IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **23510 /2016**

In the matter between:

TAILLIFER DALE COLLARD	Applicant
v	
JATARA CONNECT (PTY) LTD	First Respondent
EDCON LIMITED	Second Respondent
SOUTH AFRICAN REVENUE SERVICES	Third Respondent
THE COMPANIES & INTELLECTUAL PROPERTY COMMISSIONER OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

Coram: ***Dlodlo J***

Date of Hearing: **27 February 2017**

Date of Judgment: **14 March 2017**

JUDGMENT

DLODLO, J

INTRODUCTION

[1] The applicant is a director and creditor of the first respondent, Jatara Connect (Pty) Ltd ('Jatara Connect'). On 8 August 2016, the applicant brought a winding-up application in respect of Jatara Connect. In response to the said application, the employees of Jatara Connect (on 19 September 2016) brought an application in terms of S 131 (1) of the Companies Act, 71 of 2008 ('the Companies Act') for an order placing the company in business rescue. The applicant and Jatara Connect in business rescue were cited as respondents. The order placing Jatara Connect in business rescue was granted by my Sister, Baartman J on 7 September 2016. The essence of the business rescue plan was effectively that Jatara Connect should continue with arbitration proceedings against Edcon Limited, the second respondent in these proceedings ('Edcon') in respect of a claim for damages allegedly arising out of Edcon's breach of contract presently unquantified. Needless to mention that if the contemplated action is successful the employees will be paid their claims in full and creditors will receive a better dividend than they would on liquidation.

[2] A business rescue plan was prepared by the business rescue practitioner, Charl de Waal Boshoff ('Boshoff'). It is of importance to mention that at a meeting of affected persons held on 24 November 2016, the business rescue plan was not adopted because Edcon (in its capacity as a creditor) voted against it. Remarkably, all other creditors including SARS and Jatara Connect's employees voted in favour of the plan. Thus the 75% majority stipulated in S 152 (2) (a) of the Companies Act could not be achieved. A mention must be made that the employees have also brought an application to set aside Edcon's vote in terms of S 153 (7) of the Companies Act. Indeed, what is before me is the application in terms of S 153 (7). I point out that the employees and the applicant are separately represented.

[3] Originally, Jatara Connect operated the business of an outbound call centre. This involved the call centre contracting with clients to make telephone contact with the client's customers for a fee. The customers referred to above were contained on a database furnished by the client. The call centre would make contact with customers for various purposes including the gathering of information and the conclusion of contracts with the customer on the client's behalf. I am told and accept that the infrastructure requirements for conducting a call centre business are significant and costly and highly sophisticated software is required. Jatara Connect, as I gather, incurred substantial expense in setting up the necessary infrastructure to service an agreement with Edcon.

[4] Jatara is a group of companies. Jatara Holdings (Pty) Ltd owns the entire issued share capital in Jatara Connect (Pty) Ltd and Jatara Travel (Pty) Ltd (subsidiary companies). Jatara Holdings in turn is owned by the Jatara Family Trust. The subsidiary companies, save for minor work done for Clicks, were geared primarily to do work for Edcon. Jatara Connect was incorporated on 26 March 2014 and commenced trading as a call centre in the same year. On 28 July 2014, Jatara Connect concluded a written agreement with Edcon in terms of which it would provide call centre services to the latter ('the Edcon Agreement'). Through the call centre, Jatara Connect would contract Edcon's customers for the purpose of selling to them Edgars Club Card products. This, one gathers from the founding affidavit and Annexure 'TDC1' – service agreement. The Edcon agreement commenced on 1 May 2014 and was to continue for a period of a year during which neither party could terminate the agreement. The agreement would thereafter continue until terminated by either party on notice in terms of the agreement. It is important to mention that the agreement contained an exclusivity provision in terms of which Edcon was not entitled to contract with any other party to render services similar to those described in the service agreement.

[5] A dispute arose between Jatara Connect and Edcon. Jatara Connect discovered that Edcon was not supplying it with sufficient data to make the approximately 20 000 sales calls per month which historically it had made. Jatara Connect discovered that Edcon was using another call centre to recruit club membership

in breach of the Edcon agreement. The relationship between the parties deteriorated such that on 5 July 2016 Jatara Connect gave notice of cancellation of the contract as it was entitled to do. By agreement between the parties, the dispute was referred to arbitration. That reference culminated in the appointment of Advocate Smalberger SC as arbitrator. Jatara Connect claims to have a significant claim for damages against Edcon for the breach of the Edcon Agreement as indicated above. It appears from the business rescue plan though, that Jatara Connect indeed does have a significant claim against Edcon. This is abundantly clear in paragraph 7.2 of the amended business rescue plan. Perhaps it is prudent to deal *infra* with the business rescue plan.

THE BUSINESS RESCUE PLAN AS AMENDED CONSIDERED

[6] This business rescue plan (not surprisingly) does not envisage that Jatara Connect will continue conducting business. But Jatara Connect has a significant claim against Edcon for breach of contract and an arbitrator has been appointed to deal with the matter as shown above. The business rescue plan reiterates that if the arbitration proceedings are successful, employees will be paid in full what is due to them and creditors will get a better dividend than they otherwise would if the company were to be wound up. It must be borne in mind that the employees voted in favour of the business rescue plan. It was at their instance that Jatara Connect was placed in business rescue.

[7] An importance must be attached to the fact that the business rescue practitioner has concluded that there is a reasonable prospect of business rescue succeeding as is provided for in S 128 (1) (b) (iii) of the Companies Act. This Court bears in mind that the legislature has accepted that it is a legitimate object of business rescue if the plan envisages only a better dividend for creditors. See **Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others** [2013] 3 ALL SA 303 (SCA) para [26].

[8] When the Edcon Agreement was cancelled, Jatara Connect employed approximately 140 call centre staff. The infrastructure and technology utilised came at a substantial costs. After the commencement of business rescue, the business rescue practitioner advised affected persons that he was bound to investigate the affairs of the company in terms of S 141 of the Companies Act. According to para 3.1.7 of the amended business rescue plan, Boshoff initially formed the view that there was no reasonable prospect of the company being rescued and he prepared a draft affidavit to this effect. However, after a number of meetings had been held with employees (who indicated their wish that arbitration proceedings should continue), the business rescue practitioner concluded that there was indeed a reasonable prospect of business rescue succeeding. He accordingly formulated an amended business rescue plan. This amended business rescue plan is annexed to the founding papers as 'TDC15'.

[9] In terms of the amended business rescue plan, the loan of Jatara Connect by an associated company, Jatara Travel (Proprietary) Limited ('Jatara Travel') in the amount of R 743 509. 32 would be repaid. Each employee would sign a voluntary termination agreement; the applicant would provide the funding for the proposed arbitration and he would furnish security for these proceedings (if necessary). It follows that all concurrent creditors will in all probability be better off under business rescue because the company's assets will also be available for distribution. It needs mentioning that on liquidation any litigation would have to be funded out of the company's resources and SARS would rank ahead of them in terms of S 99 of the Insolvency Act, 24 of 1936 ('the Insolvency Act').

[10] Edcon's attorneys sought to lodge a claim on its behalf against Jatara Connect in the amount of over R8 million. However, Boshoff's investigation tended to reduce this claim to only R3.4 million inclusive of VAT. Boshoff recorded that the arbitration proceedings would enable Jatara Connect to establish its claim against Edcon and provide Edcon with an opportunity to institute an alleged counterclaim against Jatara Connect. Boshoff concludes as follows in para 10.22 of the amended business rescue plan: '*there is no reason why [Jatara Connect] should be placed into liquidation to finalise the arbitration proceedings that will only lead to a duplication of costs'.*

[11] Thus one needs to ask oneself a question whether there is a reasonable prospect for rescuing Jatara Connect. See S 130 (1) (a) (ii) of the Companies Act. In terms of S 128 (1) (b) (iii) of the Companies Act, a potential business rescue plan contemplates two objects or goals. S 128 (1) (b) of the Companies Act defines business rescue. A primary goal is to facilitate the continued existence of the company in a state of solvency. Indeed a secondary goal (provided for as an alternative in the event that the achievement of primary goal proves not to be viable) is to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. It is our law now that the achievement of any one of the two goals would qualify as legitimate objects of 'business rescue'. See **Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) Pty Ltd & Others** *supra* at para [26].

[12] It is trite that an applicant for business rescue is not required to set out a detailed business rescue plan. Such an applicant must nevertheless establish grounds for the reasonable prospect of achieving one of the two goals mentioned in S 128 (1) (b) of the Companies Act. These goals are (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation. See **Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) Pty Ltd & Others** *supra* at para [31]. Indeed a reasonable prospect means and must mean a possibility that rests on an objectively reasonable ground or grounds. See **Propspec Investments v**

Pacific Coast Investments 97 2013 (1) SA 542 (FB). In the latter case the Court reasoned as follows:

'There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.'

I fully associate myself with the aforegoing quotation.

[13] Notably, the legislative preference for business rescue is also articulated in S 7 (K) of the Companies Act. The latter section provides that the purposes of the Companies Act are, inter alia:

'[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'.

[14] The court in **Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd & Others** 2012 (2) SA 378 (WCC) talking to the business rescue provisions contained in the Companies Act made the following important observation with which I am in agreement:

'It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It

is obvious that it is in public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible'.

Undoubtedly, the principles are of direct application in the instant matter. Where the business rescue proposal reveals that employees will be paid in full and that there will be a better return for creditors than if liquidation supervened, there shall be no reason why a winding-up should be preferred. See also in this regard **Commissioner; South African Revenue Service v Beginsel NO & Others** 2013 (1) SA 307 (WCC) at para [62].

THE EDCON'S SUBMISSIONS/CREDITORS' MEETING

[15] Mr Howie was constrained in pointing out that the investigations by the business rescue practitioner had revealed a number of untoward details about the manner in which the applicant and his co-director had conducted the affairs of Jatara Connect particularly the applicant's failure to co-operate with the business rescue practitioner in accordance with his statutory obligations. The following *inter alia* is pertinently pointed out on behalf of Edcon:

(a) payments received from Edcon meant for Jatara Connect were deposited into the account of Jatara Travel; (b) after receipt of any funds from the Clicks agreement, this was transferred to Jatara Travel account; (c) various other accounts are linked to the Travel account from which creditors of Jatara Connect were paid; (d) no rental was paid to Jatara Connect by Jatara Travel etc.

[16] Edcon is of the view that the business rescue plan was formulated on the basis that it (Edcon) would receive nothing whereas in truth if assets could be recovered from Jatara Travel and the directors its position would in all probability be more favourable because the arbitration against Jatara Connect would proceed either way. In Howie's contention Edcon brought a fair and open mind to bear on the provisions of the business rescue plan and voted against it in good faith. In his submission the applicant's argument that Edcon simply sought to advance its partisan interests and did so for an ulterior purpose is at odds with the objective facts and devoid of merit. According to Mr Howie, Edcon's vote was not only cast in favour of its own interests but also those of the other creditors of the company who would benefit from recovering assets and funds from Jatara Travel and its directors, neither of which can take place in the business rescue. I deal with these contentions *infra*.

[17] According to Mr Howie there is no truth in the applicant's assertion that relief under S 424 is available in business rescue because the assertion is at odds with the provisions of Item 9 (1) of Schedule 5 of the Companies Act which reserves the operation of S 424 only for companies which have been liquidated in terms of the 1973 Act. In Mr Howie's submission Edcon's vote against the business rescue plan at the meeting on 24 November 2016 was appropriate and cannot be assailed. Edcon contends that the objective facts show that the applicant conducted the affairs of Jatara Connect and Jatara Travel in a manner which did

not recognise or maintain their separate corporate identity. In Mr Howie's submission the applicant abused the separate juristic personalities of the companies.

[18] It is common cause that the business rescue plan in respect of Jatara Connect was considered by the creditors at the adjourned meeting of creditors which took place on 24 November 2016. Annexure 'TDC16' to the founding papers testifies to this effect. In terms of S 152 (2) of the Companies Act, the business rescue plan could only be approved 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. At the meeting, the business rescue practitioner reiterated his belief that there was a reasonable prospect of the company being rescued. Apparently all creditors including SARS, save for Edcon and all employees represented voted in favour of the business rescue plan. Only Edcon (which held 40.8% of the voting interest) voted against the adoption of the plan. Because the 75% majority was not achieved, the business rescue plan could not be adopted. I am told this has precipitated the present application.

[19] In terms of S 153 (1) read with S 153 (7) of the Companies Act, the court may order that a vote on a business rescue plan be set aside on the grounds that the vote was inappropriate and if the court is satisfied that it is reasonable and just to

do so having regard to (a) the interests represented by the person who voted against the proposed business rescue plan; (b) the provision made in the business rescue plan with respect to the interests of that person; and (c) a fair and reasonable estimate of the return to the person if the company were liquidated. Edcon became the only creditor to vote against the adoption of the business rescue plan. It was thus required to exercise its vote as a major creditor in good faith. See **Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd & Another** 2014 (6) SA 214 (SCA) para [31]; **Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd,** (para 37) unreported judgment of North Gauteng High Court delivered on 8 May 2012 case number 6418/2011.

[20] The only irresible inference to be drawn from Edcon voting against the adoption of the business rescue plan in this matter is that it did so with the sole intention of frustrating the arbitration proceedings against it. This inference is justified in the circumstances of this matter. It follows logically since Edcon would be in no better position as a creditor were Jatara Connect to be liquidated than were the business rescue process to continue. Important considerations strengthening the above inference are (a) The funding of the arbitration will be done by the applicant and shall not come from Jatara Connect's resources; (b) In a winding-up, SARS would be a preferent creditor; See S 89 of the Insolvency Act and (**SARS v Beginsel NO** *supra*). (c) On a winding-up Edcon would receive no dividend at all. (d) The business rescue practitioner expressed the view that the

approval of the business rescue plan will in all probability provide creditors with a better return than winding-up.

[21] I am of the view that the business rescue plan is to the advantage of the general body of creditors of Jatara Connect since they may well derive a benefit. As a general approach, a creditor will not exercise its voting power in good faith if the vote was not in the honest belief that it is in the interests of the estate and for the benefit of the creditors as a whole, but for some collateral object, no matter whether that object is a fraudulent one or not. See **Paruk & Others v Parker, Wood & Co.** 1917 AD 163 at 168; **Kanderssen (Pty) Ltd v Bowman NO** 1980 (3) SA 1142 (T) at 1146F-1147E. In **Kanderssen** *supra* the court correctly observed as follows:

'A resolution of creditors is not bona fide and may be set aside by the court if it has been passed not in the honest belief that it was in the interests of the estate and for the benefit of creditors, but for some collateral object , whether that object is a fraudulent one or not.'

Zulman & Others v Schultz 1924 TPD 24 is authority for the assertion that creditors are obliged to exercise their vote with a view to doing what is best in the interests of the estate.

[22] It does not appear that Edcon brought a fair and open mind to bear on the provisions of the amended business rescue plan. It is noteworthy that on 15 November 2016 (prior to the meeting wherein the amended business rescue plan

was considered) Edcon's attorneys addressed a letter to Boshoff. The letter documented complaints about the manner in which Jatara Connect had conducted business saying it calls for investigation. This letter serves as annexure to the answering papers. In effect an allegation is made that Jatara Connect was run recklessly and fraudulently. I point out that the business rescue practitioner has a duty under S 141 (1) of the Companies Act to investigate Jatara Connect's affairs, business, property and financial situation generally. Boshoff's duty under S 141 (2) (c) is also to determine and report on whether reckless trading, fraud or other contravention of any law took place. The amended business rescue plan makes it appear that Boshoff complied with the provisions of SS 141 (1) and 141 (2) (c) of the Companies Act. The amended business rescue plan makes it clear than no evidence was found of the irregularities alleged and asserted in the answering papers filed on Edcon's behalf.

[23] Edcon contends in the answering papers that Jatara Connect should be wound-up so that a commissioner may be appointed in terms of SS 417 and 418 of the Companies Act. One must point out that substantial funds need to be made available to the liquidator of the company being liquidated in order to enable the conduct of an enquiry which is often very costly. Why must Boshoff's investigation conducted under S 141 of the Companies Act not be deemed sufficient? Mr Howie relied heavily on **Koen v Wedgewood Village Golf & Country Estate** *supra* para [19] and [20]. These paragraphs read as follows:

'[19] In an application in which the object of the proposed business rescue is to secure a better return than would be obtained under immediate liquidation the applicant would be required to set out in the founding papers a reasoned factual basis for the alternative scenarios that the court will have to consider, and lay a cogent foundation to enable the court to determine that there is a reasonable prospect that the better return evident on one of those scenarios can be achieved.

[20] Vague and speculative averments in the founding papers will not suffice to provide a proper basis for a court to make the required determination that there is a reasonable prospect, if the company were to be placed under supervision, that the contemplated business rescue objective could be achieved.'

The founding papers refer to the amended business rescue plan. In my view the plan does provide foundational basis that there is a reasonable prospect that the better return is a reality which if realised will benefit not only the workers of Jatara Connect but also its creditors.

[24] Edcon suggests in answering papers that the business rescue application was launched to prevent a proper enquiry into the affairs of Jatara Connect. I find this to be a strange assertion in that in fact the applicant was the petitioning creditor for the winding-up of Jatara Connect. The employees of Jatara Connect are the persons who sought to prevent the winding-up. They launched the business rescue application. They are the affected persons and were within their rights to move that application.

[25] According to Edcon, its vote against the amended business rescue plan was justified because the winding-up of Jatara Connect will result in an appointment of a liquidator who will be in a position to institute proceedings against the applicant in terms of S 424 (1) of the Companies Act. Edcon proceeds to aver that if business rescue succeeds a S 424 claim *'will never be available'* to it. However, my understanding of S 424 claim is that any creditor of the company (Edcon included) can bring proceedings under that section and at any time (whether the company is under winding-up or not. S 424 (1) of the Companies Act reads as follows in relevant part:

"When it appears, whether it be in a winding-up …or otherwise, that any of the business of the company was or is being carried on recklessly….the court may, on the application of…..any creditor….declare that any person who was knowingly or party to the carrying on of the business in the manner aforesaid, shall be personally liable.'

I am persuaded that the placing of Jatara Connect under a winding-up order and the appointment of a liquidator will have the effect of increasing the costs in the administration of Jatara Connect. That may very well achieve the improper end sought by Edcon in bringing an end to the prosecution of claims against it.

[26] In considering an attack on a vote under S 153 (7) of the Companies Act one may adopt a two-stage approach adopted in **Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC & Others**, a Gauteng case no. 47327/2015 (ZAGPPHC) 255 at para [40]. Firstly, the court must determine whether the vote

is appropriate. Only if it is found that the vote is inappropriate can it be considered whether (taking this into account) it would be reasonable and just to set the vote aside. The court remains enjoined to consider whether it is reasonable and just to set the vote aside even if a finding were to be made that the vote was appropriate. Mr Woodland submitted that if Edcon's vote was intended to achieve an ulterior purpose and was not thus in good faith, such vote cannot be considered appropriate and it must be reasonable and just to set it aside. I accept this submission as correctly made. In my view, one must adopt a holistic approach in considering which remedy is more beneficial to creditors between business rescue and liquidation.

[27] Edcon's interests must be weighed against the interests of the employees and all other creditors who voted in favour of the business rescue plan. A mention must be made that the voting interest of Edcon represents only 49,8% of the total voting interest. In my finding the vote by Edcon is inappropriate in the circumstances of this case. It is reasonable and just to set it aside.

ORDER

[28] I make the following order:

(a) The application by the second respondent, Edcon for the admission of a further affidavit is granted and no order as to costs is made in this regard.

(b) The vote against the amended business rescue plan by the second respondent at a meeting of affected parties on 24 November 2016 is hereby declared as inappropriate and it is set aside.

(c) The business rescue plan tabled at the meeting of creditors on 24 November 2016 is hereby declared as adopted by the affected parties of the first respondent.

(d) The second respondent shall pay the costs of this application.

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Judge of the High Court

APPEARANCES:

For the Applicant:	Adv. G Woodland SC
For the Second Respondent:	Adv. R Howie