THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	28 April 2017
STATUS	Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

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

MEDIA STATEMENT

The Supreme Court of Appeal, on 26 April 2017, dismissed an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (Mavundla J) concerning the interpretation of sections 153(1)*(a)*(ii) and 153(7) of the Companies Act 71 of 2008 (the Act).

The main issue in the appeal was whether it was reasonable and just, in terms of s 153(7) of the Act for the court a quo 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. Linked to the main issue, was the question of what the consequences for business rescue proceedings were, once the result of such a vote had been set aside.

KJ Foods has been operating as a supplier of bread to the informal sector of the community and cash and carry wholesalers and has also been a customer of Firstrand for more than 20 years. It commenced business rescue proceedings in July 2013 after it had experienced financial distress. Business rescue practitioners were appointed, and after several contentious creditors' meetings, a business rescue plan was proposed. Firstrand took issue with the proposed business rescue plan, which led to it being revised several times. When the creditors were required to vote on the adoption of the plan, Firstrand voted against its adoption. As Firstrand held 29 per cent of the creditors' voting interests and had voted against the adoption of the plan, the business rescue plan could not be approved on a preliminary basis. The Act requires 75 per cent of creditors' voting interests that had voted to approve the business rescue plan. The practitioners accordingly approached the court a quo

for an order in terms of s 152(3)*(a)* of the Act, to set aside the result of the vote – on the ground that it was inappropriate. The court a quo ordered that the result of the vote be set aside 'on the grounds that the voting against the plan was inappropriate' and that the revised business rescue plan be adopted.

In a majority judgment in the SCA, Schoeman AJA held that in an application to set aside the result of a vote (in terms of s 153(1)(a)(ii) and s 153(1)(b)(i)(bb) – which the court held are inextricably linked to s 153(7)), 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. This includes the purpose of business rescue in terms of the Act. Put differently, the majority said, the vote would be set aside on the grounds that its result was inappropriate, if it is reasonable and just to do so in terms of s 153(7). And according to the majority, this entails a single enquiry and value judgment.

As a consequence, the majority held, once the result of the vote is set aside, the business rescue plan is adopted – by the operation of law. Therefore, the declaratory order of the court a quo that the revised business rescue plan be adopted was superfluous. Seriti JA in his minority judgment agreed that the court a quo could not order the adoption of the rescue plan, but reasoned that the court a quo had no power to refer back the business rescue plan to the affected parties for adoption thereof.

Seriti JA also agreed that the vote against the adoption of the business rescue plan should be set aside, however, he differed with the majority that the enquiry was a single one. According to Serirti JA, the court must first determine whether or not the vote was inappropriate and if so, invoke the provisions of s 153(7). In other words, the court's discretionary powers afforded by s 153(7) become applicable once the jurisdictional fact of inappropriateness is established.

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