IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 067770/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE 26/10/2023
LENYAI J

In the matter of:

POOLE, ANGELENE N.O.	**First Applicant**
MAWELA, ABEL MAKALENE N.O.	**Second Applicant**

And

RASHIDA INDUSTRIES (PTY) LTD	**First Respondent**
GANI, SHANNA	**Second Respondent**
AYOB, NIZAMUDEEN NOOR MOHAMED	**Third Respondent**
SCHICKERLING, JOHN FREDERICK N.O.	**Fourth Respondent**
FIRST RAND BANK LTD	**Fifth Respondent**
FEDBOND NOMINEES (PTY) LTD	**Sixth Respondent**
SASFIN BANK LTD	**Seventh Respondent**
NEDBANK LTD	**Eighth Respondent**
THE SOUTH AFRICAN REVENUE SERVICE	**Ninth Respondent**
THE EMPLOYEES and TRADE UNIONS	**Tenth Respondent**

THE MASTER OF THE HIGH COURT, PRETORIA **Eleventh Respondent**

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020, and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is *deemed to be 14:00 on 26 October 2023*

J U D G M E N T

LENYAI J

1. This is an application by the first and second applicants that it be directed in terms of section 18(3) of the Superior Courts Act, 10 of 2013 that the petition to the Supreme Court of Appeal for leave to appeal, do not suspend the operation and execution of the order granted by me in the urgent court on the 26th July 2023 and the written reasons of the 31st August 2023.

2. The leave to appeal was heard on the 5th October 2023 and the judgment refusing the leave to appeal was handed down by me on the 6th October 2023. The second and third respondents launched their petition to the Supreme Court of Appeal to set aside the order refusing the leave to appeal and grant them leave to appeal to the Supreme Court of Appeal , alternatively to the Full Court of the Gauteng Division against the whole judgment and orders granted by me on the 26th July 2023.

3. It is noteworthy to mention at this stage that the Fifth Respondent (FRB) made an intervention application that it be granted leave to intervene as a co-applicant in the Section 18(3) application and henceforth participate as the third applicant.

4. FRB's reasons for the intervening application are that on the 16th October 2023 it, together with the other creditors of Hanmar Belliggings (Pty) Ltd, received an email from the provisional liquidators of Hanmar, informing them that without interim financial support to pay the legal costs incurred to date and to be further incurred in prosecuting the Section 18(3) application to finality, they will have no option but not to proceed with the matter. FRB has also delivered an answering affidavit in support of the section 18(3) application. FRB avers that it is for all intents and purposes already in a position of a co-applicant and it cannot afford for the section 18(3) application to be abandoned because the provisional liquidators are financially constrained and as the major creditor, they have a direct and substantial interest in the subject matter of the section 18(3) application and the application is seriously made and is not frivolous.

5. There was no opposition at all to this application from the respondents. The court is of the view that it is in the interests of justice that this application be granted.

6. FRB also made an application for leave to file a supplementary answering affidavit. It was submitted that FRB seeks to demonstrate that the dismissed application for leave to appeal and the petition for leave to appeal to the Supreme Court of Appeal are inarguable, without merit, an abuse of court process and are all part of a greater strategy that pursues an ulterior, improper and dishonest motive to defeat the creditors of Hanmar by placing the assets of Hanmar out of reach of the creditors and delaying the finalization of the liquidation proceedings. The supplementary affidavit deals with crucial facts not known to FRB at the time when its initial answering affidavit in support of the section 18(3) was deposed to and delivered. These new facts only transpired after the initial affidavit was already signed and delivered.

7. FRB further avers that it is important to ensure that the section 18(3) application should be adjudicated on the most recent and relevant facts. It was submitted that it would be in the interests of justice to allow this affidavit and

there is no legally recognized or relevant prejudice to be suffered by the respondents as the information in the affidavit is known to them.

8. There was no real opposition to the application. The court observed that the second and third respondents only uploaded their answering affidavit on the evening before the hearing, being the 19th October 2023 whilst the application for the supplementary affidavit was served and uploaded on caselines on the 13th October 2023. I am of the view that there is no prejudice to the respondents as they had ample time to deal with the averments made in the supplementary affidavit. It is in the interest of justice that the application for leave to file the supplementary affidavit be condoned and it be admitted and form part of the evidence before court.

9. In order to properly consider this application in terms of section 18(3),a proper reading and application of section 18 is required.

Section 18 Suspension of decision pending appeal

"(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)

(i) *the court must immediately record its reasons for doing so*

(ii) *the aggrieved party has an automatic right of appeal to the next highest court*

(iii) *the court hearing such an appeal must deal with it as a matter of extreme urgency and*

(iv) *such order will be automatically suspended, pending the outcome of such appeal.*

For purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules"

10. Turning to the applicants' application in terms of section 18(3), the applicants are required to demonstrate firstly exceptional circumstances which justify the execution of the order pending the appeal, secondly that the applicants will suffer irreparable harm if the order is not executed and lastly that the other party will not suffer irreparable harm if the order is granted. **Maughan v Zuma and Another; Downer v Zuma and Another (12770/22p) [2023] ZAKZPHC 75 (3 August 2023).**

11. The first stage of the enquiry, whether exceptional circumstances are present depends on the peculiar facts of each case. The exceptional circumstances must be derived from the actual predicaments in which the parties find themselves.

12. The following factors to my mind, establish the exceptional circumstances :

12.1 the first and second applicants bring this application for leave to execute the urgent order granted on 26th July 2023 pending the petition for leave to the Supreme Court of Appeal (SCA), in terms of which it was ordered that :

12.1.1 the liquidators' powers were extended in terms of section 386(5) and 387(3) of the Companies Act 61 of 1973, and they are authorized to institute and prosecute the main application;

12.1.2 the transfer of the business conducted by Hanmar to Rashida Industries in terms of a written of the 31st March 2023, be declared void in terms of section 34(1) of the insolvency Act, 24 of 1936.

12.1.3 Rashida Industries, Gani and Ayob are ordered to restore possession of the business and assets purportedly sold in terms of the agreement referred to in 12.1.2 above, to the liquidators within 3 days from the date of the order;

12.1.4 that Gani and Ayob are ordered to pay the costs of the main application jointly and severally.

13. The applicants being the liquidators and FRB, contend that the petition of the leave to appeal to the SCA is without merit and is simply a stratagem to prevent the liquidators from fulfilling their statutory obligation to recover and reduce into their possession all the assets and property of Hanmar.

14. The applicants aver that several court orders were granted being:

14.1 The final winding up order in respect of Hanmar was granted on the 3rd October 2023 under case number 044099/2023.

14.2 The first business rescue in respect of Hanmar was dismissed on the 3rd October 2023 under case number 073163/2023.

14.3 The second business rescue in respect of Hanmar was dismissed on the 3rd October 2023 under case number 076414/2023.

14.4 The application for leave to appeal by Gani and Ayob was dismissed on the 6th October 2023.

15. The applicants aver that there were a lot of maneuvers to prevent the liquidators from fulfilling their obligations and protect the creditors of Hanmar. Again, on the 8th October 2023, Gani and Ayob filed a petition to appeal to the SCA.

16. FRB in its supplementary affidavit avers that an enquiry was convened into the trade, dealings, affairs and property of Hanmar in terms of sections 417 and

418 of the Companies Act, 1973. The Commissioner, Retired Jugde Bertelsmann, gave his consent to FRB to make use of the evidence of Mr Henn (the former attorney of record for Gani and Ayob) and Mr Schickerling (the former Business rescue practitioner of Hanmar) obtained during the enquiry. A transcript of the evidence of Mr Henn and Mr Schickerling is attached to the supplementary affidavit and entails the following:

16.1 The sale of Hanmar's business to Rashida and the subsequent business rescue application in respect of Hanmar was a dual stratagem to stagnate the rights of Hanmar's creditors by triggering the moratorium provided in section 133 of the Companies Act, 2008 and place the assets of Hanmar beyond the reach of its creditors by stripping Hanmar of its assets and transferring them to Rashida.

16.2 Mr Henn and Mr Schikerling, upon the request of Gani and Ayob, and in consultation with them, devised and implemented this strategy on their behalf.

16.3 Hanmar, Mr Henn and Mr Schikerling implemented the stratagem contrary to the prior written opinion and advice of senior counsel, in terms of which they were advised that the sale of Hanmar's business to Rashida had to be conducted in compliance with section 34(1) of the Insolvency Act, 1936

16.4 Known to Hanmar, Mr Henn and Mr Schikerling FRB's liquidation application would defeat the second object of the strategy, in that the invocation of the section 133 moratorium would be neutralized once the business rescue resolution is set aside and Hanmar is placed in liquidation, hence the opposition of the liquidation application by Gani and Ayob.

16.5 Also known to Hanmar, Mr Henn and Mr Schikerling, the liquidators' section 34 application would defeat the first object of the stratagem and reverse their asset-stripping of Hanmar, in that an order granted to the liquidators in pursuance of the section 34 application would divest Rashida of its possession of the Hanmar business and restore same to the liquidators, rendering those assets once again available to the creditors of Hanmar.

16.6 The second business rescue application was considered at the time when the section 34 application was brought but had not been finalized. None the less the Hanmar protagonists required a business rescue application to be brought in the meantime to buy time whilst the second business rescue application was being finalized. This was required to derail the section 34 application by manufacturing a basis to rely on section 131(6) of the Companies Act, 2008.

16.7 The first business rescue application was filed two days before the hearing of the section 34 application. This application was prepared by Mr Schikerling, on the instructions of Mr Gani who happens to be the husband of Ms Gani. Mr Gani is neither a shareholder nor a director of Hanmar. Mr Schikerling was instructed that an employee (Mr Moswane) would bring the application. Mr Schikerling had not met Mr Moswane, he never consulted with him in pursuance of preparing the first business rescue application and he obtained Mr Moswane's details from a copy of his identity document provided to him. The facts set out in the founding affidavit of Mr Moswane in support of the first business rescue application emanate from from Mr Schikerling. Mr Moswane was simply the nominated signatory to the affidavit and he signed whatever was presented to him.

16.8 Mr Schikerling provided Mr Henn with the draft of the first business rescue application papers. Mr Henn collated the annexures thereto and assisted with the signing of the papers, arranging the commissioning of the founding affidavit. He was however not prepared to be the attorney formally on record representing Mr Moswane and it was for this reason that, in consultation with Mr Schikerling, an attorney Andre Scholtz (proposed by Mr Schikerling) was engaged to represent Mr Moswane, hence his involvement.

16.9 The first business rescue application was prepared and prosecuted in circumstances where everyone on the Hanmar side knew that the application was not bona fide, that it was inarguable and that it presented no prospects of success. They all knew that Mr Moswane was not an employee of Hanmar and that he did not have locus standi to pursue the application. The application was never served.

16.10 The applicants contend that the first business rescue application was and remains an abuse. It was designed with a view to derail the section 34 application.

16.11 The section 34 was granted despite the opposition mounted by Mr Ayob and Ms Gani and FRB contend that the two did not have locus standi to oppose same. Mr Ayob and Ms Gani then instructed Mr Henn to deliver an application for leave to appeal, despite Mr Henn advising that the application for leave to appeal is unlikely to succeed. The application for leave to appeal was delivered only with the view to trigger the section 18 suspension of the section 34 order, to buy time and with the view to avoid having the sold and transferred business returned to Hanmar.

16.12 The application for leave to appeal was never and is not bona fide. It rather constitutes an abuse of court processes. Mr Henn agreed that the application for leave to appeal had three purposes being :

(a) to frustrate the liquidation proceedings;

(b) to buy time; and

(c) to subvert the interests of justice in the sense that it constituted, and still constitutes an abuse.

16.13 Another plan had to be devised because the stratagem devised was busy untangling. The second business rescue application by Joria entered the arena. Mr Henn represented Joria when preparing the business rescue application, wherein the application for leave to appeal is abandoned, it being accepted that the Hanmar business ought to revert back to Hanmar and consequently the liquidators.

16.14 The second business rescue application was filed two days before the hearing in respect of the return date of the provisional liquidation order. Mr Henn persisted with the stance that the second business rescue application was arguable, however during the enquiry he conceded that that it too is without merit and is the proverbial non-starter.

16.15 The sale of Hanmar, the resolution to apply for the business rescue of Hanmar, the opposition of the liquidation application, the institution of the first and second business rescue applications and the filing of the were part of a strategy to avoid paying Hanmar’s creditors.

17. The second stage of the enquiry is in regard to whether the liquidators, FRB and the other creditors of Hanmar will on a balance of probabilities suffer irreparable harm if the court does not order otherwise as contemplated by section 18(1). The evidence placed before the court which was clearly stated in the first leg of the enquiry above shows a chilling and calculated stratagem that is intended to harm the interests of the creditors of Hanmar and to render the liquidators ineffective and useless.
18. A decision to place a company in business rescue must be *bona fide* and a section 129 resolution taken pursuant thereto must have been taken in good faith, and for a proper and legitimate purpose. **Alderbaran (Pty) Ltd and Another v Bouwer and Others (19992/2017) [2018] ZAWCHC 38; [2018] (5) SA 215 (WCC) (22 March 2018).**

19. The Hanmar business rescue resolution shortly after the sale and transfer of its business and assets was lacking on the characteristics alluded to in **Alderbaran.**

20. The applicants aver that the critical consideration in pursuing the Hanmar liquidation was and remains that the Hanmar protagonists had embarked on a transparent asset-stripping transaction prior to voluntarily placing Hanmar in business rescue with the ultimate aim being to put the assets beyond the reach of its creditors and shield Hanmar from its creditors. The applicants further submit that the commencement of liquidation proceedings brings with it the consequence of establishing a *concursus creditorium,* put simply, a gathering of creditors in relation to the company concerned and the hand of the law being placed upon the estate of such company. To this end, a fundamental public interest element is infused into insolvency proceeding, the effect of which is that the rights not only of the petitioning creditor are safeguarded, but the rights and interests of all creditors and persons otherwise affected by the ensuing insolvency of the subject company, in this case Hanmar. **ABSA Bank Limited v Hammerie Group (Pty) Ltd 2015 (5) SA 215 (SCA) at para 13.**

21. Section 391 of the Companies Act,1973 provides as follows:

"A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of the creditors, and shall distribute the balance among those who are entitled thereto."

22. The Constitutional Court in the matter of **Bernstein and Others v Bester NO and Others (CCT 23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996)**, articulated the duties of the liquidators as follows:

"[15] Some of the major statutory duties of the liquidator in any winding up are:

(a) To proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable."

23. I agree with the **Bernstein** decision of the Constitutional Court and I would even go as far as to say section 391 of the Companies Act is crystal clear and there was never any ambiguity in the language and interpretation thereof.

24. In my view all the liquidators are doing with the section 34 application and the current section 18(3) application is in pursuance of their aforesaid obligations and halt the asset-stripping stratagem that was conceded to by the attorneys in the section 417 and 418 enquiry. The applicants further aver that the debt that Hanmar is trying to avoid is in excess of R 100 MILLION Rand of which R60 Million is owed to FRB alone. The second and third respondents filed an answering affidavit as already indicated that is not disputing any of the averments made in the affidavits filed by the applicants and FRB. During argument in court the legal representative of the second and third respondents submitted that if the applicants are able to prove exceptional circumstances and they are unable to convince the court otherwise, then their opposition to the section 18(3) application must fail.

25. The version placed before court by the applicants remains uncontested and stands to be accepted by the court. I am convinced that if the order is not

granted by the court, the applicants and the other creditors will suffer irreparable harm.

26. The third stage of the enquiry is whether there is irreparable harm to the other party, in this case Mr Ayob and Ms Gani who are the ones opposing all the applications of the liquidators including this one before us.
27. In my view the evidence already placed before court in proving the first and second stages of the enquiry, demonstrate that there can be no prejudice suffered by Mr Ayob and Ms Gani as they are the ones who have been the puppet Master's all along. It cannot be correct that when their nefarious activities have been exposed and laid bare for all to see including the court, they now want to cry foul and seek the assistance of the court. They have been playing games to the detriment of all concerned and wasting everyone's time, the court frowns upon such behavior.

28. Turning to the issue of costs, it was argued by the liquidators that the conduct of Mr Ayob and Ms Gani in this application merits censure and that an appropriate punitive order for costs would be on the scale as between attorney and client. FRB on the other hand submitted that the costs should be costs in the appeal.

29. In the circumstances it is ordered that :

    29.1 The intervening party is granted leave to intervene as a co-applicant in the application in terms of section 18(3) of the Superior Courts Act and to henceforth be cited and participate as the third applicant.
    29.2 The Application to file the supplementary affidavit by the Fifth respondent is condoned.
    29.3 The section 34 Order granted on the 26th July 2023 shall not be suspended pending the outcome of the Petition to the Supreme Court of Appeal, and the applicants may carry the order into effect.
    29.4 The costs of the Intervening application, the application to condone the supplementary affidavit and the section 18(3) application will be borne

by the second and third respondents on a scale as between attorney and client scale.

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M M DLENYAI J

Judge of the High Court

Gauteng Division, Pretoria

Appearances

Counsel for Applicants: Adv Mokhethi.	: Adv Vorster
Instructed by	: Reitz Attorneys
Counsel for the Second and Third Respondents	: Adv Mokhethi
Instructed by	: Soomar & Malik Attorneys
Counsel for Fifth Respondent	: Adv P Lourens
Instructed by	: Werksmans Attorneys
Date of hearing	: 20 October 2023
Date of Judgement	: 26 October 2023