REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 2021/54279

(1) ~~REPORTABLE~~: NO

(2) OF INTEREST TO OTHER JUDGES: NO

08/11/2022 .....
DATE SIGNATURE

In the matter between:

ZAHEER CASSIM N.O. **First Applicant**

STEPHEN SMYTH N.O. **Second Applicant**
[In their capacities as jointly appointed
Business Rescue Practitioners of Busmark
2000 (Pty) Ltd (in business rescue)]

and

STRATEGIC INVESTMENT GROUP AFRICA **First Respondent**

ASSET FINANCE (PTY) LTD

(Registration Number: 2020/004014/07)

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION ("CIPC") — **Second Respondent**

PATUXOLO NODADA — **Third Respondent**

ALL AFFECTED PARTIES AS DEFINED IN SECTION 128 OF THE COMPANIES ACT 71 OF 2008 — **Fourth Respondent**

JUDGMENT

---

[1] This is an application in terms of Section 131 (1) of Act 71 of 2008 in which the applicants seek an order in the following terms: -

1. That the application be heard on urgent basis and that non-compliance of the Rules of Court pertaining to time periods and service be condoned;
2. That the first respondent be placed under supervision and that business rescue proceedings be commenced against him;
3. That the first and second applicants be jointly appointed as the first respondent's business rescue practitioners.

   In the alternative the above Honourable Court should appoint a fit and proper business rescue practitioner for the first respondent.

   That the costs of this application be costs in the business rescue of the first

respondent in the event of opposition.

The first respondent resists the relief sought on the following grounds: -

1. That the applicant's application lacks the necessary requisites for urgency and that it is accordingly not urgent;
2. It is contended by the first respondent that the applicants failed to establish and illustrate that the first respondent is in financial distress;
3. That it would not be just and equitable that the first respondent be placed under supervision and that business rescue proceedings of the first respondent be commenced with.

4. The first respondent argues that the applicant's application is the abuse of the process as the real motive of this application is to assume control over the first respondent for the sole benefit of the third applicant.

CONDONATION APPLICATION

[2] The third respondent seeks condonation for the late filing of an answering affidavit on behalf of the first respondent and himself. The application is based on the following grounds. Due to the short notice afforded to the third respondent and first respondent including all the interested and affected parties, they could not source another legal representatives as their usual attorneys were conflicted in this application. The three days' notice afforded to file the answering affidavit were not sufficient to instruct another set of attorneys to act

on their behalf. The respondents herein sought an extension of time in which to serve and deliver their answering affidavit. The applicants' attorneys did not respond to the request for the extension of time. Ultimately the respondents managed to procure the services of alternative attorneys and resumed to peruse the four hundred pages of the application and further consult and draft the answering affidavit on behalf of the affected respondents in this matter. The first and third respondents submitted that the delay caused is not due to any tardiness on the side of the respondents.

[3] The applicants accepts that the respondents secured the alternative legal representatives on the eleven hour but contend that no explanation is tendered as to why they procured their alternative attorneys late whereas they were aware that their previous attorneys were conflicted. They however indicated that they will abide by the court's decision on the issue of condonation.
A court may condone non-compliance of the Rules of Court where the applicant demonstrates that a valid and justifiable reason exists why non-compliance should be condoned.

[4] An applicant is to furnish an explanation of his default sufficiently and fully to enable the Court to understand how it really came about and to assess his conduct and motives. The factors to be considered by the court include the importance of the case, the prospects of success on appeal, any prejudice caused, the respondents' interest in the case and the finality of his judgment and

the convenience of the court and the avoidance of delay in the administration of justice. The burden lies with the applicant to prove good cause for the relief it seeks.

See **Silber .V. Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 A at 353 A and Federated Employers Fire & General Insurance Co Ltd .V. McKenzie 1969 3 SA 360 A at 362 F-H**

It is trite law that the standard for considering application for condonation is the interest of justice.

See **Brummer .V. Gorfil Brother Investments (Pty) Ltd and Others 2000 (2) SA 837 CC paragraph [3] and Grootboom .V. National Prosecuting Authority and Another 2014 (2) SA 68 CC paragraphs [22] and [23]**

[5] I find that a full and sufficient explanation as to how the non-compliance came About were disclosed by the applicant herein. I am of the view that a good and bona fide explanation has been tendered by the applicants.

I further find that it is in the interest of justice for both parties more particularly in the interest of justice that condonation be granted.

I therefore make the following order: -

1) That the application for condonation is hereby granted.

FACTUAL BACKGROUND

[6] The third applicant's (Busmark 2000 Pty Ltd) board resolved to voluntarily commence business rescue proceeding and placed the third applicant under supervision in terms of Section 129 (1) of Act 71 of 2008. The first and second applicants were licensed during 04 August 2021 to act as the joint business rescue practitioners in regard to third applicant.

[7] The records reflect that the first respondent Strategic Investment Group Africa Asset Finance Pty Ltd (SIGA) was initially registered with the companies and Intellectual Properties Commission (CIPC) as (CIMBIB) (Pty) Ltd on 06 January 2020 which name was changed to Strategic Investment Group Asset Finance (Pty) Ltd during 16 October 2020. Patuxola Nodada the third respondent, is the sole director of "SIGA" and its business is to procure tenders for delivery of buses to various organizations and in turn subcontracts with the third applicant for the manufacturing and delivery of the requisite number of buses.

[8] The first respondent will also enter into agreements with Busmark Maintenance Services (Pty) Ltd (Busmex) for the maintenance of the buses so acquired.

[9] The first respondent submitted a proposal to supply, lease and maintain ten buses to Rustenburg Transit (RF) Pty Ltd. In turn the third applicant and the first respondent were to enter into Bus Supply and maintenance agreement with Rustenburg Transit and the first respondent will source and supply the ten buses to Rustenburg Transit. The third applicant manufactured the ten buses

and delivered them to the first respondent. The first respondent delivered the buses to Rustenburg Transit and was paid a stepped lease in the sum of R15 million and continued to pay rental amounts to the first respondent.

[10] During 1 August 2020 the first Respondent entered into a Bus Supply Rental and Maintenance Agreement with Africa's Best 350 Pty Ltd and sold and supplied 130 buses for which it was paid R78 963 600 and made monthly payments of R1.5 million to the third applicant.

[11] The first respondent was awarded a tender to supply, lease and maintain 45 buses to Rustenburg Transit. The third applicant is not a party to an existing agreement between the first respondent and Rustenburg Transit for the lease of the ten buses as well as a standing order for the delivery and lease and maintenance of further forty five buses.

[12] An attempt was made to formalize the relationship between the third applicant and the first respondent to regulate their relationship prior to the first respondent placing an order to the third applicant for the manufacturing of the forty five buses for Rustenburg Transit but could not agree to the terms thereof. The parties hereto did not conclude the Bus Supply and Rental and Maintenance Agreement to date.

[13] The third applicant is a creditor of the first respondent in the sum of R41 million in respect of a loan advanced to the first respondent for the purchase of buses

and for an amount of R6.8 million in respect of the lease arrears. In the event of a dispute between the third applicant the first respondent and Rustenburg Transit the parties aforementioned are supposed to resort to a dispute resolution mechanism.

[14] The first respondent and the third applicant are to date unable to conclude an agreement relating to the Bus Supply Rental and the maintenance of the forty five buses the first respondent successfully tendered for.

[15] A letter of demand for payment of the R46, 8 million allegedly owed by the first respondent to the third applicant was dispatched to the first respondent for payment. It is disputed that the amount owed to the third applicant is due and payable and that the amount is correct. The failure by the first respondent to comply with the applicants' letter of demand resulted in the applicants launching an application for an order placing the first respondent under supervision and commencing business rescue proceedings.

ISSUES FOR DETERMINATION

[16] The issues to be decided are the following: -

1. Whether the first respondent is financially distressed;
2. Whether the first respondent should be placed under supervision and whether business rescue proceedings should be commenced against first respondent;

3. Whether the applicants should be appointed as business rescue practitioners in the event the first respondent is placed under supervision.
4. Whether the applicants' application amounts to abuse of process court.
5. Whether it would be just and equitable that an order be granted for placing the first respondent in business rescue.

LEGAL PRINCIPLES FINDING APPLICATION

[17] The applicants rely on the provisions of Section 131 (1) of Act 17 of 2008 in seeking an urgent order for placing the first respondent under supervision and business rescue proceedings to commence.

Section 131 (1) of the Companies Act stipulates that: -

"court order to begin the business rescue proceedings : -

1) Unless a company has adopted a resolution contemplated in Section 129, an affected person may apply to the court at any time for an order placing the company under supervision and commencing business rescue proceedings"

[18] In terms of Section 131 (4) of Act 17 of 2008 the applicants are vested with an onus to establish to the satisfaction of the court the following requirements: -

1. That the company (first respondent) is financially distressed;
2. That the first respondent has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract with respect to employment related matters; or

3. It is otherwise just and equitable to do so for financial reasons;
4. That there is a reasonable prospect for rescuing the company.

[19] If the court is satisfied that the aforementioned requirements are met, may place the company under supervision and business rescue proceedings may commence.

[20] The Act in Section 128 (1) (f) describes (Act 17 of 2008) financial distress in the following terms: -

That it is unreasonably unlikely that a company would be able to pay all its debts as they become due and payable within the immediately ensuing six months.

That it appears to be reasonably likely that the company will become insolvent within immediately ensuing six months.

The Applicant's contentions

[21] The applicants contends that the first respondent is financially distressed and if placed under supervision and business rescue, it would return to a solvent entity and alternatively creditors will immensely benefit as the process will yield better dividends. It is further contended by the applicants that despite the first respondent having received a stepped lease in the amount of R15 million, monthly instalments deriving from the said lease, monthly instalments payments from instalments sale agreement concluded with AB 350 Pty Ltd and payment for the delivery of the buses, the first respondent has failed to effect full payment to the third applicant.

[22] According to the applicants, the first respondent is solely enjoying all the benefits it sourced from the agreements it concluded to the detriment of the third applicant. As a result of non-payment by the first respondent to the third applicant, it is now in financial distress together with its subsidiary groups. The applicants' view is that the existing agreement between the first respondent regarding the ten buses already delivered and the standing order for the delivery, lease and maintenance of further forty five buses to Rustenburg Transit will be in jeopardy as the contractual agreement thereof will not be met without all the Busmark Companies' involvement as their business are inter-related. The applicants submitted that the third applicant will not be willing to supply the forty five buses if a business rescue practitioner is not appointed for the first respondent.

If further submitted that if the third applicant is not willing to supply the buses and guarantee warranties on behalf of the first respondent, the first respondent will be unable to fulfil its obligations to Rustenburg Transit or any potential client.

[23] The applicants contends that the fact that the third applicant is not a party to the agreement entered into by the first respondent with various institutions pertaining to the supply lease and maintenance of the buses, such agreements are reliant to the involvement of Busmark Group of companies without which the first respondent cannot comply with its obligations to those entities. The

applicants argues that if the first respondent does not meet the requirements as set out with Rustenburg Transit, it will lose the business with Rustenburg Transit including the existing lease agreement of ten buses and the standing order for the lease of further forty five buses. The first respondent according to the applicants will become insolvent within the following six months.

[24] Since the first respondent failed to respond to the applicants' letter of demand for payment of its debt, it is therefore in financial distress and it cannot pay its liabilities which are due, so argued the applicants. The applicants contend that despite there being no formal repayment agreement between them and the first respondent such amount owed by the first respondent to the third applicant become due and payable on demand.

[25] According to the applicants, it will be just and equitable to place the first respondent under supervision and that business rescue proceedings be implemented as the rights of all affected parties will be protected. The applicants contend that it has demonstrated on the objective facts available that there is a reasonable prospect under business rescue that the first respondent will be rescued from being an insolvent entity as it is presently unable to pay its debts.

The first Respondent's arguments

[26] The first respondent's submitted that in motion proceedings a final order will only be granted if the facts as stated by the respondents together with facts alleged

by the applicants that are admitted by the respondents justify such order.

[27] It is submitted by the first respondent that the applicants failed to make out a *prima facie* case in its founding affidavit for the relief it sought instead their application is premised on conjecture and speculation which is not helpful to their cause. The first respondent argues that the facts admitted by the first applicant as well as the facts so admitted by the first respondent do not entitle the applicants the relief they seek from this court.

The common facts relied upon by the first respondent inter alia are the following: -

The applicants were licensed to act as business rescue practitioners during 4 August 2020 on behalf of the third applicant.

The first respondent has a standing order with Rustenburg Transit for the supply, lease and maintenance of the forty five buses. The third applicant was supposed to deliver and supply and to provide guarantee warranties on behalf of the first respondent. However the third applicant is not a party to the tender awarded to the first respondent by Rustenburg transit and has no contractual and / or legal right to interfere in the agreement between Rustenburg Transit and the first respondent.

[28] The applicant representing the third applicant and the first respondent tried to formalize the relationship between them but could not agree on terms thereof. The third applicant is a creditor of the first respondent in the sum of R46.8

million of a loan advanced in the purchasing of the forty five buses and loan arrears.

Despite the debt owed to the third applicant, there is no obligation upon the first respondent to enter into an agreement with the third applicant for the tender and standing order for forty five buses tendered by the first respondent.

[29] The third applicants are relying on the Bus Supply and maintenance Agreement concluded between them and the first respondent and Rustenburg Transit during August 2020 and September 2020 for the ten buses delivered. Rustenburg Transit had concerns with the placing of the third applicant under business rescue.

[30] Realizing that there was no agreement formalizing the relationship between the first respondent and the third applicant, the third applicant caused a letter of demand to be issued against the first respondent recalling up a loan of R46.8 million along with rental payable within a period of four days including Saturday and Sunday. The first respondent failed to respond to the said demand and the applicants approached the court on urgent basis to place the first respondent under supervision and business rescue alleging that the first respondent is under financial distress. That applicant's reliance on the possibility and speculation that Rustenburg Transit may retract the standing order for the supply, delivery, lease and maintenance for forty five buses has no basis and the applicants cannot rely on conjecture as a ground for urgency so argued the first respondent.

[31] According to the first respondent the applicants' founding affidavit does not contain any allegation of any breach committed by the first respondent in respect of the agreements relied upon. The first respondent submitted that the agreement between Rustenburg Transit and the first respondent provides for repayment of outstanding amounts on monthly basis and the arrangements for payment due to the third applicant depended on payment received from Rustenburg Transit on payment of the monthly instalments.

ii) Busmex which is not in business rescue conducted the warranty and maintenance obligations on behalf of the first respondent while the remaining mechanical warranty in respect of the ten buses will be honoured by Mercedes Benz of South Africa.

[32] The first respondent's view is that it will be able to place an order with another manufacturer should the first respondent and the third applicant not be able to reach an agreement. The first respondent submitted that in view of the common facts aforementioned, the applicants failed to make out a case for the relief sought.

[33] The first respondent argues that the applicants failed to discharge the onus vested on them in terms of Section 131(4) of the Act and satisfy the court that the first respondent is in financial distress. The first respondent submits that it is in fact up to date with its payments and that it will be able to honour its

obligations within the ensuing six months and is not likely to become insolvent in the ensuing six months.

[34] Except the unreasonable demand that the first respondent effect payment of R46.8 million on a four days' notice, it is contended that the applicants failed to establish any factual basis for alleging that the first respondent is in financial distress. According to the first respondent, there is no evidence provided by the applicants to prove that the first respondent will be unable to honour its obligations apart from a letter of demand addressed on four days' notice to the first respondent.

[35] The only distress that may exist in the first respondent's view, is a relational distress between the applicants and the first respondent which cannot result in the first respondent being placed in business rescue. The contention by the applicants that it is just and equitable that the first respondent be placed in business rescue according to the first respondent is not justified if one considers the common facts in this matter.

[36] The first respondent argues that the main reason why this application was launched is that the first respondent and the applicants could not agree to terms of a written agreement formalizing their relationship in which the third applicants must be appointed to manufacture and deliver forty five buses to the first respondent to be delivered to Rustenburg Transit. The view of the first respondent is that the intention of the applicants in launching this application is

to gain control of the first respondent, conclude agreements with the third applicant as well as the Rustenburg Transit. The first respondent contends that the application was not brought in good faith and it is in fact an abuse of the court process.

[37] The contention by the applicants that they are entitled to assume control of the first respondent by instituting business rescue proceedings and that the first respondent is duty bound to conclude an agreement with the third applicant is unacceptable according to the first respondent as it amounts to an agreement to agree. The first respondent's view is that since there is no agreement with the applicants and as such there is no deadlock breaking mechanism, any possible agreement to agree between the parties herein is unenforceable.

[38] The first respondent submits that it is entitled to freely enter into agreement with any manufacturer for the supply of forty five buses in order to fulfil its obligations in terms of the tender awarded to it by Rustenburg Transit.
The first respondent prays for the dismissal of the application and that the first and second applicants to pay costs jointly and severally on an attorney and client scale *de bonis propriis.*

URGENCY

[39] The applicant approached the court with its application on the basis that it is

urgent as stipulated in Rule 6 (12) of the Rules of Court. The degree of urgency according to the applicants is premised on the following consideration:-

That the first respondent has an agreement with Rustenburg Transit for the lease of the ten buses and a standing order for delivery and lease and maintenance of further forty five buses. The contractual agreements between Rustenburg Transit and the first respondent depend on the involvement of the Busmark Companies (the third applicant being part of the Busmark group of companies) whose businesses are interlinked and without their participation in the agreements the first respondent will not be able to comply with its obligation with Rustenburg Transit. It is submitted that the survival of Busmark Companies and first respondent rests on this matter being heard on urgent basis. The employment of 450 employees will be terminated if this matter is not attend to urgently. The contention of the applicants is that the first respondent is unable to pay its debts and fails to comply with the contractual obligations it concluded.

If the application is not heard on urgent basis, the very harm sought to be prevented will be moot by the time this application is brought on normal roll as Rustenburg Transit may withdraw the tender awarded to the first respondent. The effect thereof will be devastating to all interested parties herein including the Busmark Companies and the first respondent.

The applicant seeks a court order against the first and third respondents for the costs of the application.

The first respondent disputes the correctness of the debt owed and that the

amount is due and payable.

First Respondent's Submissions on Urgency

[40] The first respondent's contention is that the application is not urgent as it is not based on any factual foundation but it is premised on conjecture and speculation.

[41] The grounds of urgency cited by the applicants according to the first respondent, concern the tender the first respondent obtained from Rustenburg Transit for the supply, lease and maintenance of buses of which the third applicant or the applicants are not a party thereto. The first respondent contends that an attempt was made to formalize the relationship between the applicants but could not agree to the terms thereof. It is argued that in the absence of an agreement between the first respondent and the applicants, the applicants do not have any contractual and or legal right to interfere with the first respondent's agreement with Rustenburg Transit.

[42] The first respondent submitted that the applicants failed to demonstrate and indicate the circumstances which renders the application urgent and the reasons why it is alleged that he could not be afforded substantial redress at a hearing in due course. Accordingly the first respondent submits that the application be dismissed with costs and it be struck off the roll due to lack of urgency.

Analysis

[43] Urgent applications are governed by the provisions of rule 6 (12) of the Rules of court. It is provided in Rule 6 (12) (a) that the court may dispense with the forms and service as provided in the Rules and may dispose of such a matter at such a manner and in accordance with such procedure as in it meet fit.

[44] The court is therefore seized with a special discretion in applying Rule 6 (12) which discretion is to be exercised reasonably and judicially. There are different degrees of urgency. The question to be considered is therefore whether there must be a departure at all from the times prescribed in Rule 6 (12).

See **Luna Meubel Vervardigers .V. Makin and Another 1977 (4) SA 135 (W) at paragraph 137 A-E.**

It is upon the applicants to demonstrate and set out explicitly the circumstances which render the matter urgent. The applicants must show that it will inter alia suffer real loss or damage in the event the matter is heard on normal court roll.

See **Voigt BO .V. EGH IP (Pty) Ltd 2021 JDR 1113 ECG at paragraph 11-17.**

[45] The applicants contended that its reliance on urgency is premised on the survival of both the Busmark Group as a whole, the first respondent and the interest of the 450 employees of the Busmark Group and referring the matter to a normal court roll will defeat harm sought to be prevented and that Rustenburg Transit may withdraw the tender awarded to the first respondent.

[46] On the other hand the first respondent argues that the applicants failed to demonstrate that they are entitled to a dispensing of the Rules relating to form and service and further that their application should be entertained on a week's notice without affording all the affected parties adequate opportunity to deal with the averments contained in the founding affidavit. It is the first respondent's contention that the applicants' application on urgency is not based on actual facts and thus the applicants failed to make out a case for urgency.

[47] It is clear that what prompted the launching of this application is the non-response to the letter of demand sent to the first respondent for immediate payment of an amount of R46.8 million owed to the third applicant by the first respondent relating to the tender awarded to the first respondent by Rustenburg Transit. The applicants premised the application on the agreements the first respondent concluded during August 2020 and September 2020. The letter of demand was only issued during October 2021 giving the first respondent about three days which included Saturday and Sunday and a public holiday. Regard having had to the grounds raised in the urgent application, it is noteworthy that the applicants rely not on actual facts but on speculation and what might happen if the matter is not heard on urgent basis.

[48] I am not persuaded that the applicants crossed the first hurdle to demonstrate that it is entitled to dispensing with the rules relating to form and service. More so, in my view, the applicants failed to discharge its obligation to set out

explicitly the circumstances rendering the matter urgent. I find that this application is not sufficiently urgent to be heard at the time selected by the applicants. The application was in my opinion correctly referred to the opposed roll. The urgent application is therefore dismissed.

[49] In order to succeed with the application in terms of Section 131 of Act 17 of 2008 the applicants are to satisfy Section 131 (4) of the Act. It is a requirement that a company should have adopted a resolution for any person affected to embark on a process of placing the company under supervision and to commence business rescue proceedings as provided for in Section 129 (1) of the Act. The applicants contented that since the first respondent failed to meet the demand for payment of R46.8 million which it deems due and payable, it is accordingly under financial distress.

[50] Relying on **Tyre Corporation Cape Town (Pty) Ltd and Others 2017 (3) SA 74 (WCC)** at paragraph 15, the applicants argue that existing commercial insolvency constitutes financial distress which may also apply to factual insolvency. The view of the applicants is that the first respondent will lose the tender with Rustenburg Transit if it fails to meet its obligations as per the agreement between the first respondent and Rustenburg Transit which will lead to the first respondent becoming insolvent. The unavoidable question is whether the first respondent is really under financial distress under the circumstances of

this matter. Sight must not be lost to the fact that there is no agreement concluded with the third applicant or any legal right existing between it and the first respondent.

[51] In my view, the distress between the first respondent and the third applicant is due to the parties not agreeing to terms in formalizing their agreement relating to the tender of forty five buses awarded to the first respondent. The demand for payment of R46.8 million payable within a very short period without any breach of any contract by the first respondent according to me, is not reasonable and acceptable.

[52] The first respondent in any case disputes that the amount is due and payable and further dispute the correctness of the said amount in the sum of R46.8 million. Realizing the fall out between the parties herein, the first respondent continued transferring what was due on monthly instalments to the third applicant to a trust attorneys' account.

The facts in **Tyre Corporation Cape Town (Pty) Ltd and other** referred to supra, are distinguishable to the present matter. The grounds relied upon by the applicants are not factual but based on gesture and the first respondent is not in my view commercially insolvent.

[53] The first respondent's contention is that there are no outstanding amounts payable to the third applicant presently and will be able to meet its financial obligation within the ensuing six months and beyond and that there is no threat

of it becoming insolvent anytime soon. The amount claimed by the third applicant are disputed and the first respondent argues that the said amount is not payable on demand. The first respondent submitted that the warranty and maintenance obligation are carried out by Busmax which is not in business rescue. It is my view that the applicants failed to prove that the amount is due and payable on demand. The said amounts were paid monthly to the third applicant and not at any time if demanded.

[54] Having regard to the common facts of this matter, I find that there is no reason to doubt and conclude that the first respondent is actually not in financial distress as in my view, there are no pointers and evidence established to find otherwise. It is my opinion that the applicants did not succeed in establishing that the first respondent is unable to pay its debts to the third applicant as per the demand which I found to be unreasonable under the circumstances. The failure to conclude an agreement between the parties to formalize their relationship cannot in my view be a reason enough to place the first respondent under supervision and business rescue.

[55] The applicant argued that it will be just and equitable to embark on business rescue proceedings against the first respondent as it will make a financial sense resulting in the protection of all the affected parties' rights and interests. According to the first respondent, the sole purpose of placing the first respondent in business rescue is simply to gain control over the first

respondent's affairs and the application is thus brought in bad faith.

[56] Careful reading of the papers herein reveal that the distrust and deadlock in not agreeing to terms of formalizing the relationship between the parties is in my view, the reason that resulted in this application being instituted. The motive and purpose of bringing this application is highly questionable and cannot be regarded as just and equitable as I have already found that the applicants failed to make out a case for financial distress against the first respondent. I therefore find that it is not just and equitable to place the first respondent under business rescue as there is no evidence presented justifying same. It is therefore not far-fetched for the first respondent to assert that the only reason why this application was launched is to gain control of its affairs. The applicants clearly indicated that with the business practitioners appointed, the affairs of the first respondent will be better controlled for the benefit and interests of all affected parties. According to the applicants, the success of the first respondent is reliant in it concluding an agreement with the third applicant. The applicants contended that there is a reasonable prospect of rescuing the first respondent from insolvency and that it has not secured an independent funder from any institution.

[57] The first respondent stated that it is entitled to freely contract with any manufacturer to supply the forty five buses for Rustenburg Transit and refutes that its success is dependent on the third applicant. The court has a discretion in

determining whether there is a reasonable prospect of rescuing the companies from its insolvency by placing it under business rescue. I hold the view that the first hurdle to be crossed is that the company is under financial distress and that there is a good and just cause to place it under supervision and business rescue.

[58] Having found that the applicants failed to make out a case for financial distress and that it is good and just to do so, the determination of whether there is reasonable prospect that the first respondent can be rescued is neither here nor there. I find that there is no justification to rescue the first respondent as it is not financially distressed to make such determination under the circumstances of this matter. I am not convinced that it is important and necessary to appoint the applicants and any person as business practitioners as there are no justifiable reasons to do so.

COSTS

[59] Counsel for the first respondent requested that this Court should grant a punitive costs order *de bonis propriis* against the first and second applicants.

The basis of the request is premised *inter alia* on the following: -

1) That the application is launched for ulterior purpose and its genesis is based on an innuendo that the first respondent is in financial distress;

2) That the application be heard on urgent basis as there is possibility that the

tender be awarded to the first respondent may be cancelled by Rustenburg Transit without any evidence provided;

3) It is argued by the first respondent that the applicants caused unnecessary prolixity as its founding affidavit contains 420 pages with annexures without referring the Court to relevant portions of the attached annexures despite the application being instituted on urgent basis;
4) That the applicants' unjustified letter of demand for amounts that are not due and payable being aware of the existence of dispute between the parties regarding the said amount claimed deserves a punitive costs order;

5) That the conduct of the applicants and lack of bona fides and their negligent and unreasonable act of launching this application calls for a cost order *de bonis propriis* against them.

[60] The applicants in their notice of motion submitted that in the event of no bona fide opposition to the relief sought in the application costs be in the business rescue of the first respondent. Counsel for the applicants' argued costs be for the first and second respondents if the application is opposed. It is generally accepted that ordinarily the costs follow the result. A successful party is therefore entitled to his / her costs.

[61] The court in **Ferreira .V. Levin NO and Others 1996 (2) SA 621 CC at 624 B-C par [3]** held that the award of costs unless expressly otherwise enacted, is

in the discretion of the court. The facts of each and every case are to be considered by the court when exercising its discretion and has to be fair and just to all parties.

The court will in appropriate circumstances award costs on a punitive scale including costs de bonis propriis. However, the court will not easily grant a punitive costs order and costs de bonis propriis. It goes without saying that punitive costs de bonis will only be granted in exceptional circumstances.

The criterion to be used is inter alia misconduct of any sort or recklessness.

[62] The conduct of the applicants in launching this application on urgent roll and the unreasonable time frames given to the first respondent to answer the fact that there is a dispute about the correctness of the amount claimed which the applicants deemed due and payable contrary to the protest of the first respondent and the grounds relied upon by the applicants which are speculative in nature, cannot simply be ignored when considering the issue of costs in this matter.

[63] The court in **Re Alluvial Creek Ltd 1929 CPD 532 at 535** stated that:

"An order is asked for that he pay the cost as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean

where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright and a most firm belief in the justice of the cause, and yet his proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear"

[64] It is settled law that the purpose of an award of costs to a successful litigant is to indemnify that party for the expense to which it has been put through having unjustly compelled to initiate or defend litigation as the case may be. I find that the conduct of the applicants to be unreasonable, reckless, unacceptable and amount to the abuse of the court process in the circumstances of this case. A punitive costs is in my opinion warranted.

See **Nienaber .V. Struckey 1946 AD 1049 at 1059**

ORDER

I therefore make the following order;

1. The application is dismissed;
2. The applicants are directed to pay all costs on attorney and client scale including costs of Counsel.

S S MADIBA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR THE APPLICANTS:	**VEZI & DE BEER INC.** **319 ALPINE WAY** **CNR ALPINE WAY & SOUTH** **VILLAGE LAKE** **LYNWOOD, PRETORIA** **TEL: 012 361 5640** **FAX: 086 647 3120** **E MAIL: mustafa@vezidebeer.co.za** **REF: M MOHAMED/MAT 72553**
FOR THE 1ST AND 3RD RESPONDENTS:	**MPOYANA LEDWABA INC.** **194 BLACKWOOD STREET** **ARCADIA** **TEL: 012 346 4093** **E MAIL: mpoyana@ledwaba.co.za** **REF: MR LEDWABA**
DATE OF HEARING:	**17 FEBRUARY 2022**
DATE OF JUDGMENT:	**08 NOVEMBER 2022**