SECHABA TRUST
(PTY) LTD

REG. NO : 2000/015141/07

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21 June 2021

OUR REF : C Murray (cmurray@sechaba.co.za); R Smit (admin6@sechaba.co.za)

YOUR REF :

Dear Sir/Madam

BESTINVER COMPANY SOUTH AFRICA (PTY) LTD (IN LIQUIDATION)

REGISTRATION NUMBER: 1994/009380/07

MASTERS REFERENCE: C0100/2020

We refer to our previous circular dated the 4th of May 2021 and confirm that the final liquidation order was granted.

We attach a copy of the judgement for your records.

Our further reports will follow in due course.

For more information regarding this matter, please consult our website:

http://www.sechaba.co.za/matters/982-bestinver-company-south-africa-pty-ltd

Yours faithfully

C Murray

SECHABA TRUST (PTY) LTD

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No: 2594/2021

In the matter between:

YASMINA BABA	First Applicant
BESTINVER HOLDINGS (PTY) LTD	Second Applicant

and

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O.	First Respondent
CHRISTOPHER VAN ZYL N.O.	Second Respondent
JACQUES DU TOIT N.O.	Third Respondent
LEOPONT 193 (PTY) LIMITED (IN BUSINESS RESCUE)	Fourth Respondent
JOBURG SKYSCRAPER (PTY) LIMITED (IN BUSINESS RESCUE)	Fifth Respondent
BESTINVERPROP01 (PTY) LIMITED (IN BUSINESS RESCUE)	Sixth Respondent
BESTINVER COMPANY SOUTH AFRICA (PTY) LIMITED (IN PROVISIONAL LIQUIDATION)	Seventh Respondent
FIRSTRAND BANK LIMITED	Eighth Respondent

EMPLOYEES OF THE FOURTH TO SIXTH RESPONDENTS AS PER SCHEDULE "B" TO THE NOTICE OF MOTION	Ninth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Tenth Respondent
CHRYSALIS CAPITAL (PTY) LTD	Eleventh Respondent
HERIOT PROPERTIES (PTY) LTD	Twelfth Respondent
FURTHER CREDITORS OF THE FOURTH TO SIXTH RESPONDENTS AS PER SCHEDULE "B"	Thirteenth Respondent
REGISTRAR OF DEEDS	Fourteenth Respondent

Case no: 22342/2019

In the matter between:

FIRSTRAND BANK LIMITED	Applicant

and

BESTINVER COMPANY SOUTH AFRICA (PTY) LIMITED (Registration number: 1994/009380/07)	First Respondent
CHRISTOPHER VAN ZYL N.O.	Second Respondent
YASMINA BABA	Third Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent

Court: Acting Justice Nel
Heard: 28 and 29 April 2021 and 19 May 2021
Delivered: 17 June 2021

JUDGMENT

NEL AJ:

1. Two applications came before me on the opposed motion court roll. The first was under case number 2594/2021 and shall be referred to as the setting aside application. The second matter was under case number 22342/2019 and shall be referred to as the liquidation application. Although not formally consolidated, counsel for the parties requested that the matters be heard together as the applications were largely interrelated and there was a considerable overlap of the factual matrix between them. So much so that the supplementary affidavits filed by the parties in the liquidation application were referred to during argument in the setting aside application.

2. Argument in respect of the matters took place over three court days beginning with argument in regard to the setting aside application and I shall therefore deal with such application first.

The setting aside application - Case no: 2594/2021:

Background to the matter:

3. This matter is an opposed application in terms whereof the applicants seek an order setting aside the meetings of creditors[1] and shareholders[2] of the fourth, fifth and sixth respondents (in business rescue) held on 18 December 2020. The applicants also seek the removal of the second respondent as a business rescue practitioner to the fourth to sixth respondents and the removal of the first respondent as the business rescue practitioner to the fourth respondent. When the matter was argued before me, Mr. Van Rooyen, who appeared together with Mr. Greig on behalf of the applicants, sought an amendment to the notice of motion, from the bar, to include alternative relief in paragraph 5.1 of the notice of motion. The effect thereof is that they sought the setting aside of the meetings of creditors and shareholders alternatively the setting aside of the resolutions passed at those meetings. This amendment was objected to by the first to third and eighth respondents. The parties were invited to submit further argument in respect of the proposed amendment, but were content to rely upon submissions already made during argument and nothing further was submitted to this court. It is trite that a court may at any stage before judgment grant leave to amend any pleading or document, such as *in casu*, a notice of motion.[3] I am

[1] Held in terms of section 151 of the Companies Act 71 of 2008.

[2] Held in terms of section 143(3)(b) of the Act.

[3] See the provisions of Rule 28(10) of the Uniform Rules of Court.

of the view that the amendment sought will not prejudice the respondents and in the circumstances such amendment is granted.

4. The application was brought in two parts, Part A having sought certain interdictory relief, and Part B seeking the aforementioned relief. The relief as regards Part A was resolved in terms of an interim agreement which was made an order of this court by agreement between the parties on 25 February 2021 by Ndita J.

5. The first applicant is a shareholder in the seventh respondent[4] which is under provisional liquidation. The return day of that liquidation application is the second matter before me. The applicant in that application is Firstrand Bank Limited ("FRB") (the eighth respondent in this application) which moves for a final order of liquidation. The liquidation application is dealt with in more detail below.

6. The second applicant is the sole shareholder of the fourth to sixth respondents who are under business rescue. The applicants are accordingly affected persons as defined in section 128(1)(a) of the Companies Act 71 of 2008 ("the Act").

7. The second respondent was appointed as the junior business rescue practitioner to the fourth to seventh respondents together with Mr. Harry Kaplan

[4] Together with nine other shareholders, all being members of the Baba family, and each holding 10% of the shares in the seventh respondent.

("Kaplan"), who passed away on 11 January 2021. Mr. Kaplan was replaced by the first respondent as business rescue practitioner in relation to the fourth and sixth respondents and by the third respondent as business rescue practitioner in relation to the fifth respondent.

8. Kaplan and the second respondent shall together be referred to as the practitioners, however, reference to the practitioners may also include, depending on the context, reference to the first to third respondents collectively.

9. The fourth, fifth, sixth and seventh respondents shall collectively be referred to as the companies.

10. The FRB is a major creditor in the companies.

11. The present application is opposed by the practitioners and FRB.

12. The companies operate, *inter alia*, property brokering services through the ownership of mostly commercial but also residential immovable properties.

13. In March 2019, FRB accelerated the debts owed to it by the companies arising from direct liabilities and cross-suretyships. At that time, the debt amounted to R 510 000 000.00. The companies were afforded time to secure alternative finance and repay the debt. By December 2019, they had failed to do so and on 19 December 2019 the eighth respondent instituted four separate applications for the winding up of the companies. Each of these applications

were opposed. In March 2020 the Covid-19 pandemic hit our country, which went into lockdown towards the end of that month. Up until then, the companies had disputed FRB's entitlement to accelerate the debt and had been paying the monthly instalments which they alleged were the only repayment obligations they owed to FRB. However, once the Covid-19 pandemic had hit, that was no longer the case and the companies began defaulting on their monthly payment obligations. The applicants applied for leave to intervene in the liquidation proceedings, and discussions surrounding placing the companies into business rescue arose. The applicants were granted leave to intervene in each of the relevant liquidation applications on 19 June 2020, on the same date a rule *nisi* was issued, returnable on 4 August 2020 placing the companies under business rescue in terms of section 131(4) of the Act, and postponing the liquidation application to the return date. The rule *nisi* and return date was extended on 4 August 2020 to 27 October 2020 on which date the order was made final and the liquidation applications were postponed *sine die*.

14. On 29 and 30 July 2020 a first meeting of affected persons was held in respect of each of the companies. The attorney representing the companies and the applicants, Mr. Lester Timothy ("Timothy") was present at those meetings. The meetings were held over two days in the following sequence: the seventh respondent, third respondent, fourth respondent and sixth respondent. No issue was raised by Timothy about the fact that the meetings were held in any sequence or consecutively over the period of two days. Due to a necessity for further investigations, the meetings were postponed by a vote of the majority voting interest to 14 August 2020, on which date the meetings were held in the

following sequence: seventh respondent, sixth respondent, fifth respondent and fourth respondent. Timothy was present and did not object to either the sequence or the fact that the meetings were held consecutively. The sequence of the meetings are relevant insofar as a ground relied upon by the applicants for the setting aside of the meeting which took place on 18 December 2020, as will become apparent below.

15. The shareholders have contributed approximately R 1.9 million to the post commencement funding of the companies, far less than the funding required. The position became so untenable that the practitioners required funding on 5 November 2020, failing which the business rescue practitioners threatened the winding-up of the four companies. However, FRB holds a cession of the rental income in respect of each of the four companies, which rental income is being held by the property management agent, Rennie Property Management (Pty) Limited ("Rennie"). FRB has been the major provider of post commencement funding through its releasing of a portion of the ceded rental income. FRB alleges that had it not been for the post commencement funding provided by it, the business rescue proceedings would have been terminated and the companies wound up by the practitioners some time back. Chrysalis Capital (Pty) Ltd ("Chrysalis"), the eleventh respondent, who is a secured creditor of the fifth respondent, had also released encumbered rental income on condition that the interest due on its debt was serviced monthly. However, in the months preceding the date of deposing to opposing affidavits, there had been insufficient rental income to cover operating expenses relating to the building (Marble Towers) encumbered in favour of Chrysalis, as well as the interest due

to Chrysalis. Chrysalis voted in favour of adopting the business rescue plans in respect of the fifth respondent and also required the encumbered immovable property (Marble Towers) to be sold as a matter of urgency. I was informed by counsel for each of the parties during argument that by the time this matter had been heard, Marble Towers had been sold and transferred to an entity known as the Crown Group. Such a transfer, I was informed, took place in the week preceding the first hearing of this matter on 28 and 29 April 2021.

16. On 20 November 2020 the practitioners published their plans in respect of each of the companies, which plans are for all intents and purposes identical, and gave notice that meetings would be held in respect of the companies on 2 and 3 December 2020 in terms of sections 151 and 152 of the Act, for the business rescue plans to be considered. The four meetings were held over two days in the following sequence: fifth respondent, fourth respondent, seventh respondent and then sixth respondent. Timothy was present at the meetings and did not object to the sequence in which they were held or the fact that they were held consecutively.

17. The meetings were postponed, at the instance and request of FRB, to 17 December 2020 for amendments to be made to the plans and for the shareholders to finally raise and confirm funding, in the absence of which the plans contemplated the sale of the assets of the companies. It appears that the applicants as the shareholders of the companies have always intended to attempt to refinance the company in some form such that the sale of assets could be avoided. As set out below, the applicants have since early 2020

unsuccessfully engaged with a number of financial institutions with a view to refinancing the companies. The business rescue plans themselves state that the applicants and/or their legal representatives were urged by the practitioners to finalize the process and make details of the funding available to the practitioners. However, the finalization of funding never materialized.

18. After the amended plans as aforesaid were published on 8 December 2020, but prior to the meetings' postponed date of 17 December 2020, the shareholders, Rennie and Mr. Hannes Zwiegers (who has been the accountant or auditor or financial manager of the companies) requested amendments to the plans in respect of each company. They were advised by the practitioners that they were at liberty to table the amendments to the plans at the meetings to be held on 17 December 2020.

19. On 14 December 2020 the applicants brought an urgent application under case number 18819/2020 in which they effectively sought a court order to amend the proposed business rescue plans. The application was argued on 17 December 2020 but was struck from the roll for a lack of urgency by Baartman J. The meetings accordingly proceeded on 18 December 2020 whereat those holding voting interests voted against the amendments proposed by the shareholders, Rennie and Zwieger.

20. The four meetings were held on 18 December 2020 in the following sequence: fourth respondent, fifth respondent, sixth respondent and then seventh respondent. At those meetings, the applicants, through Timothy and counsel

(Mr. Greig), raised objections to the plans. Despite those objections, the plans in respect of the fourth to sixth respondents were adopted.

21. The applicants, through a related entity Sign & Seal (Pty) Ltd ("Sign & Seal") voted against the adoption of the plan in respect of the seventh respondent, and the plan was not adopted. No further action was taken by any party in accordance with section 153(1) of the Act, and the second respondent and Kaplan were accordingly to file a notice of the termination of the business rescue proceedings as envisaged in section 153(5) of the Act. However, due to the lateness in the year and the holiday season, the notice could not be filed promptly and on 11 January 2021 Kaplan passed away due to Covid-19 complications. The applicants were then called upon to nominate alternative practitioners. In respect of the fourth and sixth respondents they nominated the first respondent and in respect of fifth respondent they nominated the third respondent. They did not nominate a practitioner in respect of the seventh respondent, and this court later ordered that such business rescue proceedings were terminated and the seventh respondent was placed under provisional liquidation. The fate of such liquidation application is dealt with below.

22. On 10 March 2021 the applicants launched yet another urgent application to interdict the practitioners from implementing the adopted plan in respect of the fourth to sixth respondents, which was heard on 15 March 2021 and dismissed by Kusevitsky J on 24 March 2021.

Grounds for the relief sought:

23. The applicants do not suggest that there was no publication in respect of the meetings; or that there was no notice of the meetings; or that the meetings were conducted in any way or manner which is irregular. Rather, the reasons advanced for the relief which they seek are the following:

(i) That the voting interest is skewed because FRB's entire claim is taken into account when calculating the voting interest in respect of each of the companies;

(ii) The practitioners failed to disclose material information in respect of the PNB Paribas and Stein offers in the business rescue plans;

(iii) The practitioners failed to comply with section 150 of the Act as there was a substantial misstatement of the financial position and likely dividends in respect of each of the companies;

(iv) There was an arbitrary sequencing of meetings;

(v) The practitioners erred in accepting FRB's cession of the shareholders voting rights;

(vi) Lastly, there was a conflict of interest, illegal conduct, and grounds for the second respondent's removal.

24. These allegations are all denied by the first to third and eighth respondents, collectively referred to as the respondents.

25. The respondents allege that this gives rise to a dispute of fact. The applicants on the other hand allege that the material facts are common cause. I am in agreement this latter submission. The majority of the material facts are indeed common cause between the parties. The conclusions drawn by each of the parties from these facts differ, and this is what this court is called upon to decide.

26. Nevertheless, insofar as there may be a dispute of fact, these shall be pointed out in this judgment and be resolved in accordance with the rule in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A).

(i) Voting interest of the eighth respondent:

27. Timothy, who represented the applicants at the meetings on 2 and 3 December 2020 which were ultimately postponed to 17 December 2020, and proceeded on 18 December 2020, did not object to the voting interests as reflected in the business rescue plans at the time.

28. It was only at the meeting which took place on 18 December 2020 that objection to the voting interests were raised.

29. The applicants allege that the voting interest of FRB was skewed. The applicants contend that after each meeting where the plan was adopted, the claim should be reduced by the value of the proceeds to be obtained by the sale of the immovable property(ies), owned by that particular company, and which were anticipated to be paid to FRB.

30. FRB is a creditor of each company, in an amount of approximately R 507 million as at 18 December 2020. This is because various amounts were advanced to the companies by FRB, and each of the companies signed suretyships in favour of FRB for the amounts owing by the other companies (cross-suretyships). FRB called up the debt[5] and accordingly each surety is liable to make payment.

31. FRB can never recover more than the total amount owing to it, but it may recover the amount from any one of, or a combination of, the companies. Accordingly, until such time as monies are paid to FRB in settlement of the debt, it enjoys a voting interest in each of the companies equal to the value of the amount owed to it in each entity.

32. The applicants allege that the revised business rescue plans ignore the interrelationships between the group companies established by the various cross-suretyships. This is not the case as each plan expressly confirms that

[5] The applicants dispute FRB's right to call up the debts when it did so. This is disputed by FRB who allege that they validly called up the debt. This dispute must be decided by the application of the *Plascon-Evans* principle with the result that the matter must be decided on the facts as alleged by FRB. Moreover, it is common cause between the parties that by the time that meeting had been held on 18 December 2020 the companies had defaulted on their obligations to FRB and the full balances outstanding therefore became due, owing and payable.

FRB holds cross-suretyships and that to the extent that FRB's claim is paid elsewhere, the amount due to it will reduce.

33. Moreover, if any of the companies were compelled to settle the debt arising from the cross-suretyship, that company immediately thereupon would obtain a legal right of recourse against the other companies, who are signatories to precisely the same cross-suretyship agreement.

34. The applicants allege that the practitioners at the meetings which took place on 18 December 2020 declined to vote intercompany voting interests, which they allege was a breach of their fiduciary duties. This too, the applicants allege, contributed to the skewing of the voting rights. This is denied by the first to third respondents. In their opposing affidavit they state that there are significant loans between the various companies. The practitioners did not vote in respect of these loans as they did not want to influence the outcome of the voting. They wanted creditors to make the decision in respect of the plans without inter-company loans skewing the voting. The opposing papers indicate further that the fact that this was the approach that the practitioners were taking was disclosed at the outset to all creditors and there were no objections to this, including from the applicants. There is accordingly no merit to this complaint on their behalf.

35. The same reasoning is applicable to the applicants' complaint that the practitioners failed to allow voting in terms of the contingent rights that the companies had against one another in accordance with the cross-suretyships.[6]

36. The applicants also allege that resultant rights of recourse were ignored. The applicants therefore contend that the business rescue plans drastically overstate FRB's debt. The respondents however point out that: firstly, the right of recourse does not arise until payment is made by one suretyship of the liabilities secured; and secondly, there is no way to predict the playing out of the different scenarios and the sale and transfer of any particular property before others. Unless and until FRB has been paid by one of the companies, this issue does not arise. Each company remains jointly and severally liable to FRB for the debt.

37. See in this regard the matter of *Zungu-Elgin Engineering (Pty) Ltd* v *Jeany Industrical Holdings (Pty) Ltd* 2020 JDR 2673 (SCA) at para [12] and [13] where Van der Merwe JA held that:

> *[12] The surety's right of recourse is succinctly summarized in C F Forsyth and J T Pretorius Caney's The Law of Suretyship 6th ed (2010) at 159:*

[6] The plans themselves provide that a creditor who has a contingent, prospective, unliquidated, disputed and/or damages claim will not be entitled to vote at the meeting except to the extent permitted by the practitioners in their sole discretion.

The surety who has paid the debt of the principal debtor to the creditor has a right of recourse against the debtor; he is entitled to reimbursement by the principal debtor of what he has paid the creditor. This was so in Roman law, notwithstanding that payment of the debt extinguished it and released the debtor; it became the Roman-Dutch law and is our law.

[13] In Proksch v Die Meester en Andere 1969 (4) SA 567 (A) this court considered the common law principles in respect of when the surety's right of recourse arises. With extensive reference to Roman and Roman-Dutch authorities, Rumpff JA said at 584H-585A: "It appears clear that at common law, a surety could only be regarded as a creditor of the principal debtor, when he had paid the creditors". (Translated)

See also Proksch at 589D-E, Caney at 163 and P A Delport and Q Vorster Henochsberg on the Companies Act 71 of 2008 Vol 1 at 445. The same applies to the right of recourse between co-sureties. See Caney at 174.[7]

[7] The principle is subject to exceptions set out in C F Forsyth and J T Pretorius *Caney's The Law of Suretyship* 6th ed (2010) at p165 – 166. The applicants contend that one such exception finds application to the present matter, being that the principal debtor is in failing financial circumstances with the result that the surety has good cause for alarm as to whether there will be anything left with which to pay the debt. There is no merit in this contention. Whilst the companies may be in failing financial circumstances, there is nothing on the papers before me to suggest that they have good cause for alarm as to whether there will be anything left with which to pay the debt. In fact, the papers and

38. Moreover, the first to third respondents state that they will exercise rights of recourse where necessary and have never indicated otherwise. They correctly contend that it served no purpose to speculate where rights of recourse might arise when publishing the plan as no such rights existed at the time as no debt had been repaid.

39. The applicants contend that the Act precludes pursuit of such rights of recourse, unless included in the business rescue plan.

40. Section 154(2) of the Act provides that:

> *If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.*

41. FRB correctly contends such debt will only arise and become due once one of the companies makes payment to it. It is therefore not a debt owed by the company immediately before the beginning of the business rescue process as envisaged in section 154(2) of the Act.

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business rescue plans suggests the opposite; they suggest that as and when the various immovable properties of the companies are sold, the debt to FRB will be reduced and there is no evidence to indicate that the sale of the immovable properties will not eventually settle the entire FRB debt.

42. In this regard, Van der Merwe JA in *Zungu-Elgin Engineering (Pty) Ltd v Jeany Industrical Holdings (Pty) Ltd (supra)* at para [14] in considering section 154(2) of the Act held that:

> *The question is whether s 154(2) of the Act expressly or by necessary implication varied the common law principle that a debt based on the surety's right of recourse arises upon payment to the creditor. It did nothing of the sort. On the contrary, in terms of s 154(2) the question whether any debt was owed by the company at the specified point in time, is to be determined in terms of existing law, including the common law.*

43. There can accordingly be no doubt that the claim of FRB is correctly recorded in the plans of the companies, and until any payment is received by it, the claim is not overstated. By parity of reasoning, the voting interests attributed to FRB should be equal to the value of the amount owed to it by each company as envisaged in section 145(4)(a) of the Act, as was the case in this matter.

44. Moreover, the business rescue plans, despite what the applicants allege, contain a provision preserving a surety's right of recourse. In this regard the plans have a clause which provides as follows:[8]

[8] See for example clause 6.12.2.3 of the amended plan of the fourth respondent, p 287 of the record.

Notwithstanding what is set out herein, this Business Rescue Plan in no way whatsoever novates, waives, nullifies or prejudices claims that a Creditor or a surety or guarantor has from any guarantee or suretyship it has received or enjoys to secure the Company's indebtedness to such Creditor/s, or has provided to secure the Company's indebtedness to such Creditors, and to the extent that any suretyships or guarantees are enforced against such sureties or guarantors, they reserve their rights to claim against the Company.

45. There is accordingly no merit in the applicants' contention that the companies' rights of recourse were not reserved by the practitioners in the plans. However, for the reasons given above, it was not necessary to expressly do so.

46. As an aside, the first to third respondents also indicate that it may be possible to balance the distribution of funds to FRB to achieve a result that means that concurrent creditors in one company are not better off than concurrent creditors in another due to arbitrary factors, however this would need to be done with the consent and co-operation of FRB, and the practitioners would need to work together (which is less likely if there are different practitioners for each company who know nothing of the affairs of the other companies).

47. Mr. Van Rooyen moreover in reply argued that the value of FRB's claim and its correlating voting rights was incorrectly recorded as R 507 million in each plan, as the claim of FRB against each company was as a result of contingent right; the submission was further that in some or other way (although no details were

indeed provided as to how) as the meetings progressed, the contingent claim of FRB had to be reduced in each company.[9] Mr. Van Rooyen argued further that if the practitioners elected to include the contingent rights of FRB in calculating the voting interests, they too should have included the contingent rights of each of the companies in respect of the cross-suretyships.

48. In support of his argument, Mr. Van Rooyen referred the court to a blog post on the South African Commercial Law website authored by Don Mahon.[10] The title of the blog is "Counting Your Votes – The Voting Rights Afforded to Creditors Under Business Rescue".[11] The author references the calculation of voting interests in circumstances where company's have signed cross-suretyships. The paragraphs of the blog are not numbered, however, I was referred to paragraphs which read as follows:

> *Take, for example, the situation where the company under business rescue has stood surety for the debts of another in favour of a creditor. It may be that various companies in the same groups have signed cross-sureties in favour of the creditor for the same debt of the principal debtor.*
>
> *Obviously, the nature of these liabilities is contingent. Therefore, the first question is whether the claim based on a suretyship is entitled to be*

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[9] This is also goes to the sequencing of the meetings which is dealt with in more detail below.

[10] Mr. Van Rooyen also attached a copy the notable credentials of Mr. Mahon. What is also evident therefrom is that he himself manages the blogs which can be found at www.sacommerciallaw.com.

[11] It is moreover evident that at the top of the blog it specifically states that "*posts do not constitute legal advice*".

recognized at the meeting at all inasmuch as a creditor who enjoys such a claim is a contingent creditor. It is submitted that such claims, being contingent liabilities, are not entitled to be recognized.

If however, it is assumed that such a creditor is entitled to have his claim recognized and to be afforded voting rights at the meeting, does that mean that the creditor would be entitled to have his voting rights recognized to the full extent of this contingent liability? Would he be entitled to exercise such voting rights to the same extent in every company which has signed surety and which may be under business rescue?

49. The argument of Mr. Van Rooyen on the basis that FRB is a contingent creditor of each company is without merit.

50. In *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) Trengrove J at 528C stated that:

...a contingent or prospective creditor may be defined as one who by reason of some existing vinculum juris has a claim against a company which may ripen into an enforceable debt on the happening of some future event or on some future date.

51. FRB has enforced the cross-suretyships and called up the debt due to it. It is accordingly now due, owing and payable by each company. Each of the

companies' liabilities towards FRB is not contingent upon the happening of some future event or on some future date. Each company is therefore liable for the full debt of FRB, which liability will be reduced as and when payments are made by any one or more of the companies. FRB can claim the debt from any or all of the companies, as it has done in the present matter. As a result, FRB is not, as Mr. Van Rooyen submitted, a contingent creditor.

52. The position of each of the companies is however different. As I have set out above, in each case a right of recourse only arises on behalf of a company, if and when it makes payment to FRB, against the other companies. The claim is therefore contingent upon it making payment to FRB in respect of the cross-suretyships. The reasons provided by the practitioners for electing to not include these contingent creditors in the voting interests have been dealt with above.

53. Mr. Van Rooyen also referred to me to portion of Mr. Mahon's blog which read as follows:

> *Take the following example, the bank provides a loan to company A in an amount of R 100 million. As security for the loan, the bank registers a first mortgage bond over property owned by company A and procures suretyships in its favour by companies B and C who form part of the same group.*

Subsequent thereto, companies A, B and C are all placed under business rescue by resolution of their various directors.

There can be no difficulty in recognizing that the bank is a creditor of company A in the full amount of its claim and that such claim is secured to the extent of the value of the property over which the mortgage bond has been registered.

...section 145(4) of the Act states that:

> *In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests –*
>
> *(a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and*
>
> *(b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.*

... the suretyship in favour of the bank by company B and company C would give rise to a concurrent claim by the bank as against those

companies. In those circumstances, section 145(4)(b) would dictate that the bank would not be entitled to exercise voting rights in respect of the full value of their claims but would only be entitled to exercise voting rights in accordance with what they would be likely to receive under liquidation.

The business rescue practitioner would therefore have to procure the services of an independent expert to give an indication of what the bank would be likely to receive if the company were liquidated and the company would only be able to exercise voting rights at the meeting convened in terms of section 151 to the extent of the estimated value under those circumstances.

54. Mr. Van Rooyen used this portion of the blog as support for his submission that the voting interests of FRB had to be determined as suggested above by Mr. Mahon.

55. This however ignores the fact that FRB is a secured creditor in each of the companies having mortgage bonds registered over at least one property of each company. Insofar as it may be suggested that FRB is to be regarded as a concurrent creditor, for the purposes of section 145(4)(b) of the Act, for the amount of its claim which will not be covered by the proceeds of its various security, as is usually the case in a liquidation, this runs counter to the express provisions of section 145(4)(a) of the Act which states that the secured creditor shall have a voting interest equal to the value of the amount owed to that

creditor by the company; it does not limit the voting interest to the amount of the secured claim only, or imply that the provisions of section 145(4)(b) would be applicable to the concurrent portion of the claim.

56. Moreover, there is no allegation in the founding papers that the practitioners failed to adhere to the provisions of section 145(4) of the Act.

57. I accordingly find, for all of the reasons set out above, that the voting interests were correctly recorded.

(ii) Failure to include details in respect of the PNB Paribas and Stein offers in the plans:

58. The applicants allege that the practitioners were primarily concerned with the sale of the companies' immovable properties, in a manner which was akin to a controlled liquidation as opposed to rescuing the businesses. This is denied by the second respondent who states that as a result of the shareholders' inability to secure alternative financing of the companies (through an alternative financier injecting capital into the companies thereby allowing the payment of creditors of the companies) the only option available to the companies was to sell certain of the immovable properties owned by the companies in order to decrease the debt owed by them. This was particularly so because FRB had been clear that its relationship with the companies had broken down and it required repayment.

59. This is further evidenced by the fact that the revised business rescue plans circulated by the practitioners on 8 December 2020 call for the implementation of Part 1, and failing which, Part 2. Part 1 relates to the sourcing of alternative funding. Part 2 relates to the sale of the immovable properties.

60. The shareholders have had since 2019 when FRB first accelerated and called up the debt to either attempt to obtain alternative financing or sell the immovable properties. They have failed to do either. Whilst there has been some interest by financiers in respect of alternative financing, they have either fallen through or not been finalized.

61. The first such offer was a refinancing attempt with BNP Paribas, a major international bank, received on 12 November 2020.[12] This however was in respect of a loan facility to the second applicant, not one of the companies, and was subject to a due diligence investigation that would be completed by 15 December 2020. BNP Paribas requested an extension of time to 15 February 2021 to conduct such a due diligence investigation. Such request was made to the second applicant and not the practitioners. The applicants allege that this offer was never given any reasonable prospects. The first to third respondents on the other hand allege that in order to properly incorporate this potential funding into each of the business rescue plans, they required an indication of how and when the second applicant would make funding available to each of

[12] Although the term sheet is dated 2 November 2020.

the companies.[13] The requested details were not forthcoming and BNP Paribas did not engage, at any time, with the practitioners to commence the due diligence investigation that was required by it. The practitioners emphasize that they were not party to arrangements with BNP Paribas or any other funder engaged by the applicants.

62. Nevertheless, the plans published on 20 November 2020, and the revised plans published on 8 December 2020, provided in the first instance, for funding to be made available by the applicants in the form of a cash loan to be advanced by the second applicant to the companies by 15 December 2020, failing which the practitioners would pursue the sale of assets.

63. The issue as to whether or not to amend the plans to include the proposal of PNB Paribas together with the request to grant them an extension of time to 15 February 2021 to conduct their due diligence investigation was nonetheless tabled at the meetings by the applicants but was voted down. There was accordingly nothing more that the practitioners could have done.

64. The second such offer which involved a combination of sales of properties and refinancing was the offer by Stein Enterprises (Pty) Ltd. This Stein proposal was received on 10 December 2020,[14] leaving insufficient time to publish an amended plan prior to the scheduled meetings on 17 December 2020, without

[13] They initially requested this information by 18 November 2020 and despite not being provided with same they included the possibility of funding by the second applicant in the amended plans.

[14] After the amended plans had been published on 8 December 2020.

having to postpone the meeting, and the practitioners therefore circulated the proposal on 11 December 2020 and informed the applicants to raise it at the meetings for the creditors' consideration.

65. On 18 December 2020 it was tabled at those meetings and proposed amendments to the plan in respect of each of the companies were proposed but were voted down. There was no support for a motion to amend the plans to incorporate the Stein proposal. That was the end of the matter and there was once more nothing else that the practitioners could have done. There is no provision in sections 151 or 152 of the Act for a practitioner to postpone or amend a plan against the express wishes of creditors. The practitioners accordingly complied with their statutory obligations.

66. Whilst the applicants contend that the meetings should have been postponed in order for the practitioners to have sufficient time to amend the plans to include the Stein proposal, section 151(3) of the Act envisages an adjournment of the meeting "*from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153*". Such a decision had been taken by the creditors in accordance with section 152(1)(e) of the Act as set out above. Moreover, a week prior to this vote, the creditors were advised of, and had been provided with, a copy of the Stein proposal.

67. The practitioners furthermore had concerns about the Stein proposal, *inter alia*, that it did not differentiate between the separate companies and anticipated a

loan not yet procured by Stein. Moreover, it contemplated the purchase by Stein of Princess Crossing for R 200 million and Marble Towers for R 85 million. On the other hand, Heriot's offer for Princess Cross was R 264,9 million[15] and the practitioners had accepted an offer from another party for Marble Towers in the amount of R 88 million. Both of these accepted offers were subject to "meet and beat" clauses which were not triggered by the Stein offers. Incidentally, the Marble Towers offer was subsequently increased to R 95 million by virtue of another offer triggering the "meet or beat" clause,[16] and as stated above, this property has now been sold and transferred into the name of the purchaser.

68. The motions by the applicants to amend the plans as aforesaid having failed, a vote on each of the plans as published on 8 December 2020 followed. Part 1 of the plan not having been achieved, part 2 of the plan was approved and adopted in respect of the fourth to sixth respondents.

69. As regards the current status of the Stein offer, I was referred by Mr. Manca, who appeared on behalf of FRB, to papers filed in the liquidation application of the seventh respondent which indicates that Stein, on 26 April 2021, presented an amended offer. They still wish to purchase Princess Crossing for R 200 million and provide a loan to the second applicant in the amount of R 188 million. This leaves a deficit to FRB in the amount of approximately R 122 million. Stein states that it requires additional time until 30 June 2021 to raise these funds. It has attached a letter of interest from ABSA Bank Limited for R

[15] Although this offer has now fallen by the wayside.

[16] The sale of Marble Towers to Stein was therefore not a realistic possibility at the time.

40 million, and whilst this letter of interest is in no way a guarantee that the funds will be made available, it still leaves a deficit of R 82 million owing to FRB. This Stein transaction, so the respondents contend, is therefore anything but unconditional or uncomplicated.

70. Furthermore, this matter initially came before me on 14 April 2021. On such date, for various reasons, including the fact that the applicants sought time to finalize a third offer from Paramount Capital (Pty) Limited, the matter was postponed to 28 April 2021. Counsel for the parties presented argument on both 28 and 29 April 2021 and on the latter date I was informed, once again with reference to the papers filed in the liquidation application of the seventh respondent, that Paramount were no longer interested in providing alternative finance to the companies, but were interested in purchasing two of the immovable properties owned by the companies, one of which being Princess Crossing.

71. During further argument of the matter on 19 May 2021 I was presented with a further supplementary affidavit filed on behalf of the seventh respondent (although it was filed in the liquidation application) which had attached thereto yet another offer to purchase for Princess Crossing as well as an offer to purchase for a building owned by the fifth respondent known as Moffat on Main.

72. This lends further support to the practitioners' allegation that sourcing alternative funding in situations such as the present often proves difficult and the sale of properties is inevitable.

73. The applicants allege that the practitioners have done very little, if anything, to procure loan funding for the restructuring of the companies, and have preferred the route of the sale of the immovable properties. The practitioners on the other hand allege that they have no obligation to secure financing for the companies' restructuring; they state that all that they can do is prepare the best possible plan in the circumstances and the time available, after consulting with affected persons and management, something which they say they have done. They state that they have provided the shareholders with as much time as reasonably possible to raise funds.

74. Section 140(3)(b) of the Act states that the practitioner has the responsibilities, duties and liabilities of a director of the company, as set out in section 75 to 77 of the Act. Section 75 deals with a director's personal financial interests whilst section 77 deals with the liability of directors. Of importance in the present matter is section 76 of the Act which provides that a director, and as a result of section 140(3)(b), also a practitioner, must exercise his or her powers and perform their functions in good faith, for a proper purpose, in the best interests of the company and with the degree of care, skill and diligence that may reasonably be expected.[17] Whilst section 135 of the Act does permit a practitioner to raise post commencement finance, as Henochsberg on the Companies Act points out:

[17] See section 76(3) of the Act.

...there would be very few, if any, lenders that would be prepared to continue financing the company in circumstances where it is financially distressed and has been placed under supervision...[18]

...it is difficult to imagine lenders rushing to make new money available in circumstances where pre-commencement loans have not yet been repaid. Lenders would be wary of throwing good money after bad in circumstances where the company is already financially distressed...[19]

75. The procurement of alternative financing in order to restructure the companies has, as shown by the experience of the shareholders themselves, proven to be challenging. The Stein proposal is the only proposal which offers a hybrid of the purchase of properties and refinancing. That proposal, for the reasons set out above, has its own challenges and is by no means a certainty. It was moreover presented for the first time on 10 December 2020, being 6 months after the companies were initially placed under business rescue. Section 150(5) of the Act provides that a practitioner must publish the plan within 25 days after the date of his or her appointment, or such longer time as may be allowed by the court on application by the company or the holders of a majority of the creditors voting interests. The circumstances of the present matter show that it would have been impossible to procure alternative financing for the restructuring of the companies within the time constraints of the Act, and I am

[18] Volume 1, p 482(47) [Issue 19].
[19] Volume 1, p 482(48) [Issue 19].

accordingly satisfied that the plans prepared by the practitioners were done in good faith, for a proper purpose and in the best interests of the company.

76. The first to third respondents moreover state that the severe liquidity constraints and mounting operational challenges meant that funds were urgently required in each of the companies, and they would have been delighted to receive new funds and avoid selling assets but that has not materialized.

77. One cannot lose sight of the fact that at the date of deposing to its opposing affidavit, FRB had funded operational expenses, including those associated with the business rescue itself, of the companies in the sum of R 63.8 million. One therefore can not expect the creditors to wait indefinitely and, in the case of FRB, increase its exposure, in the hope that alternative financing would become available, especially when there is significant interest in the purchasing of the immovable properties evidenced by the fact that the practitioners had received over 40 offers for them.

78. In *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others* (1274/2019) [2021] ZASCA 59 (21 May 2021) the Supreme Court of Appeal in considering the obligations of business rescue practitioners held at para [23] that:

> *Their obligation is to investigate in order to ascertain whether there is a reasonable prospect of the company being rescued. It is established that this means more than that the company will be returned to solvent*

trading. It includes a situation where the company is wound down on terms that provide a better return for creditors or shareholders than on an immediate liquidation. The responsibility of the BRP is to investigate and ascertain whether either of these is reasonably possible.

79. This the practitioners have done. By preparing the plans, which were ultimately adopted, they took the first step in fulfilling their obligations as set out above. They have continued to do so by facilitating the sale of certain of the immovable properties dealt with in more detail below.

80. Furthermore, the mechanism of business rescue proceedings are designed to be a speedy process.

81. This is borne out by various sections of the Act itself such as for example section 150(5), set out above, which requires the plan to be published within 25 business days of the appointment of the practitioner, or for example section 132(3) which provides that if a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner may allow, the practitioner is obliged to prepare and circulate to affected parties a progress report in regard to the proceedings.

82. In *South African Bank of Athens Limited v Zennies Fresh Fruit CC* 2018 (3) SA 278 (WCC) Kusevitsky AJ (as she then was) held at para [43] that:

... the mechanisms of Business Rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors.

83. In *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees Sas and Others* (GNP) Case No 72522/2011, judgment delivered on 6 June 2012, Fabricius J was asked to consider an application for the extension of the time limits stated in sections 129(3) and (4) of the Act after these had expired. He was of the view that it was clear from the relevant sections contained in Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings.[20]

84. In the matter before me, the companies have been in financial distress, on their own version, for well over a year already. FRB cannot possibly be expected to continue providing the operational financing of these companies, whilst they are under business rescue, in the absence of any viable alternative financing solutions whilst the implementation of the adopted business rescue plans can and should be carried out.

85. This is in line with the provisions of section 7(k) of the Act which provides that:

[20] See para [27] of the judgment.

The purposes of this Act are to provide of the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.[21]

(iii) Failure to comply with section 150 of the Act in that substantial misstatement of financial position and likely dividends:

86. The applicants argue that the practitioners accepted offers by the twelfth respondent to purchase various properties of the companies for approximately R 408 million less than their valuations. This, the applicants argue, represents potential shareholders' equity which would be lost if the business rescue plans are implemented. Given the developments in this matter, this argument has become largely academic, nonetheless it is briefly dealt with below.

87. What is evident from the twelfth respondent's offers is the following:

a. Thibault Square, owned by the sixth respondent, had an offer of R 261 000 000.00 (being R 128 470 000.00 less than its valued amount);[22]
b. Waldorf, owned by the fourth respondent, had an offer of R 122 500 000.00 (being R 142 400 000.00 less than its valued amount);

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[21] See further in this regard *Firstrand Bank Ltd v KJ Foods* 2017 (5) SA 40 at para [80], [24], [33] and *Ferrosteal GmbH and Another v Transnet Soc Ltd t/a Transnet National Ports Authority and Another* (Case no 1194/2019) [2021] ZASCA 62 (25 May 2021) at para [12].

[22] The first to third respondents state that although this offer is below market value, there are a number of practical considerations that necessitate the prompt sale of the property, including but not limited to, a declining tenancy rate, material arrears owing to the City of Cape Town in respect of municipal rates and taxes and an array of operational challenges regarding the state of the building itself.

c. Princess Crossing, owned by the seventh respondent, had an offer of R 264 900 000.00 (being R 10 900 000.00 less than its valued amount)

d. Norton Rose, owned by the seventh respondent, had an offer of R 153 700 000.00 (being R 7 050 000.00 less than its valued amount).

88. It is pointed out by the respondents that the valuations of the properties by Gibbons[23] does not take into account that costs of capital expenditure will have to be incurred to realize the valuations attributed to the properties (due to the poor state of repair of the buildings) or the funds required to bring the buildings to a compliant state (to enable transfers to take place). Furthermore, Gibbons has refused to sign off on the valuations, which were provided in March 2020, due to the effect of the Covid-19 pandemic on his previous estimated values of the properties. This is indicative of the property market being volatile whilst the pandemic is still ongoing.

89. FRB moreover alleges that the practitioners have always maintained, even at the December 2020 meetings, that all offers on the properties would be considered. The practitioners themselves state that they have sought offers for the various immovable properties owned by the companies and have spent a significant amount of time engaging with agents, brokers and various interested parties. At the date of deposing to their opposing affidavit, 41 offers had been received on the immovable properties. This, the practitioners state, was done whilst still hoping that the applicants would source funding so that sales of

[23] Being a valuator instructed by the applicants. The practitioners state that they do not have sufficient post commencement funding to instruct someone to conduct another valuation.

assets would not be necessary. They however also state that they could not sit idle and do nothing in the interim. The offers from Heriot (the twelfth respondent) were accordingly secured late in October 2020. These offers were cash offers. The offers were accepted subject to various conditions precedent. One of these was that a plan be adopted by creditors in each case that included the sale of the properties (though not necessarily a sale to Heriot). Thus if funding was obtained and part 1 of the plans implemented, the condition precedent would fail and the practitioners would not be obliged to implement the sales. The practitioners wanted to be able to continue to invite and consider further offers on the properties and therefore, an addendum was concluded in the case of each of the accepted offers that incorporated a "meet or beat" clause that entitled the practitioners to keep marketing the properties (and Heriot would have to meet or beat any better offers).

90. FRB furthermore estimated that 1 Thibault will not realize more than R 300 million and therefore the offer, which is 87% of that value, should be accepted. It also points out that a number of offers were made and this was the highest offer in addition to being an unconditional one. The practitioners later accepted this offer, however, the applicants referred the sale to the Competition Commission. In the latest supplementary affidavit filed on behalf of the first applicant and seventh respondent (albeit in the liquidation application) the court is advised that the Competition Commission approved the sale and it has now become unconditional. This is the only property that the twelfth respondent is purchasing.

91. Norton Rose House and Princess Crossing are properties owned by the seventh respondent (now in liquidation), and because the offers were conditional upon the adoption of a business rescue plan, they have fallen away. There are currently three other purchasers interested in Princess Crossing and the latest supplementary affidavit referred to above in fact annexed an offer to purchase in respect thereof from Axis Fund (Pty) Ltd, although, this offer is not unconditional.

92. Certain other conditions precedent in relation to the Waldorf offer relevant to the fourth respondent were not fulfilled and that offer has also fallen away.

93. The applicants take issue with the fact that the proposed dividends in part 2 of the plans were based upon the offers received by the twelfth respondent. They submit that the plans ought to have incorporated a comparison of dividends in respect of the proposed Stein transaction.

94. What cannot be ignored is that the Stein transaction had only been brought to the attention of the practitioners on 10 December 2020 (after the amended plans had already been published) and that it had the day thereafter been circulated to all affected persons. At the meeting of 18 December 2020 the proposed resolutions to adjourn the meetings, to incorporate amendments and all proposals, or to await the outcome of the BNP Paribas due diligence, or that the Stein transaction be formally incorporated, were tabled but voted down. No-one, apart from the applicants, Rennie and Zwiegers, raised any issue in

respect of the plans, and the plans in respect of the fourth to sixth respondents were accordingly adopted.

95. For the reasons set out above, it was not for the practitioners to unilaterally amend plans which had already been published. They had informed the applicants to table their proposals at the meetings, which the applicants duly did. The process followed by the practitioners can accordingly not be faulted. One also has to bear in mind that the plans envisage, in part 1, a loan to be advanced to the companies by the second applicant in the amount of R 535 million. It does not make reference to any particular financier or agreement (accordingly no reference is made to PNB Paribas, being the only alternative finance possibility at the time of publication of the plans). What was approved by creditors was a process, not any particular offer.

96. If one has regard to the plans they appear to comply with the provisions of section 150 of the Act in so far as the content is concerned. The applicants challenge of the plans relates to the failure to amend the plans after publication on 8 December 2020. Despite the applicants' contention to the contrary, the correct process to amend those plans is envisaged in section 152(1)(d) of the Act which provides that:

> *At a meeting convened in terms of section 151, the practitioner must –*
>
> *(d) invite discussion, and entertain and conduct a vote, on any motions to –*

(i) *Amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or*

(ii) *Direct the practitioner to adjourn the meeting in order to revise the plan for further consideration.*

97. The motions by the applicants to include the Stein transaction were tabled and voted down and a vote ensued in respect of the amended plan published on 8 December 2020 which was accordingly approved as envisaged in section 152(1)(e) of the Act.

98. Given the express wording of section 152(1)(d) it is doubtful whether affected persons, other than creditors with voting interests have the *locus standi* to move for a motion to amend a proposed business rescue plan. Mr. Van Rooyen initially submitted that in light of the purpose of business rescue, this could not have been the intention of the legislature and that shareholders would enjoy a right to table such motions. However, in reply he stated that the wording of the section was clear and limited the right to creditors, which made it even more important to ensure that comprehensive plans were published and presented.

99. One has to apply the ordinary grammatical meaning when interpreting legislation. Moreover, section 151 of the Act provides that within 10 days after publishing the business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of

a voting interest, called for the purpose of considering the plan. A voting interest is defined in section 128(1)(j) as an interest as recognized, appraised and valued in terms of section 145(4) to (6) which specifically deals with creditors voting interests. It therefore appears apparent that the legislature intended only creditors with voting interests to be in position to move for motion to amend proposed plans.

100. Nevertheless, the applicants were, even though contrary to the provisions of section 152(1)(d), provided with the opportunity to move for such motions, which were, as stated above, unsuccessful. The applicants were therefore provided every opportunity to present their alternatives at the meeting.

101. The applicants take issue with the fact that creditors who were not present at the meeting would not have been privy to the discussions which took place thereat, and the applicants argue that they may have chosen to attend and/or voted differently if the Stein transaction had been incorporated into a further amended plan. The reality of the situation is that the Stein transaction was circulated to all affected persons on 11 December 2020. They accordingly had notice that there was a further possible offer. If they wished to have discussed it further and/or voted upon it, the duty was on them to ensure attendance at the meeting. In this regard section 152(4) stresses the importance of attendance in providing that:

A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person –

(a) Was present at the meeting;

(b) Voted in favour of adoption of the plan; or

(c) ...

102. The applicants contend that the circulation of the Stein proposal was one day short of the requisite 5 business days envisaged in section 151(2) of the Act. However, that section provides for a practitioner to circulate a notice setting out: (a) the date, time and place of the meeting; (b) the agenda of the meeting; and (c) a summary of the rights of affected persons to participate in and vote at the meeting. This had been complied with by the practitioners. Circulating the Stein proposal does not fall within the ambit of this section.

103. Accordingly, the plans published on 8 December 2020 were accurate and did not contain misleading information. Insofar as the plans did not incorporate the requested extension to the second applicant by PNB Paribas and the Stein proposal, these issues were dealt with and voted upon at the meetings.

104. Moreover, no creditor has taken issue with or challenged the approved and adopted plans.

105. I therefore cannot find that there was a failure on the part of the practitioners to comply with the provisions of section 150 of the Act.

(iv) Sequencing of meetings:

106. The applicants also contend that the arbitrary sequencing of the meetings held on 18 December 2020 resulted in a situation where, if the business rescue plans are implemented, concurrent creditors in certain companies would achieve significant dividends whilst others would achieve nothing, merely by reason of the sequencing.

107. FRB on the other hand alleges that Timothy was present at all meetings since July 2020 and no issue was raised in respect of the holding of meetings over two days, or in subsequent half-day meetings, or the sequence in which meetings were conducted, or that they were held consecutively.

108. In respect of the meeting which took place on 18 December 2020, I was referred to a portion of the transcript in respect of the fourth respondent's meeting, by Mr. Van Rooyen during his reply to this court, where Mr. Greig stated that "*...it is very critical to adopt the right order, and you need to see how things develop in each company*". It was submitted by Mr. Van Rooyen that this is indicative of the applicants objecting to the sequence in which the

meetings were held. However, when this statement is read in context, the objection was in fact in respect of the amount reflected as due to FRB. The applicants were disgruntled with the fact that FRB was reflected as a creditor in equal amounts in each of the companies. Their contention was that one first had to deal with one particular company, see if the property(ies) were sold and then reduce the debt of FRB accordingly in the remaining companies' financial records. The objection was therefore, read in context, not in respect of the sequence in which the meetings were held, but was rather in respect of the *quantum* of the claim of FRB in each company.

109. FRB moreover restates that one cannot predict how properties will be sold and transferred, or what events may occur to prevent a transaction from being registered, or which company would first render payment to creditors.

110. Moreover, the sequencing of meetings does not have the result, despite the applicants' contention otherwise, that some concurrent creditors would in effect pay concurrent creditors in other entities or that some would achieve significant dividends whilst others would achieve nothing. This is so because the adoption of a business rescue plan does not automatically result in the repayment of debts to creditors and therefore has no effect on the flow of funds or dividends.[24] This can only be determined once properties are sold and

[24] See *Knoop N.O. v Gupta* [2021] 1 All SA 726 (SCA) at para [48] where Wallis JA held that "*one cannot treat a business rescue plan as being writ in stone or having the same status as the Laws of the Medes and Persians*".

creditors are indeed settled. Whichever company sells property first and makes payment to FRB would have a right of recourse against the other companies.

111. The applicants contend that this offends the provisions of section 133(2) of the Act which provides that:

> *During business rescue proceedings, a guarantee or surety by a company in favour of another person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.*

112. This section of the Act simply precludes a surety from enforcing such suretyship against the company whilst it is under business rescue, without the leave of the court to do so. It does not preclude a right from arising and the debt therefore accruing to the surety should payment indeed be made by it on behalf of the company, it simply precludes the enforcement thereof. That such was the intention of the legislature is clear from the heading of section 133 which reads: "General moratorium on legal proceedings against company". Moreover, Rogers AJ (as he then was) in the matter of *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) at para [16] held that:

> *Section 133(2) is a special provision dealing specifically with the enforcement of claims against the company based on guarantees and*

suretyships, and stipulates that in such cases the claims against the company may be enforced only with the leave of the court.

113. Moreover, one simply does not know at this stage, the order in which properties will be sold and accordingly which companies will be making payment to extinguish the debt of FRB. At the date of the hearing of this matter, Marble Towers had been sold, however, that property was bonded to Chrysalis. Now that the Competition Commission has approved the sale, the next property which seems the most likely to be transferred is 1 Thibault Square which is bonded to FRB, however, the purchase price will not be sufficient to extinguish the debt owed to it. Further property(ies) will therefore have to be sold. Mr. Goodman, appearing on behalf of the practitioners, informed the court that once the sale of properties has produced sufficient funds to settle FRB and cover the costs of the business rescue process and other necessary expenses, the companies would be restored to solvency and returned to their shareholders.[25]

114. The applicants contend that the matter is not quite as simple as that, as there may be binding sale agreements in place in respect of some or all of the properties which may not need to be sold. That however is not the situation at

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[25] This would be in line with the provisions of section 141(2)(b)(i) of the Act which provides that:

If, at any time during business rescue proceedings, the practitioner concludes that there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company and all affected persons in the prescribed manner, and if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings.

present. As stated above, the only sale that has been completed is in respect of Marble Towers and the only pending sale is in respect of Thibault Square. The first applicant in the most recent supplementary affidavit has attached offers to purchase for Moffat on Main and Princess Crossing, however, both offers are conditional, and it will be for the practitioners to decide which offers to accept and which to reject.

115. The practitioners in this matter, when exercising their duties, would have to carefully navigate the sales of the properties and monitor the concomitant debt reduction from the proceeds of such sales, in order to ensure that properties are not sold unnecessarily. Should the practitioners fail to act to with requisite degree of care, skill and diligence and in the best interests of the companies, to such an extent that it amounts to gross negligence, the applicants are not left remediless and could hold the practitioners liable in accordance with section 140(3)(c)(ii) of the Act.

116. I accordingly find, for the reasons set out above, that the sequencing of the meetings do not have the consequences alleged by the applicant.

(v) Practitioners erred in accepting FRB's cession of the shareholders voting rights:

117. On the same day at the creditors meetings, being 18 December 2020, the applicants attended meetings in terms of section 143(3) of the Act. The applicants allege that at each of the meetings their representatives attempted to vote as the registered shareholders in each entity. They state further that

they were not advised that they could not vote, either before or during the meetings, and that there was every appearance that their votes were being tallied. They contend that the practitioners later accepted proxies FRB purportedly based on share cessions in its favour.

118. The applicants argue that the practitioners accepted and recorded the votes of FRB as cessionary in terms of various cession of shares agreements, contrary to section 37(9) of the Act.

119. Section 37(9)(a) of the Act provides that:

> *A person acquires the rights associated with any particular securities of a company when that person's name is entered in the company's certificated securities register.*

120. FRB held a cession of the relevant shareholders' rights and interests in the shares, which entitled it to exercise certain rights in terms of the cessions as soon as an "enforcement event" arose. Business rescue is such an enforcement event. These cessions therefore entitled FRB to exercise the shareholders vote at those meetings.

121. The practitioners deny that they allowed FRB to vote *qua* shareholder. FRB was entitled to exercise a vote on behalf of certain shareholders who had ceded those voting rights to it. Section 37(9) of the Act, contrary to what the applicants submit, does not find application. It does not prevent a shareholder

from contractually ceding certain rights to another to be exercised on its behalf in certain circumstances. FRB did not purport to be a registered shareholder. It merely exercised the shareholder vote at the meetings, as it was entitled in the circumstances to do.

(vi) Breach of fiduciary duties:

122. For the reasons set out above, the practitioners have not breached their fiduciary duties to the companies. It is evident that the practitioners had numerous meetings and conversations with the shareholders and their representatives, in addition to other affected persons, over a number of months, in respect of the business rescue. As stated above, they provided the applicants with various opportunities to obtain alternative funding, invited the applicants to engage further with them in that regard, and requested further details. They published the amended plan on 8 December 2020 based upon the information they had at hand at that date. Insofar as new information became available thereafter, they circulated such information to affected persons and indicated that proposed amendments to the plans had to be tabled at the meetings. The objections were raised at the meetings, the proposals were tabled for amendment to the business rescue plan in respect of each of the companies, but were voted down.

123. There are accordingly no reasons to find that the practitioners breached their fiduciary duties.

(vii) Removal of second respondent as business rescue practitioner to fourth to sixth respondents:

124. Section 139(2) of the Act provides that:

> *Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds –*
>
> *(a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;*
>
> *(b) Failure to exercise the proper degree of care in the performance of the practitioner's functions;*
>
> *(c) Engaging in illegal acts or conduct;*
>
> *(d) If the practitioner no longer satisfies the requirements set out in section 138(1);*
>
> *(e) Conflict of interest or lack of independence; or*
>
> *(f) The practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.*

125. In *Knoop N.O. v Gupta* [2021] 1 All SA 726 (SCA) Wallis JA when considering section 139(2) of the Act held at para [17]:

> ***The court has a discretion either to grant or to refuse an order for the removal of a BRP. The discretion is exercisable if one or more of the grounds for removal set out in section 139(2) has been established on a balance of probabilities. However, proof of a ground for removal alone does not dictate that an order for removal must follow. The power of removal is not combined with a duty to exercise that power... The range of actions by BRPs that might fall within these subsections and the degree of seriousness and varying implications they may have for the business rescue process, is such that it cannot be said that proof of one or more of these grounds will necessitate removal, or even give rise to a presumption or inclination to order removal. Whether they do is a matter for judgment on the facts of the particular case. In that sense it involves what is loosely called a discretion, meaning only that the court must take into account a number of disparate and incommensurable features.***

126. The applicants allege, *inter alia*, that the second respondent has preferred business rescue plans from which he stands to earn commissions from property disposals. They allege that the second respondent has in this way exposed himself to significant and unexplained conflicts of interest.

127. In *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others* (1274/2019) [2021] ZASCA 59 (21 May 2021) Wallis JA at para [18] held that:

> *The ordinary understanding of a conflict of interest… is a situation where the private interests of the BRP conflict with their obligations to the company in respect of which they have been appointed.*

128. FRB has pointed out that the applicants initially agreed to the practitioners receiving a fee of 3% on the proceeds from the sale of properties, it insisted on and managed to secure a reduced fee of 1.5%. This was done at the meeting of shareholders which took place in accordance with section 143 of the Act as dealt with above. It is therefore difficult to see how the applicants, who were initially content with a 3% fee, are alleging a conflict of interest in respect of 1.5% fee.

129. The fact that a business rescue practitioner will receive a fee constituting a portion of the sale price of an asset of a company cannot in and of itself give rise to a conflict of interest, otherwise a great number of business rescue practitioners would face removal for this reason alone. The applicants must be able to show more.

130. Other complaints levelled against the second respondent such as, for example, misstating FRB's voting interest and the sequencing of the meetings

have been dealt with above, and for the reasons already stated, are without merit.

131. The practitioners had numerous consultations with the applicants and creditors of the companies. They provided the applicants with an opportunity to raise alternative finance in order to possibly avoid the sale of the immovable properties of the companies. They prepared plans, published them on 20 November 2020, held requisite meetings to discuss the plans, postponed those meetings, published amended plans on 8 December 2020, provided the applicants an opportunity to table further proposed amendments to the plans at the meeting of 18 December 2020.

132. The second respondent appears to have acted with competence and appears to have considered the interests of all affected persons, not only the shareholders. I accordingly find that the applicants have failed to prove that the requirements of section 139(2) are present, and they have accordingly failed to prove that there is a proper basis for the second respondent's removal in terms of that section. Accordingly, I need not exercise my discretion as to whether or not to remove the second respondent; in any event, if I was required to do so, for the reasons set out in this judgment, I would have exercised my discretion against the removal of the second respondent as business rescue practitioner.

133. Moreover, it is the applicants who nominated the second respondent as a business rescue practitioner to the companies. FRB alleges that the applicants are not seeking the removal of any practitioner, but rather they wish

to further control the process by having the existing practitioner "relocated" to particulars companies[26] in order to have particular properties sold first.

134. The first respondent is now the joint business rescue practitioner in the fourth and sixth respondents, and the third respondent is now the joint business rescue practitioner in the fifth respondent. The business rescue practitioners are therefore no longer all the same individuals in each of the companies in business rescue. The first and third respondents were appointed by the applicants themselves as recently as late January this year.

135. In *Knoop N.O. v Gupta (supra)* Wallis JA at para [141] held that:

> *It has long been the practice in liquidations of a number of companies in the same group for the Master to appoint one or two lead liquidators and some others to ensure that there is an ongoing working relationship between all the liquidators, to enable information to be shared and to enable the liquidators to build a clear picture of the overall position in the group. This facilitates the winding-up process and is generally beneficial to the winding-up process. The fact that one company in the group may be indebted to another does not normally present a problem. Where there is a genuine dispute about the claim this may give rise to a problem, but in the ordinary course that should not be the case. There was an obvious advantage to the creditors for the investigation into the*

[26] Presumably they are referring to the first applicant.

affairs of the companies under business rescue to be undertaken by someone having access to the books and records of all of them. That was far and away the best way in which to untangle the web of inter-company loans and determine whether these were genuine or whether they might involve transactions falling within section 141(2)(c) of the Act.[27]

136. These remarks find application to the facts of the present matter. It is common cause that there are various loans between the companies, and that the companies have signed cross-suretyships for the debt of FRBt. I accordingly find that there is no merit in the applicants' submission that each company should have its own completely independent practitioner(s). An overlap between practitioners appointed to the companies, such as is currently the case, will be advantageous for the reasons set out in the *Knoop N.O. v Gupta* judgment.

(viii) Removal of first respondent as business rescue practitioner to fourth respondent:

137. The applicants themselves appointed the first respondent as recently as 29 January 2021 as a replacement for Kaplan in terms of section 139(3) of the Act as the business rescue practitioner for the fourth respondent.

[27] See also the matter of *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others* (1274/2019) [2021] ZASCA 59 (21 May 2021).

138. They have made out no case whatsoever for his removal other than to state that they wish each company to have entirely independent practitioners appointed to them. For the reasons given above, this argument must fail.

Relief sought:

139. The relief sought by the applicants as shareholders insofar as they seek the setting aside the creditors' meetings in relation to the fourth to sixth respondents held on 18 December 2020 is incompetent. The meetings were held. The meetings cannot be set aside. At best, the plans which were adopted at those meetings could notionally be set aside, however for the reasons set out above, no case has been made out such relief.

140. Moreover, the only mechanism available to set aside a vote, is contained in section 153 of the Act, and envisages a situation where a business rescue plan was proposed and voted down. There is no mechanism for setting aside a positive vote, adopting a plan. The only instance which I could find where an adopted plan had been set aside was in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufactuerers (Pty) Ltd and Another* 2015 (5) SA 192 (SCA). In that matter a bank (the holder of 63% of creditors' voting interests) voted against approval of a business rescue plan. The shareholders (who were also the directors) then made a 'binding offer to purchase the voting interests' (section 153(1)(b)(ii) of the Act) of the bank. The business rescue practitioner ruled that the bank could not respond to the offer; that it was binding; and that its voting interests were transferred to the shareholders. He

amended the plan accordingly. A new vote was immediately held with the shareholders (now the holders of the majority of the voting interests) voting to approve the plan. The court found that the offer, lacking essential requirements, was not binding, and that absent a binding offer, the transfer of the voting interest, and later the vote of approval of the plan, was null and void.

141. Given my finding that the voting interests were correctly recorded there is no provision in the Act for the setting aside of the adopted business rescue plans.

142. It further bears mentioning that the plan in respect of fifth respondent has already been partially implemented as a result of the sale of Marble Towers and same is also the case in respect of the sixth respondent as a result of the sale of 1 Thibault Square. Accordingly, plans in respect of two of the three companies have already been partially implemented.

143. Notably, the applicants do not seek to set aside the creditors' meeting in respect of the seventh respondent, despite the fact that exactly the same process was followed and the same methodology applied in regard to voting interest. At the time of launching this application the seventh respondent was not yet in liquidation. This creates the impression that the applicants simply do not like the outcome of the meetings in regard to the companies in business rescue. Nevertheless, for the reasons set out above I cannot find that there was anything irregular in respect of the meetings.

Conclusion:

144. For the reasons set out above I am of the view that the applicants have failed to make out a case for the relief which they seek. In the circumstances I the following order is made:

ORDER:

(i) The application is dismissed with costs, such costs to include the costs of senior counsel employed by the practitioners and the costs of two counsel (one senior and one senior junior) employed by FRB.

Liquidation application – case no 22342/2019:

145. For the sake of convenience, I shall continue to refer to the parties as cited in the setting aside application.

146. As stated above, an application for the liquidation of the seventh respondent was initially instituted on 12 December 2019 under the aforementioned case number.[28]

147. On 19 June 2020 however, a rule *nisi* was issued, returnable on 4 August 2020 placing the companies under business rescue in terms of section 131(4) of the Act, an postponing the liquidation application to the return date. The rule

[28] Liquidation applications for all of the companies had indeed been instituted.

nisi and return date was extended on 4 August 2020 to 27 October 2020 on which date the order was made final and the liquidation applications were postponed *sine die*.

148. The Covid-19 pandemic however had a drastic impact on the financial status of the companies, and they began defaulting on their monthly payment obligations to FRB. As a result, FRB saw fit to file an amended notice of motion together with a fresh founding affidavit, which the seventh respondent answered to. Replying papers were also filed. This had the result that a number of the grounds for opposition in the original application were no longer applicable in light of the financial position of the company post the onset of the pandemic.

149. As stated above, on 18 February 2021 Ndita J granted an order in terms where the business rescue proceedings in respect of the seventh respondent was declared to be terminated and the company was placed under provisional liquidation.

150. There has undoubtedly been compliance with the provisions of such order.

151. The question then is whether this court should grant a final order.

152. An applicant for the winding-up of a company must rely on the grounds set out in sections 344 and 345 of the old Companies Act.[29] In *Murray N.O. and Others v African Global Holdings (Pty) Ltd and Others* 2020 (2) SA 93 (SCA) at para [23] it was held that commercially insolvent companies are liable to be wound up under the old Act.

153. Accordingly, section 344 of the old Act provides for instances in which a company can be wound up. Subsection (f) provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345. The relevant portion applicable to the present matter is section 345(1)(c) which provides that a company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that it is unable to pay its debts.

154. It is trite that an application for the winding-up of a company may be brought by a creditor of the company.[30] FRB is a creditor of the seventh respondent. It is not in dispute that it has the requisite *locus standi* to bring the present application.[31]

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[29] These sections form part of Chapter 14 of the Companies Act 61 of 1973 ("the old Act") dealing with the winding-up of companies. The continued operation of that chapter, notwithstanding the repeal of the old Act by the Companies Act 71 of 2008 ("the new Act"), is preserved under Item 9(1) of the Fifth Schedule to the new Act. The reason is that, subject to one exception, the new Act contains no provisions dealing with the winding-up of companies.

[30] Section 346(1)(c) of the old Companies Act.

[31] This was conceded by Mr. Van Rooyen during argument; although this was initially a ground of opposition in the original liquidation application. It is however common cause that since the Covid-19 pandemic, the seventh respondent has defaulted on its payment obligations towards FRB. That alone constituted an event of default in accordance with clause 14 of the loan agreement contained on p 25 – 28 of the addenda file. Further events of default were the fact that the seventh respondent had applied

155. What is in dispute is whether the seventh respondent is unable to pay its debts as envisaged in section 345 of the old Act, and as such whether there are grounds for winding-up the company in terms of section 344.

156. It is common cause between the parties that the company is not factually insolvent. FRB accordingly relies upon commercial insolvency as the ground for the winding-up of the company.

157. That the seventh respondent is commercially insolvent is evident from the fact that the first applicant applied for it to be placed under business rescue.[32] Moreover, the seventh respondent itself in its answering affidavit

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to placed under business rescue, as well as the fact that it had been placed under provisional liquidation. It is evident from the initial founding papers (see para 14, p 9 read with para 20.3, p 18 read with para 111.1 p 70) that the seventh respondent was indebted to FRB directly, at the very least in respect of a facility extended to it. Mr. Van Rooyen in argument conceded this liability in the sum of approximately R 151 million. However, insofar as the seventh respondent (or any of the other companies for that matter) challenged its further indebtedness to FRB based upon a dispute regarding the validity of the cross-suretyships, as set out above, the companies have relied extensively on the cross-suretyships in respect of the setting aside application as a basis for, *inter alia*, their assertion that FRB's voting interests were not correctly calculated. They accordingly for those purposes accepted the validity of the cross-suretyships. The companies cannot both approbate and reprobate in this regard. See *Bowditch v Peel & Magill* 1921 AD 561 at 572-3. Accordingly, any challenge in respect of the validity of the cross-suretyships must therefore fail.

[32] It is evident from an affidavit filed on behalf of the first applicant in the application for leave to intervene in the initial liquidation application and application for business rescue that the company was experiencing financial difficulties. Para 11 of such affidavit states that *"[t]he respondent companies, in their affidavit of 4 June 2020, set out details of their liquidity difficulties given widespread tenant defaults associated with the coronavirus pandemic"*, whilst para 14 provides that *"...business rescue is indeed the only alternative available to the respondent companies arising from the considerable difficulties they now face in light of the coronavirus pandemic"* and lastly para 27.3 states that *"[i]t appears to be*

admits to being commercially insolvent, but lays the blame therefor at the door of FRB and the practitioners.[33]

158. In respect of commercial insolvency, the comments of Berman J in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440F-G are instructive:

> *The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.*

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reasonably unlikely that the companies will be able to pay all of their debts as they become due and payable within the immediately ensuing six months".

[33] See para 128 of the answering affidavit, page U232.

159. In *Murray N.O. and Others v African Global Holdings (Pty) Ltd and Others (supra)* the court at para [28] quoted from LAWSA as follows:

> *Commercial insolvency is dealt with in the following passage from LAWSA: 'A company is unable to pay its debts when it is unable to meet current demands on it, or its day-to-day liabilities in the ordinary course of business, in other words, when it is "commercially insolvent". The test is therefore not whether the company's liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant.'*

160. The court continued at para [29] and held that:

> *'Liquid assets' in this context mean assets that are available to the company for the purpose of meeting its obligations. These will include not only cash on hand, but receipts that it can expect to receive in the ordinary course; overdraft or other banking facilities that can be used to make payment of debts when they fall due; or assets, such as shares, bonds or book debts, that can be realised quickly so as to generate cash with which to pay debts. When, for whatever reason, a company is*

unable to access any liquid assets it is illiquid and unable to pay its debts as they fall due.

161. Mr. Van Rooyen, on behalf of the seventh respondent, submitted that whilst the company may have been commercially insolvent when application was made by the first applicant to place the company under business rescue, which order, as stated above, was granted on 19 June 2020, Mr. Van Rooyen argued that the company is no longer commercially insolvent due to the fact that there are three interested parties in purchasing Princess Crossing, to wit, Stein, Paramount and most recently an entity known as Axis Fund (Pty) Ltd ("Axis"). Notably, the Stein proposal, as set out above, is a hybrid proposal and envisages the purchase of Princess Crossing for a purchase price less than that tendered by Paramount and Axis, and also involves the refinancing of the companies. The Stein proposal accordingly requires the buy-in or cooperation of a number of the companies and not simply the seventh respondent. Moreover, Paramount has expressed interest in purchasing Princess Crossing but there is no offer to purchase on the table, and lastly, the offer of Axis is also not unconditional and is subject to, *inter alia*, the company being discharged from provisional liquidation and also subject to a due diligence investigation as well as unconditional approval by the Competition authorities in terms of the Competition Act 89 of 1998.

162. The application is therefore primarily resisted on the basis that the respondent has liquid assets or readily realizable assets available, the proceeds of which, could be utilized to pay its debts.

163. There can be no doubt that the immovable properties are not liquid assets; the question then is whether these immovable properties can be regarded as being readily realizable assets?

164. In *Firstrand Bank Ltd v Seriso 321 CC* (952/2011) [2011] ZAWCHC 394 (31 October 2011) at para [32] Zondi J (as he then was) held in respect of the respondent's immovable property in an application for it's provisional liquidation that:

> *In my view the respondent's property is not an asset which is readily realisable because if it was, the respondent would have sold it to meet the applicant's claim.*

165. I am in agreement with the aforementioned comments of Zondi J (as he then was) in that the seventh respondent's immovable properties do not constitute readily realizable assets.

166. The interest being expressed in one of the properties, namely Princess Crossing, does not change the nature of the asset. Moreover, as stated above, the offers received on Princess Crossing are not unconditional and it would take a considerable amount of time before any proceeds would be realized from the eventual sale thereof. The seventh respondent is accordingly commercially insolvent. It is unable to pay its debts within the meaning of section 345(1)(c) as read with section 344(f) of the old Act.

167. During further argument of the matter on 19 May 2021 I was presented with a further supplementary affidavit filed on behalf of the seventh respondent which had attached thereto the Axis offer for Princess Crossing as well as an offer to purchase for a building owned by the fifth respondent known as Moffat on Main for the sum of R 150 million.

168. The purpose of the this latest supplementary affidavit was to attempt to persuade the court to exercise its discretion against the granting of a final winding-up order on the basis that should Princess Crossing and Moffat on Main sell in the near future, the proceeds of those two sales (both properties being bonded to FRB), together with the proceeds from the sale of 1 Thibault Square (also bonded to FRB),[34] together with the ceded rentals held by Rennies, would be sufficient to discharge the debt owed by the group of companies to FRB.

169. Section 347(1) of the old Act provides that:

> *The court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just...*

[34] Tables setting out which properties belong to which company, and who the secured creditors are in respect of each property, have been set out on pages 727 to 728 of the setting aside application.

170. Given the prospects that the sale of immovable properties as set out above would settled the FRB debt, I requested the parties, at the end of their argument, to address me on why the matter should not be postponed, and the powers of the provisional liquidators extended in order to facilitate the sale of Princess Crossing.[35] The parties took the necessary instructions from their clients which resulted in a draft order being emailed to my Registrar in line with the above proposal.

171. However, I do not have an application before me to extend the powers of the liquidators in terms of section 386(5) of the old Act. I am furthermore of the view that to make such an order would have the undesirable effect of prescribing how to liquidate the company to its liquidators. One also cannot lose sight of the fact that the seventh respondent has creditors other than FRB, most notably Nedbank Limited, who has a mortgage bond registered over a property known as Hyde Park and ABSA Bank Limited, who has a mortgage bond registered over an immovable property known as Constantia. The rights of these creditors cannot be ignored. Moreover, the applicant has alleged in its founding affidavit that both Nedbank Limited and ABSA Bank Limited have demanded payment from the seventh respondent. This is not denied by the seventh respondent. The applicant alleges further that several judgments have been entered against the seventh respondent, which have not been set aside.

[35] It being common cause that the provisional liquidators' powers have been restricted by the Master in terms of section 386(6) of the old Act, as is usually the case, and they don't have the power to liquidate any of the seventh respondent's immovable assets.

This too is not denied by the seventh respondent. These factors all lend support for the granting of a final order.

172. In *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA) at para [25] it was held that, subject to considerations of business rescue proceedings, it is 'business as usual' when it comes to a decision as to whether a commercially insolvency company should be placed in liquidation under the 2008 Act.

173. Moreover, in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC) Rogers J at para [17] and [18] held as follows:

> *[17] ...Mr van Coller referred to the traditional view that where a company is unable to pay a creditor's claim the latter is ex debito justitiae entitled to a winding-up order and that the court's discretion to refuse is narrow (Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F; Sammel & Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F; Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C) at 440-441). Although the ex debito justitiae maxim has been repeated in recent cases, there are other decisions holding that the legislative policies underlying the new Act require the discretion to be viewed more broadly in favour of saving ailing companies (see Absa Bank Ltd v Newcity Group (Pty) Ltd &*

Other Cases [2013] 3 All SA 146 (GSJ) paras 29-33; Dippenaar NO & Others v Business Venture Investments No 134 (Pty) Ltd [2014] 2 All SA 162 (WCC) paras 45-46). Where there are competing applications for liquidation and business rescue, the policy considerations underlying the business rescue procedure must inevitably derogate from the traditional approach. The two cases just mentioned extended this approach to circumstances where, although there were not competing business rescue applications, there was evidence that the companies could be saved by transactions of which particulars were furnished.

[18] *I doubt that the ex debito justitiae maxim has ever been, or justified, an inflexible limitation on the court's discretion. In one of the leading English cases on the discretion to refuse a winding-up, Re Southard & Co Ltd [1979] 3 All ER (CA), Buckley LJ said that, where a judicial discretion is concerned, it is mistaken to attempt to lay down rules for its exercise and that no judge can fetter any other judge in the manner of its exercise or lay down rules binding on others in the exercise of the discretion (562b-c). The ex debito justitiae maxim, I venture to suggest, conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order (and see Blackman op cit Vol 3 at 14-91). To borrow another judge's memorable phrase, the court 'does not sit under a palm tree'. There must be some particular reason why, despite*

the making out of the requirements for liquidation, an order is withheld.

174. Mr. Van Rooyen also argued that in light of the interest in Princess Crossing, and the offer in respect of Moffat on Main from Axis, as well as the Competition Commission approving the sale in respect of 1 Thibault Square, a suitable order would be one in accordance with the provisions of section 131(7) of the Act[36] placing the seventh respondent under business rescue again. I am not in agreement therewith. The seventh respondent had already been placed under business rescue. The applicants, through a related entity Sign & Seal, voted against the adoption of the plan. The nature of business rescue and liquidation proceedings are that they should be dealt with swiftly and not be unnecessarily and unreasonably delayed. Furthermore, the interests of justice require finality in the present matter one way or another. I am accordingly not of the view that placing the seventh respondent back under business rescue would achieve the requisite balancing of the rights and interests of all relevant stakeholders as envisaged in section 7(k) of the Act.

175. As set out above, I have considered options other than granting a final liquidation order; however, I am of the view that an order other than a final order

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[36] Section 131(7) provides that:

In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) [dealing with making an order placing the company under business rescue] *if applicable, at any time during the course of any liquidation proceedings...*

would not be appropriate in the present matter, and I accordingly exercise my discretion in favour of granting such an order.

ORDER:

176. In the circumstances the following order is made:

(i) The rule *nisi* issued on 18 February 2021 by Ndita J is confirmed and a final liquidation order granted;

(ii) The costs of the application, which costs shall include the costs of two counsel, shall be costs in the winding-up of the company.

NEL, AJ