

Editorial note: Certain information  
judgment in compliance with the



has been redacted from this  
law.

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D11428/2021**

In the matter between:

**INVESTEC BANK LIMITED**

**APPLICANT**

and

**MFBK PROPERTIES (PTY) LTD  
JERIFANOS MASHAMBA NO  
PIERRE DE VILLIERS BERRANCE NO  
ORIEL RAMPOLOKENG SEKATI NO  
MASTER OF THE HIGH COURT, DURBAN  
COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT  
FOURTH RESPONDENT  
FIFTH RESPONDENT  
SIXTH RESPONDENT**

In re:

**DONALD MANUEL HOWARD BARRELL  
VENAY HOLDINGS (PTY) LTD**

**FIRST APPLICANT  
SECOND APPLICANT**

and

**MFBK PROPERTIES (PTY) LTD (IN LIQUIDATION)  
(REGISTRATION NUMBER 2015/063184/07)  
PIERRE DE VILLIERS BERRANGE N. O**

**FIRST RESPONDENT  
SECOND RESPONDENT**

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**ORIEL RAMPKOKENG SEKATI N. O  
COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION  
THE MASTER OF THE HIGH COURT, DURBAN  
KWAZULU NATAL**

**THIRD RESPONDENT  
FOURTH RESPONDENT  
FIFTH RESPONDENT**

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## **JUDGMENT**

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**SIPUNZI AJ**

### **Introduction**

[1] This is an urgent application to set aside a court order that commenced the business rescue proceeding of MFBK Properties (Pty) Ltd (MFBK). The court order that is the subject of the application was granted on 17 April 2023, with the knowledge of the applicant and the consent of the respondents.

[2] As outlined in the notice of motion, the order sought is in the following terms:

‘1. That this application be heard as one of urgency in terms of the provisions of rule 6(12) and that the forms and service provided for in the Uniform Rules be dispensed with.

2. That the order granted on 17 April 2023:

2.1. that MFBK Properties (Pty) Ltd (MFBK) be placed under supervision and for business rescue proceedings to commence in terms of the provisions of s 131(1) read with s 131(4)(a) of the Companies Act, 2008 (The Act); and

2.2. that Jerifanos Mashamba be appointed as business rescue practitioner of MFBK in terms of s 131(5) of the Act; and

2.3. that the costs of the application be costs in the business rescue proceedings of MFBK is set aside in terms of s 132(2)(a)(i) of the Act; and

3. That the costs of this application be costs in the winding up of MFBK save that, in the event of opposition, the party opposing this application be ordered to pay the costs of the opposition.’

[3] The matter served before the court on 19 October 2023, on an urgent basis. However, it did not proceed on that day. Instead, the parties agreed on a timetable

that regulated the further filing of papers, the hearing was postponed *sine die*, and the costs of the adjournment were reserved for later determination.

### **The parties**

[4] The applicant is Investec Bank Limited, a company duly incorporated in terms of the laws of South Africa and a duly registered bank, which has its principal place of business at 5 Richefond Circle, Ridgeside Office Park, Umhlanga, KwaZulu-Natal. The applicant also considers itself to be an affected party as defined in section 128(1)(a) of the Act, whose right to participate (ie its *locus standi*) in this application lies in section 131(3) read with section 132(2)(a)(i) of the Act.

[5] The first respondent is MFBK Properties Proprietary Limited (MFBK) or the company), a company duly incorporated in terms of the laws of South Africa with its principal place of business at 1 Richefond Circle, Ridgeside Office Park, Umhlanga, KwaZulu-Natal. MFBK was also the first respondent in the original application.

[6] The second respondent is Jerifanos Mashamba, a chartered accountant who practices as a business rescue practitioner under the style of JM Capital (Pty) Ltd at Morningside Office Park, 222 Rivonistreet, Sandton. Mr Mashamba is cited in his capacity as the business rescue practitioner of MFBK (he will be referred to as 'the BRP'), appointed by the court in terms of section 131(5) of the Act.

[7] The third respondent is Pierre De Villiers Berrance, an attorney and an insolvency and business rescue practitioner, who practices as such as a director of Berrance Inc. at Suite 9, 2<sup>nd</sup> floor Block C, Townbush Office Park, Montrose, Pietermaritzburg. Mr de Villiers Berrance is cited in his capacity as the liquidator of MFBK. This is the second respondent in the original application.

[8] The fourth respondent is Oriel Rampolokeng Sekati, an attorney and insolvency practitioner, employed by Graceleng Trust (Pty) Ltd, and is based at Cedar Avenue, Clubview, Extension 20, Pretoria, Gauteng. Mr Sekati is cited in his capacity as the liquidator of MFBK. The third and fourth respondents are referred to herein as 'the liquidators'. This is the third respondent in the original application.

[9] The fifth respondent is the Master of the High Court, Durban ('the Master') who has his office at 2 Devonshire Place, Durban Central, Durban. This is the fifth respondent in the original application.

[10] The sixth respondent is the Companies and Intellectual Property Commission ('the CIPC') having its offices at DTIC Campus, Block F, 77 Meintjies Street, Sunnyside, Pretoria. This is the fourth respondent in the original application

[11] The first affected party is Kenneth Russel Collins ('Mr K Collins'), a businessman who resides at [...] Road, Ballito, KwaZulu-Natal.

[12] The second affected party is Murray Russell Collins ('Mr M Collins'), a businessman who resides at [...], Mount Edgecombe, KwaZulu-Natal. The first and second affected parties are referred to herein as the 'Collins Group'.

[13] The third affected party is Redbill Holdings Proprietary Limited, a company duly incorporated in terms of the laws of South Africa with its registered address being 1 Richefond Circle, Ridgeside Office Park, Umhlanga, KwaZulu-Natal.

[14] The fourth affected party is Teez Away Trading Proprietary Limited, a company duly incorporated in terms of the laws of South Africa with its registered address being 1 Richefond Circle, Ridgeside Office Park, Umhlanga, KwaZulu-Natal.

[15] The third and the fourth affected parties are controlled by the first and second affected parties. This herein referred to as the Collins Group.

[16] The fifth affected party is Donald Manuel Howard Barrell ('Mr Barrell'), a businessman who resides at [...] Street, Atholl, Sandton, Gauteng. Mr Barrell was the first applicant in the original application.

[17] The sixth affected party is Venay Holdings Proprietary Limited, a company duly incorporated in terms of the laws of South Africa with its registered address being 28a Riley Road, Bedfordview, Gauteng. This is the second applicant in the original application.

[18] The application is opposed by the respondents and some of affected parties who participated in the proceedings.

### **Summary of facts**

[19] In 2016, MFBK acquired a residential property in Atholl, Sandton, Gauteng from Mr Barrell, who is cited as the fifth affected party herein. The plan was to have the property rezoned by 14 April 2019 for purposes of development. However, due to protracted and unresolved disputes over the realisation of the property, the rezoning did not materialise. MFBK was financed by the applicant when it acquired this residential property. The Collins Group, which comprised of the first and the second affected parties herein, also provided the guarantees in support of MFBK funding.

[20] Subsequent to that, MFBK was in financial distress. In December 2019, its liquidation process commenced. On 13 August 2021, before the rezoning of the property, an order of liquidation and final winding up of MFBK was granted. The liquidation process was suspended when the business rescue proceedings order was granted on 17 April 2023. During the course of the business rescue proceedings, the Collins Group continued to make monthly payments towards the interest of the debt that was owed to the applicant.

[21] The business rescue proceedings unfolded under the second respondent, Mr Mashamba, the BRP. The applicant and the Collins Group actively participated in these proceedings. On 1 September 2023, when the amended business rescue plan was presented, they were among the voters. The amended business rescue plan was, however rejected, with the applicant and the Collins Group voting together. Upon rejection of the amended business rescue plan, the fifth affected party, Mr Barrell lodged two applications before the Gauteng Division of the High Court (Gauteng Court), seeking relief that would intervene in the voting outcomes. In the one application, he sought an order setting aside the voting results as inappropriate.<sup>1</sup>

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<sup>1</sup> Section 153(1)(b)(i)(bb) of the Companies Act 71 of 2008 (the Act).

In the second application, he sought an order of claim determination.<sup>2</sup> Both applications were opposed and pending at the time of the hearing of this application.

[22] This application was lodged on 13 October 2023, shortly after the notices to oppose were filed in the applications before the Gauteng Court. The applicant however denied that it opposed these applications, and recorded that the Collins Group did. Among others, the respondents' opposition to the application to set aside the business rescue proceedings is on the basis that the applicant is not entitled or empowered in terms of the Act to pursue an application of this nature, as will be discussed in detail below.

### **Submissions of the parties**

[23] According to the applicant, it should not be barred or precluded from pursuing the relief sought in these proceedings on the basis that the applications that are pending before the Gauteng Court. In fact, it was submitted that there were no time restrictions for an application to set aside business rescue proceedings, it could be done even after the adoption of the business rescue plan, so the argument continued. According to the applicant, those applications were meant to delay the sale of the immovable property and that the company had no prospects to be rescued. The applicant referred to *CSARS v Louis Pasteur Investments (Pty) Ltd*<sup>3</sup> on various grounds. Particularly in relation to its entitlement to initiate the setting aside of business rescue proceedings, as it also contended that the first respondent had no prospects of being rescued.

[24] On behalf of the respondents, collectively and individually, two points *in limine* were raised. These related to the *lis alibi pendens*, occasioned by the applications that were pending before the Gauteng Court. The fifth affected person, Mr Barrel, and the first respondent, MFBK, raised the *non-joinder* of other interested persons. The respondents also submitted that the applicant was not empowered in terms of section 132(2)(a)(i) of the Act to pursue the application for termination of the

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<sup>2</sup> Section 153(6) of the Act, which provides that,

'A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1)(b)(ii)'

<sup>3</sup> *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (in provisional liquidation) and others* [2022] ZAGPPHC 230; 2022 (5) SA 179 (GP).

business rescue proceedings. In actual fact their contention was that the applicant's conduct had the effect of usurping the powers of the BPR, the second respondent.

[25] Finally, it was also argued that the applicant did not suffer prejudice if the business rescue proceedings continued because the debt in issue was continuously serviced by the first and second affected parties, i.e. the Colling Group, who had stood surety for MFBK. The respondents and some affected parties denied that the first respondent had no prospects of being rescued.

### **Issues**

[26] Two most salient questions that require determination from the set of facts discussed above are: first, whether the applicant is entitled to pursue the application at hand whilst there are two pending applications before the Gauteng Court on the matters related to the ongoing business rescue proceedings. Second, what process must be followed when setting aside an order that commenced the ongoing business rescue proceedings and whether any of the affected parties or only the BPR may pursue that process?

[27] Depending on how the questions above are answered, it must also be considered whether the applicant has established a case to justify the setting aside of the business rescue order that was granted on 17 April 2023.

### **Applicable legal principles**

[28] The voting meeting of 1 September 2023, which would determine the rejection or approval of the revised business rescue plan, was the last significant step in the business rescue proceedings, which preceded the application at hand. The meeting was convened by the BPR, or the second respondent, for the consideration of the amended business rescue plan. During the voting, the proposed plan was rejected, thereby activating the various options that are provided in section 153 of the Act, as will be outlined below.

[29] Section 153 of the Act provides for where there is a failure to adopt the business rescue plan, and the relevant part reads:

'(1) (a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may-

- (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
- (ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

(b) If the practitioner does not take any action contemplated in paragraph (a)-

- (i) any affected person present at the meeting may-
  - (aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or
  - (bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate'.

[30] It is common cause in these proceedings that these are the steps that were taken by the fifth affected party, Mr Barrell, when he approached the Gauteng Court.

[31] Whilst the proceedings mentioned above are still pending before the Gauteng Court, the applicant herein seeks to invoke the provisions of section 132(2)(a)(i) of the Act. This provision provides for the duration of the business rescue proceedings, and the relevant part states that:

'Business rescue proceedings end when-

- (a) the court-
  - (i) sets aside the resolution or *order that began those proceedings*'.

It should be noted that the applicant seeks to have the court order granted on 17 April 2023, set aside and not a resolution.

[32] The respondents raised the defence of *lis alibi pendens*, in that the applicant should not be permitted to pursue this application when other related proceedings are pending before the Gauteng Court. In simple terms, this principle affirms that there should be no parallel pending litigations, between the same parties, based on the same cause of action and in respect of the same subject matter.<sup>4</sup>

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<sup>4</sup> *Eravin Construction CC v Twin Oaks Estate Development (Pty) Ltd* [2012] ZANWHC 27 ('Eravin').



[33] The Constitutional Court in *AMCU v Ngululu Bulk Carriers (Pty) Ltd*<sup>5</sup> held that, 'The purpose of *lis pendens* is to prevent duplication of legal proceedings. As its requirements illustrate, once a claim is pending in a competent court, a litigant is not allowed to initiate the same claim in different proceedings. For a *lis pendens* defence to succeed, the defendant must show that there is a pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter. This is a defence recognised by our courts for over a century.' (footnote omitted)

## **Evaluation**

### ***Non-joinder***

[34] At the commencement of the oral submissions, some the interested parties were represented. This was merely to record that they did not seek to take part in the proceedings, and they expressed no desire to be included. Therefore, in that way, the issue of non-joinder was resolved and ceased to be part of the respondents' defence.<sup>6</sup>

### ***Lis alibi pendens***

[35] The elements of the *lis alibi pendens* defence, pointed out in *Eravin*, feature in the characteristics of the litigations pending in the Gauteng and the KwaZulu-Natal Divisions of the High Court. It is common cause that:

- (a) There are currently two pending litigation processes that are unfolding before the Gauteng Court. Similarly, to the application at hand, they too, were borne out of the voting results of 1 September 2023.
- (b) The same parties are participating in these two applications before the Gauteng Court.
- (c) It is not in dispute that the pending matters relate to the business rescue proceedings.
- (d) These pending proceedings are attempts to invoke the specified interests of affected parties and based on the provisions of the same legislative process.

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<sup>5</sup> *Association of Mineworkers and Construction Union and others v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation) and others* [2020] ZACC 8; 2020 (7) BCLR 779 (CC) para 26 ('AMCU').

<sup>6</sup> DE van Loggerenberg *Erasmus: Superior Court Practice* (Revision Service 22, November 2023) at 10-3 to 10-4.

[36] It is also not in issue that it is unavoidable and within the rights of the parties involved to be actively involved in the litigations that are unfolding, for they have the potential to substantially impact on their respective interests. They all relate to the contentious processes of the unfolding business rescue proceedings that were commenced by a court order obtained with the knowledge of the applicants and with the consent of some of the parties involved.

[37] The applicant acknowledged that its application was instituted after it became aware of the nature of the pending applications in the Gauteng Court. The applicant however contended that it could not be barred by any procedural or timeframe limitations from pursuing this application. The applicant also contended that the two applications before the Gauteng Court are merely meant to delay the public auction of the property and are brought on ulterior motives.

[38] The questions that arise from this summary above have to be viewed in light of the assertion of the court in *AMCU*, where the court highlighted the purpose of the *lis alibi pendens* defence and to the extent that its requirements should not be separated

[39] When considering the point raised by the respondents, it will be apposite to adopt the principle in *Nestle (SA) v Mars*<sup>7</sup> where it was held that 'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'

[40] The question that arises will be whether the outcome of this application will be determinative to the two applications that are already unfolding before the Gauteng Court or vice versa. By implication,

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<sup>7</sup> *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16 ('Nestlé').

*lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject-matter.<sup>8</sup>

[41] The *AMCU* matter where the court held that *lis alibi pendens* defence could not be upheld is clearly distinguishable to the applicant's circumstances. The court found that only one of the three requirements was satisfied, namely, that the litigation was between the same parties in two sequential proceedings.<sup>9</sup> It also held that, the review application was directed at achieving a different outcome by impugning the council's ruling and the certificate of non-resolution, and that such had nothing to do with unfairness of the second dismissal. It therefore concluded that the cause of action in the two proceedings were different.<sup>10</sup>

[42] The expression 'cause of action' as discussed in *Abrahamse & Sons v SA Railways and Harbours*,<sup>11</sup> should be viewed as

'The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'

[43] In the instant matter, all the parties involved are seeking to pursue their interests in relation to the ongoing business rescue proceedings. The main point of contention is the immovable property that is the only asset of MFBK or its proceeds. The parties are in disagreement about the future or process of the business rescue proceedings, and obviously, the same parties are involved. The set of facts that require to be declared in all these litigations are the same, including the competing interests that are sought to be enforced.

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<sup>8</sup> *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) at 138.

<sup>9</sup> *AMCU* para 28.

<sup>10</sup> *AMCU* para 29.

<sup>11</sup> *Abrahamse & Sons v S.A. Railways and Harbours* 1933 CPD 626.

[44] Upon application of the principles in *AMCU* and *Nestlé* and reflection on the presence of all the factors highlighted in *Eravin*, to my mind, it would cause a duplication of litigation processes to allow this application to proceed in the current form without offending the *lis alibi pendens* principle for all the parties involved. The situation may turn out to be problematic, particularly to the BRP, who is a central figure in all these disputes. It is inescapable that the posture adopted by the applicant, if permitted, has the potential to complicate, disorganise and prolong the litigation process for all parties whose interests are affected, thereby offending the efficacy of justice.

[45] The applicant has not advanced any factors that substantiate the contention that the litigation before the Gauteng Court are merely meant to delay the public auction of the property and were brought on ulterior motives. From the available evidence, there is no support for the view that the applicant could not be barred by any procedural or timeframe limitations from pursuing this application.

[46] In light of the findings above and pursuant to the guidance provided in *Kerbel v Kerbel*,<sup>12</sup> as discussed in *Mofokeng v Motlounge N.O.*<sup>13</sup> that

‘once the requisites for a plea of *lis alibi pendens* are established, the court should be inclined to uphold it, because it is undesirable for there to be litigation in two courts over the same issue.’

Evidently, a sufficient link between the litigation processes that are pending before the two Divisions, which are of equal status and powers has been established. I am of the firm view that substantial grounds to uphold the *lis alibi pendens* raised by the respondents have been established.

[47] The merits of the application can be dealt with once the litigation proceedings before the Gauteng Division of the High Court has been determined.

### **Costs**

[48] The first and second respondents argued that punitive costs should be ordered, on the basis that this application was an abuse of process by the applicant.

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<sup>12</sup> *Kerbel v Kerbel* 1987 (1) SA 562 (W) at 567F-G.

<sup>13</sup> *Mofokeng v Motlounge N.O. and others* [2022] ZAGPJHC 546 para 46.

The applicant disagreed with this contention. I am also not persuaded that the institution of this application and the conduct of the applicant in these proceedings warranted the costs in a punitive scale.

### **Order**

[49] Given all these considerations, the following order is made:

1. The point *in limine* of *lis alibi pendens* raised by the first and second respondents is upheld.
2. The current application is stayed pending the finalisation of the proceedings that are currently before the Gauteng Division of the High Court.
3. The applicant is to pay the costs of this application.

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Sipunzi AJ

Date of hearing: 22 March 2024

Date of Judgment: 25 April 2024

APPEARANCES

For the applicants

Instructed by:

Adv RM van Rooyen

MENDELSON ATTORNEYS

55 Victoria Road

Sandringham

Johannesburg

Ref: JM/B019

C/O STRAUSS DALY INC

9<sup>th</sup> Floor, Strauss Daly Place

41 Ridgeside Office Park

Umhlanga

Durban

Ref: M Lombard

For the first & second respondents:

Instructed by:

Mr M Marshall

MICHAEL MARSHALL ATTORNEYS

42 Cheltenham Ridge

5 Parade Ring Road

Royal Ascot

Milnerton

Cape Town

Ref: MFBK001/MAT053

C/O HK ATTORNEYS INC

2<sup>nd</sup> Floor, Mayfair on the Lake

5 Park Lane

Umhlanga

Durban

For the first to fourth affected persons  
not participating:

Ms Singh

For the fifth & sixth affected persons:

Mr N Rylie