentions

[66] It is apposite at this stage, to set out the parties' respective entrenched positions. Firstrand contended that the decision of the high court to set aside its vote in the business rescue was wrong. It averred that the enquiry in relation to the question whether the vote in the business rescue must be set aside in an application of this nature, is two-pronged. First, it must be determined whether Firstrand's vote was inappropriate, and second, if so, whether it would be reasonable and just to set aside the result of the vote. It relied on two high court judgments namely, *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC*[2] and *Ex Parte Bhidshi*

[2] *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC (Murray NO, Mikateko, Shirilele NO Intervening Parties)* 2015 JDR 0558 (GP).

Investments CC[3] to support its contentions. It was argued in this court that the question whether it was reasonable and just to set aside a vote rejecting the adoption of a rescue plan can only be considered after it had been found that such a vote was inappropriate. Therefore, if the vote was appropriate, the application must fail for then there is no need to consider whether it was just and reasonable to set aside the vote. KJ Foods, on its part, submitted that the court a quo's finding that Firstrand's vote against the rescue plan was inappropriate should be upheld. KJ Foods submitted that s 153 of the Act allowed the court a quo a discretion which it exercised around the parameters of what it considered to be 'reasonable and just'. It further contended that the language of s 153(7) did not support the interpretation propagated by Firstrand.

[67] Before us, Firstrand heavily criticised the rescue plan. It argued that the plan would fail to achieve the result postulated due to erroneous arithmetic and assumptions and conditions that will cause one creditor to be preferred over the others. It submitted that forecasts made in the plan were not workable, that the plan was vague and erroneous, and that its failure to deal with the disputed claims exacerbated this. It bemoaned the fact that the plan allegedly caused preferences and relegated secured creditors to a subordinate status of concurrent creditors, because they were paid last and could not rely on their security, as they would have been entitled to in liquidation proceedings.

The Salient Provisions of the Act

[68] Business rescue is the development and implementation of a plan to rescue an entity by restructuring its affairs, business, property, debt and other liabilities in a manner that maximises the likelihood of the entity

[3] *Ex Parte Bhidshi Investments CC* 2015 JDR 2161 (GP).

continuing in existence on a solvent basis. If it is not possible for the entity to so continue in existence, the plan must be developed and implemented in a manner that results in a better return for the entity's creditors or shareholders than would result from its immediate liquidation.[4] The manner in which the plan envisaged in s 128(1)*(b)*(iii) must be developed and approved is dealt with in, amongst others, ss 150[5] and 151.[6] In terms of s 151(1) the plan must be considered at a meeting of creditors and any other holders of a voting interest.[7] Section 152(1)*(d)*(ii) of the Act directs the practitioner to adjourn the meeting in order to revise the plan for further consideration. Approval of the plan occurs in terms of s 152(2) which reads:

'In a vote called in terms of subsection (1)*(e)*, the proposed business rescue plan will be approved on a preliminary basis if-

(*a*) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and

(*b*) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.'

An independent creditor is defined in s 128(1)*(g)* as a person who is a creditor of the company, including an employee of the company who is a creditor in terms of s 144(2) and who is not related to the company, a director, or the practitioner, subject to

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[4] Section 128(1)*(b)*(iii) of the Act.

[5] In terms of s 150(1) of the Act, the practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of s 151.

[6] Section 151 reads:

'(1) Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.

(2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out-

(a) the date, time and place of the meeting;

(b) the agenda of the meeting; and

(c) a summary of the rights of affected persons to participate in and vote at the meeting.

(3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153.

[7] A 'voting interest' means an interest as recognised, appraised and valued in terms of subsecs 145 (4) to (6) of the Act. These provisions deal with participation by creditors respect of any decision contemplated in Chapter 6 of the Act.

subsection (2).[8]

[69] Section 152(3)*(a)* states that if a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of s 153. Section 153 determines:

'(1)*(a)* If a business rescue plan has been rejected as contemplated in section 152 (3) *(a)* . . . the practitioner may-

(i) . . . ;

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.'[9]

[70] In this instance the business rescue plan was not approved but rejected in terms of s 152(3)*(a)* because it could not muster the required support of holders of more than 75 per cent of the creditors' voting interests that were voted; and it is not clear from the papers whether there were independent creditors who voted. The application to set aside the vote was brought in terms of the provisions of s 153(7) which reads as follows:

'(7) On an application contemplated in subsection (1)*(a)*(ii), or (1)*(b)*(i)(*bb*), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to-

(a) the interests represented by the person or persons who voted against the proposed business rescue plan;

(b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and

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[8] Section 128 (2) states that for the purpose of subsection (1)*(g)*, an employee of a company is not related to that company solely as a result of being a member of a trade union that holds securities of that company.

[9] Professor Piet Delport et al *Henochsberg on the Companies Act 71 of 2008 Companies Act 71 of 2008 and Commentary* (eds) (Service issue 10, May 2015) at 530, the provisions of this section amount to a last-gasp attempt to have a proposed business rescue plan approved by (1) attacking the rejection of the plan by the holders of the creditors' voting interests as "inappropriate".

(c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.'

[71] Whilst s 153(1)*(a)*(ii) makes provision for a company seeking to be placed under business rescue to apply to a court to set aside 'the result of the vote', s153(7) confers on that court a discretion to order that 'the vote on a business rescue plan be set aside' if it is satisfied that it is reasonable and just to do so, having regard to the factors listed in subsec (7)*(a)* to *(c)*. It is clear from a reading of those factors that the vote that may be set aside is not the entire vote on the business rescue plan, but only the vote exercised against the approval or adoption of the plan. The factors referred to apply only in respect of the person or persons 'who voted against the proposed business rescue plan'. It follows that once the vote against the approval of the plan is set aside the result thereof, namely the rejection of the plan, will be nullified. The difference in the wording of subsecs (1)*(a)*(ii) and (7) of s 153 is, therefore, of no real consequence.

The Different Interpretive Approaches of the High Courts

[72] There are a few cases of the high courts which have dealt with the interpretation of s 153(1)*(a)*(ii) and (7) of the Act, with divergent views. I have mentioned, in para 21, that Firstrand relied on the interpretation adopted in *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC (Murray NO, Mikateko, Shirilele NO Intervening Parties)* and *Ex Parte Bhidshi Investments.* Seriti JA has discussed *Shoprite Checkers* in para 27 of his judgment, thus it is not necessary to deal with again.

[73] In the earlier case of *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd & another*[10], the Limpopo Division of the High Court,

[10] *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd & another* 2014 (6) SA 214 (LP) para 38.

Polokwane, Makgoba J focused solely on the attitude of the creditors who voted against the business rescue plan. The first respondent's attitude in voting against the business rescue plan was found to be self-serving and unreasonable, while the second respondent's vote against the business rescue plan was irrational for, absent such plan, it would receive no dividend.[11]

[74] It is clear from the cases referred to above that the provisions of s 153 have given rise to considerable uncertainty. I agree with Leach JA in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* where he said that it was not unfair to comment that many of the provisions of the Act relating to business rescue, and s 153 in particular, 'were shoddily drafted.'[12]I turn to consider the appropriate approach to the provisions under discussion.

The Correct Interpretation of Section 153(1)*(a)*(ii) and (7) of the Act

[75] In interpreting the provisions of the Act the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[13] and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[14] find application. These cases and other earlier ones,[15] provide support for the trite proposition that the interpretive process involves considering the words used in the Act in the light of all relevant and admissible context, including the circumstances in which the legislation came into being.

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[11] See ibid para 37, where the court described the first respondent's 'attitude' as unreasonable, and that of the second respondent as irrational.

[12] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* [2015] ZASCA 69; 2015 (5) SA 192 (SCA) para 43.

[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[14] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27.

[15] See for instance, *Jaga v Dönges NO & another; Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 662G-H and 664E-H. See also *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16-19, and the cases cited therein.

Furthermore, as was said in *Endumeni,* 'a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results'. Thus when a problem such as the present arises the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies.[16] Accordingly, in this instance, the proper approach in the interpretation of the provisions is one that is in sync with the objects of the Act, which includes '[enabling] the efficient rescue and recovery of financially distressed companies, *in a manner that balances the rights and interests of all relevant stakeholders*.'[17](My emphasis.)

[76] In interpreting s 153(1) and (7) the words of the Act are taken into consideration. However, these words must not be considered in isolation, but in the light of the context of the provision, the Act as a whole and the purpose for which it was enacted. The interpretation is 'essentially one unitary exercise'.[18]

[77] In *DH Brothers Industries (Pty) Ltd v Gribnitz*[19] Gorven J said the following about chapter 6 of the Act, dealing with business rescue:

'I respectfully agree that the chapter as a whole reflects "a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction" but only of viable companies, not of all companies placed under business rescue.'

[78] It is so that there is no definition of 'inappropriate' in the Act. I do

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[16] *Panamo Properties (Pty) & another v Nel & others NNO* [2015] ZASCA 76; 2015 (5) SA 63 (SCA) para 27.

[17] Section 5(1) of the Act directs that its interpretation and application must give effect to the purposes stated in s 7 of the Act. Section 7*(k)* states that one of these purposes 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;'

[18] *Bothma-Batho Transport (Edms) v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para12.

[19] *DH Brothers Industries (Pty) v Gribnitz NO & others* 2014 (1) SA 103 (KZP) para 10.

not have any issue employing the dictionary meaning to the word, as was done in the cases highlighted above, in terms of which 'inappropriate' is described as meaning, 'not suitable or proper in the circumstances'. Despite my acceptance of this definition, I am readily aware that it is still the court's role to ascertain the legal meaning of the word. As G E Devenish *Interpretation of Statutes* (1992) said (at 141), this meaning will normally correspond with the ordinary grammatical meaning of the word, but this may not always be the case since the meaning of the word is determined by language and legal context. [20]

[79] Firstrand's counsel argued that it is the subjective view of Firstrand in voting against the business rescue plan that determines whether the vote was inappropriate. This submission is unsustainable in light of the wording of s 153(1). I agree with the authors of *Henochsberg*[21] that if '. . . creditors are to be allowed to exercise their votes freely it has to be assumed that they would only vote in support of the business rescue plan if its implementation would be to their benefit.' If the issue was to be approached on the basis as proposed by counsel for Firstrand, the probabilities are that it would always be appropriate if the plan is to a creditor's advantage as it is difficult to think of circumstances where the creditors' votes for the rejection of a business rescue plan would be inappropriate.[22] However, *Henochsberg* suggests that the provisions of s 153(7)*(a)* to *(c)* provide some insight as to what the court should take into account when determining whether it would be reasonable and just to set aside the vote on a business rescue plan on the grounds of the vote being inappropriate'.[23]

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[20] See in this regard, *City of Johannesburg v Engen Petroleum Ltd & another* [2009] ZASCA 5; 2009 (4) SA 412 (SCA) para 11.
[21] *Henochsberg* op cit Vol 1at 530.
[22] *Henochsberg* at 530. See, however, *Copper Sunset Trading* fn 10 above.
[23] *Henochsberg* at 530.

[80] It is clear that s 153(1)*(a)*(ii) and s 153(1)*(b)*(i)*(bb)* are inextricably linked to s 153(7). On an application to set aside the result of a vote in terms of any of these subsections, the court is enjoined by s 153(7) to determine only whether it is reasonable and just to set aside the particular vote, taking into account the factors set out in s 153(7)*(a)* to *(c)* and all circumstances relevant to the case, including the purpose of business rescue in terms of the Act. Put differently, the vote would be set aside on application on the grounds that its result was inappropriate, if it is reasonable and just to do so in terms of s 153(7). To my mind this entails a single enquiry and value judgment.

[81] In opposing the application Firstrand averred that its vote against the business rescue plan was 'appropriate'. It argued that the employees of the company would not lose their employment as the business would be sold as a going concern. Furthermore, the deponent to the answering affidavit stated that the creditors would not receive a substantially better return as compared to liquidation, but that the 'creditors would be in a far worse position if the plan is approved and implemented'.

[82] The argument that liquidation would not negatively affect the position of the employees is fallacious. The winding-up of a company results in the suspension of all employee contracts without remuneration.[24] Business rescue, on the other hand, protects employees as they continue, subject to certain provisions, to be employed by the company on the same terms and conditions that applied prior to the company being placed under business rescue. [25]

[24] Section 38 of the Insolvency Act 24 of 1936.
[25] S 136(1)*(a)* of the Act.

[83] It is clear that the allegation that the creditors would be worse off with business rescue is wrong. The court a quo mentioned that the dividend, with liquidation, would be 39 cent in the rand. However, at this stage, the concurrent creditors have already been paid approximately 70 per cent of their claims, with payments still being made.

[84] The determination that a vote was inappropriate is therefore a value judgment made after consideration of all the facts and circumstances. The view held by the practitioners that the result of the vote was inappropriate in the instant matter was clearly based on the proposition that Firstrand's claim would be paid in full with business rescue and payment would be on the same terms that Firstrand and KJ Foods had agreed when the contract or contracts were initially concluded. The only exception in this regard was the overdraft of KJ Foods, which had already been paid in full. Furthermore, with business rescue, all the other creditors, both secured and unsecured, would also be paid in full, whereas with immediate liquidation, the unsecured creditors would be paid at most 51 per cent of their claims. Liquidation would also have the result that approximately 200 employees would be rendered unemployed.

[85] It is clear, when taking Firstrand's interests into consideration, that the only negative feature for it would be that it would not be paid its full claim immediately, but payment would be in terms of the contracts entered into between the parties. Therefore, it would still be paid in full albeit, not immediately. Taking all these factors into consideration, being the interests of Firstrand, the employees of KJ Foods and other creditors, it is indeed reasonable and just to set aside the vote against the approval or adoption of the rescue plan in terms of the provisions of s 153(7) of the Act.

[86] In this instance, it is clear from the implementation of the plan that Firstrand's reservations were unfounded. I am of the view that it was reasonable and just to set aside Firstrand's vote.

What is the Effect of Setting Aside the Result of the Vote?

[87] In terms of the provisions of s 153(2)*(b)* after the practitioners had informed the meeting that they intended bringing an application to set aside the result of the vote, the meeting was adjourned until the court has disposed of the contemplated application.

[88] Firstrand contended that the business rescue plan must again be put to the vote at the resumption of the postponed meeting. That, however, does not result in a businesslike interpretation, for if the creditor who voted against the adoption of the business rescue plan were to vote once more against it, the whole process would start all over again, causing a possible never-ending loop. The Act clearly does not envisage another round of voting. In my view a businesslike interpretation is that the vote rejecting the business rescue plan having been set aside, it follows by operation of law that the business rescue plan would be considered to have been adopted, for, as stated above, no further voting is envisaged. At the resumption of the meeting of creditors that had been adjourned in terms of s153(2)*(b)*, it would only be necessary for the business rescue practitioner to report on the outcome of the application to court.

[89] Therefore, once the result of the vote is set aside the business rescue plan is adopted, by the operation of law. That being the position, the declaratory order of the court a quo that the revised business rescue plan be adopted by the affected parties is superfluous, as it is a natural consequence of the setting aside of the result of the vote.

[90] Due to the settlement agreement referred to above, it is appropriate that no costs order is made in the appeal.

[91] The following order is made:

1 Paragraph 1 of the order of the court a quo is amended to read:

'In terms of the provisions of section 157(7) of the Companies Act 71 of 2008 the vote of the respondent against the adoption of the revised business rescue plan exercised on 2 December 2013 is set aside.'

2 Paragraph 2 of the order of the court a quo is set aside.

3 The appeal is otherwise dismissed.

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IRMA SCHOEMAN

ACTING JUDGE OF APPEAL

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