IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED: ~~YES~~/**NO**

DATE:

SIGNATURE:

Case Number: 016845/23

In the matter between:

BRILLIANT ACCENT HOLDINGS (PTY) LTD	First Intervening Party
YELLOW SUNSHINE PROPERTIES (PTY) LTD	Second Intervening Party
OEC INDUSTRIAL HOLDINGS (PTY) LTD	Third Intervening Party

V

TFM HOLDINGS (PTY) LTD	First (Interlocutory) Respondent
RITAM HOLDINGS (PTY) LTD	Second (Interlocutory) Respondent

TFM MANUFACTURING (PTY) LTD	Third (Interlocutory Respondent
TFM CUSTOMIZING (PTY) LTD	Fourth (Interlocutory) Respondent
TFM INDUSTRIES (PTY) LTD (in liquidation)	Fifth (Interlocutory) Respondent
RALPH FARREL LUTCHMAN N.O.	Sixth (Interlocutory) Respondent
ANNEKE BARNARD N.O.	Seventh (Interlocutory) Respondent
RANJITH CHOONILALL N.O.	Eighth (Interlocutory) Respondent
COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	Ninth (Interlocutory) Respondent

In RE: the main application between:

TFM HOLDINGS (PTY) LTD	First Applicant
RITAM HOLDINGS (PTY) LTD	Second Applicant
TFM MANUFACTURING (PTY) LTD	Third Applicant
TFM CUSTOMIZING (PTY) LTD	Third Applicant

V

TFM INDUSTRIES (PTY) LTD (in liquidation)	First Respondent
RALPH FARREL LUTCHMAN N.O.	Second Respondent
ANNEKE BARNARD N.O.	Third Respondent
RANJITH CHOONILALL N.O.	Fourth Respondent
COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	Fifth Respondent
BRILLIANT ACCENT HOLDINGS (PTY) LTD	Sixth Respondent
YELLOW SUNSHINE PROPERTIES (PTY) LTD	Seventh Respondent
OEC INDUSTRIAL HOLDINGS (PTY) LTD	Eighth Respondent

Coram: Kooverjie J

Heard on: 17 April 2023

Delivered: 12 May 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 12 May 2023.

SUMMARY: Vague averments and mere speculation does not suffice in an application for business rescue.

ORDER

It is ordered: -

1. the business rescue application is dismissed.
2. the applicants are ordered to pay the costs of the intervening parties, namely the sixth, seventh and eighth respondents on a scale as between attorney and client.

JUDGMENT

KOOVERJIE J

[1] The applicants in this matter have applied to place the first respondent, TFM Industries (Pty) Ltd, under supervision and an order directing that the first respondent commences with business rescue proceedings.

[2] The sixth to eighth respondents, namely the intervening parties, opposed the said application. The main contention is that the business rescue procedure application was instituted in bad faith and it was further a strategy to frustrate the winding up of the company.

[3] The applicants form part of the TFM Group (the Group). The first applicant, TFM Holdings (Pty) Ltd ("TFM Holdings"), is the majority shareholder of TFM Industries (Pty) Ltd which has been placed in liquidation. The second applicant, Ritam Holdings (Pty) Ltd ("Ritam") holds majority shares in TFM Holdings (Pty) Ltd. The third and fourth applicants are creditors of the company. The first respondent will be referred to as "the company". The parties would be referred to as they are in the main application.

[4] The intervening parties, Brilliant Accent holdings (Pty) Limited, Yellow SunshineProperties (Pty) Limited and OEC Industrial Holdings (Pty) Limited leased their respective premises to the applicants. Since the intervening parties were not joined in the business rescue proceedings they intervened by instituting an urgent

application. The court in the urgent proceedings granted the intervening parties leave to intervene. However, the remaining issues have been referred for determination to this court. This matter comes before me as a special allocated matter. The core issue for determination is whether the business rescue application is justified.

FILING OF THE SUPPLEMENTARY AFFIDAVIT

[5] The applicants had indeed sought leave to file their supplementary affidavit. The intervening parties' opposed the applicants filing of the supplementary affidavit. It was argued that the applicants had attempted to make out a new case and further dealt with material aspects which could have been addressed in the founding affidavit. I have noted that the respondents nevertheless filed their response to the said supplementary affidavit.

[6] It is accepted law that a court may, in the exercise of its discretion, permit the filing of further affidavits so as to enable the true facts (relevant to the issues and dispute) to be placed before court.

[7] Ultimately, the test is one of justice and equity. The issue is one of fairness to both sides. At least a proper explanation should be proffered as to why a further affidavit was warranted. The court must be satisfied that there is no prejudice and which cannot be remedied by an appropriate order as to costs.[1]

[1] Erasmus, Superior Court Practice, 2nd Ed, Vol 2 D1-68

[8] I have considered both parties' explanations and am of the view that in fairness, the supplementary papers and the response thereto will be considered.

BACKGROUND

[9] In brief, the TFM Group is involved in, *inter alia*, the specialized manufacturing of automative, defence, mining and building sectors. It is an established business since 1966.

[10] It is not in dispute that the company was "financially distressed"[2]. The company has been placed in liquidation prior to the business rescue proceedings. The applicants argued that the winding up of the company was not justified.

[11] The intervening parties initially instituted their opposition to the business rescue application on an urgent basis. On their version, the urgency was justified due to the fact that the respondents had sold the premises (which have been leased to the company) during the latter part of 2022 to Mcgwade Property Holdings (Pty) ("Mcgwade") and to Rua Construction and Projects (Pty) Ltd ("Rua"). It had been expected that the assets of "the company" which comprised of plant, equipment and vehicles were to be sold by public auction on 22 February 2023. The auction was interrupted due to the current business rescue application being instituted. It was argued that the intervening parties had little choice since the assets of the company has to be removed prior to the said new owners' occupation, which is envisaged to take place by 1 May 2023.

[2] S 128(1) of the Companies Act defines the concept- it is when a company is reasonably unlikely to pay all of its debts and it appears to be reasonably likely that the company will become insolvent within the ensuing six months.

[12] The financial predicament of the company came about during the Covid 19 pandemic and to make matters worse, the company lost two key employees.

[13] The applicants motivated their business rescue procedure mainly on the fact that the Group secured funding in an amount of R25 million from a well-known and established spanish company named Aeronautica SDLE ("Aeronautica"). This was part of a contractual project between the TFM Group and Aeronautica in terms of which a long-term and lucrative cooperative relationship is planned between the entities. Aeronautica was to assist the company once the business rescue procedure application is granted. The amount would assist in paying the creditors and further allow the company to resume its business activities and trade under solvent circumstances.

[14] The company, at this point in time, is not trading and has been wound up. The intervening parties argued that not only is the company financially distressed, but it is factually insolvent.

THE APPLICANT'S CASE

[15] At paragraph 4.2 of their founding affidavit the applicant submitted *"although the company is in financial distress, there are reasonable prospects of rescuing the company. In addition, the applicants believe it would be just and equitable, for financial reasons, to place the company under supervision for financial reasons. If the company cannot be better rescued, a better return for creditors than the*

immediate winding up of the company will be achieved by placing the company under business rescue".

[16] In argument the applicant's motivation for the business rescue procedure was twofold:

16.1 firstly, the business rescue proceedings would allow a company's assets to be sold in a structured manner. The company's business, in itself, is of a specialized nature. It could therefore be sold to a competitor as a going concern at a much higher price than would be achieved should the assets be sold separately;

16.2 secondly, if the former fails, there exists a reasonable prospect of rescuing the company in terms of Section 128 of the Companies Act (71 of 2008). The development and implementation of a business rescue plan would restructure the affairs of the company in a manner that would afford the company to continue in existence on a commercially solvent basis.

[17] The company's assets are valued at around R22 million and it was argued that if the matter proceeds in liquidation, the liquidators would dispose of the assets without justified values and would further be allowed to levy a 10% fee on each of the sold assets.

[18] In placing the company in business rescue, the business rescue practitioner would be able to sell the intellectual property rights and equipment as a going concern and such sale would most definitely achieve a better return than selling off the company's assets in a piecemeal manner.

[19] In the supplementary papers, the applicants further indicated that they had acquired alternative premises which would be ideal for the business rescue processes to continue and allowance could be made for the continued trading of the company. The applicants further undertook to pay for the transport costs pertaining to the relocation.

[20] It was extensively explained that there was no justification for the company to be placed in liquidation at the time. Mhlawane (known as "Odwa"), the CEO at the time, propagated a senseless liquidation application instituted by an entity, Safe Tyres, around September 2022, for a negligible debt of R221,175.20. Although the company was experiencing financial strain, the company would have been able to settle the said debt. The company took issue with Odwa's mismanagement of the business and his dereliction in his duties by failing to ensure that the said liquidation proceedings was properly challenged.

[21] The TFM Group is reliant on the company to sustain it financially. Although the company is no longer in operation, it was argued that the TFM Group has around 400 employees which it has to sustain.

[22] In addition, it was argued that TFM's financial ruin was due to the intervening parties charging excessive rental amounts to the company.

THE RESPONDENT'S CASE

[23] The respondents, on the other hand, argued that there is no prospect to place the company under business rescue. In essence, it was submitted that the said

application constitutes an abuse of the court process. In particular, it was pointed out that the financial predicament of the company was due to the withdrawal of the R47.5 million from the company's accounts. These monies had never been repaid.

[24] The company further failed to furnish a concrete or objectively ascertainable plan which would enable the court to determine the likely costs involved for the resumption of the company's business. Even if Aeronautica injects R25 million, it would be insufficient to satisfy the creditors of the company, let alone to fund the substantial costs of the business rescue practitioners and to enable the company to meet its day-to-day expenditure once the company's trading operations are resumed.

[25] It was illustrated that the monthly overhead of the company, prior to its winding up, was in excess of R5 million a month (rental, salaries and wages and other day-to-day operational costs). This amount excludes the purchase of materials from suppliers.

[26] On the respondents' version the valuation of the assets is in the region of R28 million. It was submitted that the sale of the company's assets, in liquidation, would be far more likely to yield a better dividend to creditors than the speculative business rescue process. The respondents' valuation of the assets was based on the liquidators' report.

[27] The highly skilled key staff members, who once were with the company, have now sought gainful employment elsewhere and it is unlikely that they would return to the company. It was reiterated that with the company no longer trading, it has lost the

confidence of its critical customers and suppliers and is unlikely that the relationship would be restored.

[28] Notably the debt owed to the City of Johannesburg ("the City") presented a major obstacle. It was pointed out that the applicants failed to disclose the claim against the company by "the City" which is in the region of over R62 million. In recent litigation proceedings in the High Court in Johannesburg, the court ordered the company to deliver the vehicles it undertook to provide, which included water tankers, rescue units and industrial pumpers. If the company failed to do so, then it was ordered to repay the City of Johannesburg an amount of R62,468,779.94. This judgment stands.

[29] It is common cause that the intervening parties are secured and concurrent creditors of the company. The company is indebted to them in the respective amounts totaling to over R15 million. The company leased three different properties and had failed to honour the outstanding rentals. It was argued that these amounts do not include the claims for repairs and rehabilitation costs for which the company became liable in terms of Section 37(1) of the Insolvency Act. This adds another R635,445.00 to their debt.

[30] As things stand, for the time being, the intervening parties entered into lease agreements with the liquidators. The respective extended leases operate on a month-to-month basis. The main purpose was to enable the liquidators to secure and preserve the assets of the company which are situated on the respective premises. As alluded to above, the liquidators would have disposed of the assets by means of the auction which could not proceed.

EVALUATION

[31] From the outset I deem it necessary to emphasize that motion proceedings, unless concerned with interim relief, are all about the resolution of legal disputes on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual disputes because they are not designed to determine probabilities. It is well established under the *Plascon Evans* rule that where in motion proceedings disputes of facts exist on the affidavits, a final order can be granted only if the facts averred by the applicant, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order, unless the respondents' version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting merely on the papers.[3]

[32] It is accepted that, in generality, affected persons may in appropriate circumstances apply to court for a company to be placed under supervision and to commence business rescue proceedings in terms of Section 131 (1) of the new Companies Act.

[33] The primary object of the business rescue procedure is to save the company that is financially distressed so that it may continue to exist as a going concern. If that is not possible, the secondary object is to restructure the business to produce a better return for creditors and shareholders than would result from immediate liquidation of a company.[4]

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[3] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 291 A-B (SCA) at par 26

[4] Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 [3] ALL SA 303 (SCA) at paragraph 31

Rescuing the company

[34] Section 131(4)(a) of the Companies Act sets out the grounds on which a court can grant such an order on application. The court must be satisfied that the company is financially distressed and there is reasonable prospect of rescuing the company.

[35] The court in ***Oakdene*** remarked:

"Rescuing a company means achieving the goals set out in the definition of business rescue in s 128(1)(b) of the Companies Act. The goals contemplated in s 128(1)(b)(iii) of the Companies Act are as follows: a primary goal to facilitate the continued existence of the company in a state of solvency; and a secondary goal, which is provided in the alternative in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation."

[36] The onus to prove that the company would have reasonable prospects of recovery or of a better return for creditors and shareholders than immediate liquidation is on the applicants. The court in ***Oakdene***[5], when considering what constitutes "reasonable prospect" remarked that it requires more than a mere *prima facie* case or an arguable possibility. The "prospect" must be based on reasonable grounds. A mere speculative suggestion is not enough. The court further remarked that what is required is a substantial measure of detail about the proposed plan to satisfy the reasonable prospect test.[6]

[5] Oakdene, par 29

[6] Oakdene, par 30

[37] The authorities have clarified that parties are required to set out the relevant material facts. Although not required to provide a detailed rescue plan it must set out the grounds supported by facts for which reasonable prospects for achieving either of the objects set out in section 128(1)(b) of the Companies Act. [7]

[38] Having considered the papers and both parties' submissions, in my view, it cannot be gainsaid that the pending liability in excess of R62 million constitutes a grave indication that the company would not be able to sustain itself if it has to resume its business. The applicants failed to explain their predicament relating to "the City" debt.

[39] It is clear from the judgment that in 2019 the company entered into an agreement with "the City" for the supply of 92 specialized fire and rescue vehicles for the total value of over R582 million. The applicant received payments from "the City" for the units delivered as well as for these that would be delivered in the future. "The City" made an advance payment to secure the continued building of the vehicles in an amount in excess of R172 million. The first payment was made by "the City" on 27 September 2019. It was in fact recorded that "Ritam" held the balance of R47.6 million. The said agreement and the payment is clearly recorded in the minutes of TFM Group Executive Committee meeting held on 20/2/2020 (**Annexure ATV8.3**)

[40] Upon receipt of these funds, Mlonzi, the CEO, also the controlling shareholder of the second applicant, Ritam, convened a meeting of the shareholders of the first applicant on 2 October 2019 where he advised the shareholders that Ritam would

[7] Oakdene, par 23 and 26

assume the treasury function of the TFM group of companies. With him at the reins, an amount of R47.5 million (from the R172 million that the City paid), was paid to Kwane Fleet Services (Pty) Ltd ("Kwane") and Anacott Trading (Pty) Ltd ("Anacott"), thus depriving the company of a huge chunk of its working capital.

[41] To date, no accounting records have been made available to justify the legitimacy of the said payments. Further there are no board resolutions authorizing the payments to Kwane and Anacott and no further special resolutions from shareholders to support the payments. The Factual Findings Report recorded this state of affairs within the TFM Group.

[42] When Savage and Els (the former directors), attempted to recover the funds, their employment contracts were terminated at the behest of Mlonzi, the majority shareholder. There is no doubt that the company started experiencing financial strain since this episode. The extraction of the R47.5 million from the company, TFM Industries, created a cash flow crisis which threatened the survival of the TFM Group.

[43] In my view, the applicants' version on their papers remain improbable. The applicants explained that the monies were due and owing to Kwane as Kwane facilitated the purchase of intellectual property rights, designs and distribution rights from Volkan, a Turkish company. Kwane paid Volkan R89 million at the time. Kwane obtained these intellectual property rights from Volkan pursuant to its treasury function and supplied those rights and designs to the company to fulfill its contract with "the City". This is why the payment was due to Kwane. Subsequently, in a later explanation, it was alleged that Kwane had in fact repaid R13 million.

These versions are not only implausible but contradictory. The question that begs an answer is if Kwane was entitled to the R89 million, then on what basis had it repaid R13 million to the company?

[44] Relating further to the Kwane debt, the applicants' argument that under business rescue the company would be bound to recover the lost capital is also untenable. From the various minutes and correspondence between the previous directors and Mlonzi, it was evident that recovering the debt at that time already proved to be a challenge.

[45] I have also noted that prior to the business rescue application, the directors sought guidance from Business Restructuring (Pty) Ltd (BDO) to advise the board on the possible options available to the company to alleviate its cash flow constraints and whether the company should commence voluntary business rescue proceedings. Mlonzi, upon learning of the board's decision, then suspended the managing director at the time, Mr Johan van der Merwe.

[46] Mlonzi now persists and supports the business rescue procedure route. It is evident that the conduct of those involved in the decision making was not conducted in the best interests of the company.

[47] In ***Wedgewood Village Golf and Country Estate*** the court emphasized that cogent evidential information is required. At paragraph [17] to [18] the court stated:

"The information or evidence that will suffice to meet this requirement will depend on the object of the proposed business rescue, namely whether it is to achieve the continued existence of the company on a solvent basis; alternatively, to allow the

company's business to be managed for an interim period to allow for a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. Whatever the object of the proposed business rescue, however, in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved. While it is the function of the business rescue practitioner, if appointed, to draw up a business rescue plan to be considered by the 'affected persons', the founding papers in a business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or, at the very least, make out a case for the court to hold that an investigation by a business rescue practitioner to that end, in terms of s41(l) of the Act, as appears justified..."[8]

[48] It was argued that no such cogent evidential information has not been forthcoming so as to be satisfied that the business rescue proceedings are viable. In fact, the papers revealed that the company is insolvent. It ceased trading since being placed in liquidation in September 2022. The recent balance sheet of the company as at September 2022 reflects a loss of R53 million (**ATV40**).

[49] I am mindful that the company is involved in manufacturing specialized vehicles and equipment, and would therefore require specialized skill to produce and assemble the various vehicles and equipment. In particular, the evidence lacks a reasonable explanation as to what extent the expertise would be procured and further how

[8] my emphasis

salaries together with the running expenses of the company would be sustained going forward.

[50] In a letter on 18 February 2020, it was recorded that based on “the City’s” court order, the company fell in deficit of R24 million (**ATV8.4**). In addition, the outstanding rental amounts due and owing to the intervening parties which is in excess of R15 million, adds to the debt. Such outstanding rentals were not disclosed in the applicant’s papers. This resulted in the assets being attached and are in favour of the intervening parties.

[51] In my view, the Aeronautica financial injection, on its own, would not sustain the company going forward. If this amount together with the City’s debt as well as the monies paid to Kwane, on a rough calculation, are taken into consideration, the debt would be in excess of R100 million. On the first leg of the business rescue objective, the applicants cannot succeed.

[52] I have noted the applicant’s explanation that the Group was in negotiation for various lucrative contracts for production, manufacture and assembling of specialized vehicles. Reference was merely made to a certain potential contract which is at an advanced stage and valued in excess of R1 billion. Once again, these allegations remain vague and have not been supported by any sufficient facts. Amongst other remedies, for instance, the applicants could surely have taken the court into its confidence by, at least, disclosing the said deal on a confidential basis.

[53] I find it apt to refer to the approach set out in the ***Southern Palace Investments*** matter[9] and which have been consistently been cited with approval by our courts. At paragraph [21] the court stated:

"*A reasonable prospect of recovery indicate something less than that recovery should be a reasonable probability*."

At paragraph [24] the court stated:

"Whilst every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of:

24.1. the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

24.2. the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

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[9] Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Limited and Others 2012 (2) SA 423 (WCC) at paragraph [21]

24.3. the availability of any other necessary resource, such as raw materials and human capital;

24.4. the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success."

[54] I reiterate that it has been, time and again, pronounced that vague averments and mere speculations would not suffice in an application for business rescue. The applicant is obliged to place a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.[10]

Better return for creditors

[55] On the second leg as to whether the applicants have proven that it would attain better return on the sale of the assets, I find that the applicants' version is implausible. The applicants merely allege that they have in fact secured premises where the movable assets would be relocated to and that the premises can be utilized by the business rescue practitioner to conduct its business. Moreover, the applicants tendered to pay the costs of the transportation of the movable assets to the said premises.

[56] They further explain that the liquidators and the respondents colluded with each other in order to obstruct the business rescue proceedings. This was despite the fact that the applicants continued to engage with the intervening parties as well as the liquidators to facilitate the removal of the company's movable assets from the properties of the intervening creditors.

[10] Propspec Investments v Pacific Coasts Investments 97 Ltd 2013 (1) SA 542 F-B, paragraph 11

[57] I was directed to various correspondence that reflected the intervening parties' change of heart regarding the removal of the assets. As late as 28 March 2023 the applicants pursued negotiations with the intervening parties (**Annexure SA3**). On 31 March 2023 the intervening parties in fact advised that they would not oppose the applicants' tender to move the assets provided that the liquidator remains in control of the assets and that the intervening parties' securities would not be prejudiced in any way (Annexure SA4). Thereafter, on 5 April 2023 (Annexure SA7), the intervening parties refused to consent to the business rescue proceedings and further advised that they would withdraw their tender for alternative premises owned by the intervening parties.

[58] It was argued that there was no reason advanced for the intervening parties' to renege on their consent to proceed with the business rescue proceedings. The applicants submitted that it made a *bona fide* tender to move the movable assets of the company from the intervening parties' premises.

[59] However, having considered the matter, in my view, in respect of the second leg, namely that the applicants would acquire a better return on the assets through the business rescue procedure, remains wanting of a sufficient explanation. Apart from the decision to remove the assets and to fund the transportation thereof, once again, there is insufficient detail before me as to how they would be able to attain a better return on the sale of the assets.

CONCLUSION

[60] In conclusion, on both grounds, I find that the applicants have failed to establish a cogent basis with the necessary and sufficient factual detail to enable this court to find that the business rescue proceedings are not only appropriate but remains a viable basis to undertake the affairs of the company going forward. The averments made in the founding and supplementary papers are inadequate to demonstrate there are reasonable prospects that the company should be placed under supervision. Simply put, the factual foundation for the existence of a reasonable prospect that the business rescue proceedings are appropriate, are lacking.

COSTS

[61] I emphasize that business rescue exists to rehabilitate companies who can be restored to profitability. If that is not possible, then to at least attain better returns on the sale of a company's assets. It was not envisaged to delay the winding up of the company or to afford an opportunity to those who were not able to financially manage the affairs of the company.

[62] The respondents have sought a punitive costs order against the applicants on the basis that the business rescue application was not *bona fide* and constituted an abuse of process. The Supreme Court of Appeal in ***Van Staden and Others***[11] held the view that punitive costs are appropriate in certain circumstances. The court identified on the facts that there was clearly an abuse of process. It held that if the application for the business rescue proceedings was merely to delay the winding up or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted

[11] Van Staden and Others NNO v Pro-Wiz (Pty) Ltd [412/2018 [2019] ZA SCA 7 (8 March 2019) at paragraph 22

with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals, a punitive costs order is appropriate.

[63] In the circumstances of this matter, it is clear from the evidence that the application for business rescue was not only unjustified but that the Group's and particular company's financial affairs were maladministered by those responsible for decisions at the top.

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H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicants:	*Adv R Raubenheimer*
	Adv WR du Preez
Instructed by:	*Goodes & Co Attorneys*
Counsel for the intervening parties/6th to 8th respondents:	*Adv CC Bester*
Instructed by:	*GB Liebmann Behrmann & Company*
	c/o Klagsbrun Edelstein Bosman Du Plessis Inc
Date heard:	*17 April 2023*
Date of Judgment:	*12 May 2023*