REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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SIGNATURE **DATE: 3 June 2020**

CASE NO: 2020/10556

In the matter between:

MATSHAZI MHLONIPHENI Applicant

and

MEZEPOLI MELROSE ARCH (PTY) LTD First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

CASE NO: 2020/10555

In the matter between:

NYONI LWAZI Applicant

and

MEZEPOLI NICOLWAY (PTY) LTD First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

CASE NO: 2020/10955

In the matter between:

MOTO, TONDERAI ROSELYN Applicant

and

PLAKA EASTGATE RESTAURANT CC First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

CASE NO: 2020/10956

In the matter between:

ABDULLAH MOHSEN First Applicant

AZANIA HOSPITALITY (PTY) LTD Second Applicant

and

BRAND KITCHEN HOSPITALITY (PTY) LTD First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

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JUDGMENT

Weiner J

[1] The applicants in each of the four applications sought orders placing the first respondent in each application under supervision and commencing business rescue proceedings under s 131(4)(*a*) of the Companies Act 71 of 2008 (the 'Act').[1] The applications were supported by various employees[2] and creditors[3] of each respondent company.

The applicable legislation

[2] Business rescue is defined as follows in s 128(1)*(b)* of the Companies Act:

'"Business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) a temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

[3] As stated by the Supreme Court of Appeal (the SCA) '…"*business rescue" means to facilitate "rehabilitation", which in turn means the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation*….'[4]

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[1] On 1 June 2020, the order which appears at the end of this judgment was handed down. I stated that reasons would follow. These are the reasons.
[2] In terms of s 144(3)(*b*) of the Act which states: '*During a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to participate in any court proceedings arising during the business rescue proceedings'*.
[3] In terms of s 145(1)(*b*) of the Act where during a company's business rescue process each creditor is entitled to '*participate in any court proceedings arising during the business rescue proceedings*'.
[4] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA); (609/2012) [2013] ZASCA 68 (27 May 2013) para 26.

[4] Section 131(4)(*a*) of the Act provides that a court may make an order placing a company under supervision and commencing business rescue proceedings if it is satisfied that –

4.1. the company is financially distressed; or

4.2. the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters; or

4.3. it is otherwise just and equitable to do so for financial reasons; and

4.4. there is a reasonable prospect of rescuing the company.

[5] It is noteworthy that any of the grounds referred to in 4.1, 4.2 and 4.3 above are sufficient to ground an application for business rescue.

Urgency

[6] The respondent companies in each of the matters before the Court submitted that the application was not urgent as none of its creditors were threatening action against them for payments of amounts owing. Business rescue proceedings are, in my view, inherently urgent. As stated by Binns-Ward J in *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd,*[5]—

'*It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue.'*

[7] I accordingly find that the matters should be dealt with on an urgent basis.

[5] *Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC) para 10.

The corporate structure

[8] The first respondent in each case is a juristic entity which conducts business in the operation of a group of restaurants in Johannesburg, which trade under the 'Mezepoli' and 'Plaka' brands. They are the following:

8.1. Brand Kitchen Hospitality (Pty) Ltd ('Brand Kitchen'), which conducts business as the management company for the restaurants, and employs the Chief Executive Officer of the associated companies, Mr Adriaan Kruger ('Kruger'), as well as the Operations Manager, Mr Mohsen Abdullah ("Mun Manal"). Brand Kitchen has 5 employees.

8.2. Mezepoli Melrose Arch (Pty) Ltd ('Mezepoli Melrose'), which conducts a 'Mezepoli' restaurant at the Melrose Arch shopping centre and which has 54 employees.

8.3. Mezepoli Nicolway (Pty) Ltd ('Mezepoli Nicolway'), which conducts a 'Mezepoli' restaurant at the Nicolway shopping centre and has 49 employees.

8.4. Plaka Eastgate CC ('Plaka Eastgate'), which conducts a 'Plaka' restaurant at the Eastgate shopping centre and has 50 employees.

[9] The first respondents in each case conduct the restaurant businesses, referred to in paragraphs 8.1 to 8.3 above. They will be referred to as the 'trust companies'. When Brand Kitchen and the trust companies are referred to, they, together will be referred to as the 'respondent companies'.

[10] There is a further entity, Plaka Menlyn (Pty) Ltd ('Plaka Menlyn'), which conducts the business of a 'Plaka' restaurant at the Menlyn shopping centre in Pretoria. It has already been placed under business rescue.

[11] In addition to the respondent companies and Plaka Menlyn, there are two other entities which are involved in the 'Plaka' and 'Mezepoli' businesses, being Mezepoli Holdings (Pty) Ltd ('Mezepoli Holdings') and Plaka Holdings (Pty) Ltd ('Plaka Holdings'). The trust companies pay franchise fees to these entities. All of the income derived by Mezepoli Holdings and Plaka Holdings is thus derived from the fees which they charge the trust companies and Plaka Menlyn.

[12] As the management company for the businesses, Brand Kitchen charges management fees to the trust companies, as well as Plaka Menlyn, Mezepoli Holdings and Plaka Holdings. All of Brand Kitchen's income is derived from the fees which it charges to these entities. It is not a trading entity.

[13] All of the respondent companies are controlled by the KAM Trust ('the Trust'), of which the current trustees are FWC Estate and Related Services (Pty) Ltd ('FWC') – which is represented by Francois Froneman ('Froneman'), Elpida Haitas ("Elpida"), and Konstantinos Haitas ('Kosta'). In addition to being a trustee, Kosta is also the sole income and capital beneficiary of the Trust. Kosta supports the relief sought in these proceedings.

[14] The businesses which are conducted by the respondent companies were founded by Evangelos Haitas ('Angelo') during July 2005. Angelo passed away on 21 October 2018. Kosta is his only child.

[15] Although it is disputed that Angelo's then-wife, Margarita Tsangaris-Scherf ('Margarita') founded the businesses together with Angelo, it is not in dispute that Margarita played an important role in the businesses until at least 2012, shortly before she and Angelo divorced during 2013. Margarita is Kosta's mother.

[16] Shortly after Angelo's passing, Froneman and Elpida were purportedly appointed as directors of the respondent companies, among others (collectively, 'the directors'). The validity of these appointments is contested by Kosta and this and other disputes between the trustees and directors is the subject of proceedings which were decided in this court.[6] An appeal is currently pending before the Supreme Court of Appeal. Whatever the legal position, Froneman and Elpida have been in *de facto* control of the respondent companies and the other entities controlled by the Trust since 23 October 2018.

[17] The applicants are each employed as managers of the respondent companies concerned. In the case of Brand Kitchen, the applicant is Mun Manal, who is an

[6] Unreported judgment of *Haitas, Konstantinos v Froneman, Gabriel Francois van Lingen and others* 2019/13947 ZAGPJHC (11 July 2019).

employee, creditor and shareholder of Brand Kitchen. The second applicant (Azania Hospitality) is a shareholder in Brand Kitchen.[7]

[18] The applicants contended that each of the respondent companies ought to be placed under business rescue because all of the requirements referred to in s 131(4) are met. They submitted that placing the respondent companies under business rescue will allow them reasonable prospects of rescue because:

18.1. the moratorium which ensues will protect the respondent companies from their creditors enforcing claims against them;

18.2. the post-commencement financing ('PCF') which has been secured will provide funding to the companies until they are in a position to resume profitable trade;

18.3. such funding will allow them to trade and pay certain costs and a portion of employees' salaries for at least 14 months; and

18.4. the wide powers of the business rescue practitioner (the 'BRP') will allow for the business as a whole to be streamlined and for the profitable parts of the business to support the unprofitable parts of the business until they are able to return to profitability.

[19] The applicants seek to have Mr Cloete Murray appointed as the interim BRP of the first respondent in each application in terms of s 131(5) of the Act.

[20] The defences raised by the respondent companies are threefold:

20.1. First, as a result of the national lockdown, *force majeure* excuses the respondent companies from their obligations to their employees and their other creditors, who therefore have no *locus standi* to bring these applications.

20.2. Second, other than Plaka Eastgate, the trust companies are not financially distressed.

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[7] Mun Manal explains that his shareholding was transferred to the second applicant. Brand Kitchen acknowledges that Mun Manal as shareholder has *locus standi* but disputes the second applicant's *locus standi qua* shareholder, despite acknowledging that Brand Kitchen's share register 'erroneously reflects the second applicant as shareholder'. The shareholder must be the registered shareholder, even if the entitlement to the shares is disputed. See *Oakdene* (note 4 above) para 6.

20.3. Third, the PCF referred to by Margarita, is not available.

[21] In the case of Plaka Eastgate, its financial distress is conceded. It has adopted the position that there is no point in attempting to rescue it and that, if it is not sold to Kosta,[8] it ought to be would up. The respondent companies referred to a letter in which it is stated that a decision will be made in regard to this possible sale on 30 May 2020.

Background

Common cause facts

[22] The businesses of the respondent companies slowed from 16 March 2020 and they have not traded at all since 26 March 2020. The 158 employees of the respondent companies were last paid their salaries on 28 March 2020. It is not disputed that this has had a devastating impact on them and their families.

[23] None of the respondent companies have traded since the national lockdown was implemented in response to the COVID-19 pandemic on 27 March 2020. They did not trade in food products (which was designated an essential service) during level 5 of the lockdown, and the directors of the respondent companies have taken a decision not to trade on a 'delivery only' or delivery/collection basis under level 4 and level 3 of the national lockdown. They state that the restaurants will only resume operations 'once the lockdown is lifted'.

[24] Prior to the issue of these applications, during April and May 2000, memoranda (the 'memos') were sent by the directors of the respondent companies and/or Kruger to the employees of the respondent companies. These contained the following information:

24.1. The restaurants are small businesses which are in distress. Applications were being made to various entities (the landlords, the Department of Small Business Development, the Small Enterprise Development Agency, the UIF's Temporary Employee Relief Scheme). They would '*continue to find ways and solutions to*

[8] An offer was made by Kosta to purchase the trust's interest in Plaka Eastgate.

do all that we can to keep our Plaka and Mezepoli families supported' (1 April 2020) [Emphasis added].

24.2. Applications had been made to landlords for rental relief '*to assist the cash-flow of the business in support of paying amongst other obligations, salaries and wages'.*

24.3. That the *'UIF applications went in yesterday'* (17 April 2020).

24.4. On 28 April 2020, the day on which staff salaries were to be paid, a memo (the '28 April memo') was sent, stating *inter alia* that: -

'*the company will not be paying you for the month of April 2020* <u>*as a direct result of the down-trading and continued losses incurred during the recent months exhausting any historic profits there may have been.'*</u> [Emphasis added]

'The company will remain closed for the duration of the lockdown – we will not be opening for deliveries only at this stage.'

24.5. On 29 April 2020, the directors stated that '*Brand Kitchen will be making a R1,000 advance to all staff members and R3,000 advance to managers to assist our staff until the funds from the UIF arrive. This payment … is an advance payment made in the absence of having received any payment from UIF to date.*'

24.6. On 4 May 2020, a further memo was sent, stating *inter alia* that:

'The company will remain closed for the duration of the lockdown – we will not be opening for deliveries only at this stage.'

'<u>*Employees will be notified*</u> *in due course and with sufficient notice as to when they are required to return to work.'* [Emphasis added].

24.7. On 5 May 2020, following receipt of the above memos, a message was sent to Kruger and the directors of the respondent companies by Mun Manal, in his capacity as the nominated employee representative for the trust companies. The memorandum set out the employees' grievances in detail and called on the CEO / directors of the respondent companies to identify the creditors thereof.

24.8. On 8 May 2020, after the launch of this application two memoranda were sent to the employees of the respondent companies by Froneman and Elpida, in response to Mun Manal's message stating, *inter alia* that: -

(a) *'It is with regret that the company has to inform you and confirm that the temporary layoff as of 1 April 2020 continues to be in force.'*

(b) *'The temporary layoff period will continue until the end of lockdown, when each company's circumstances will be reviewed.'*

(c) *'As a result of the company being closed and not being allowed to trade as normal, a "no work no pay" principle will apply.'* [Emphasis added]

The applicants' *locus standi*

[25] Under the Act, both a creditor and an employee have *locus standi* to bring an application for business rescue, both being 'affected persons' in terms of s 131(1) of the Act.[9] The respondent companies challenged the applicants' *locus standi* on the basis that, as a result of *force majeure*, they are neither employees, nor creditors.

[26] In business rescue proceedings, employees have many more rights than they would have under the winding-up provisions of the Act. The term 'creditor' includes employees to the extent that any amounts relating to employment that were not paid to that employee immediately prior to the commencement of those proceedings, became due and payable by a company to that employee. The fact that the employment contract of such a person might be suspended for any reason does not have the effect that the employment contract is terminated.[10]

[27] The employees of the respondent companies have at all times tendered their services, and the respondent companies at all times expected them to remain

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[9] The definition of an 'affected person' is at s 128(1)(*a*) of the Act which provides as follows:
'affected person', in relation to a company, means-
(i) a shareholder or creditor of the company;
(ii) any registered trade union representing employees of the company; and
(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;

[10] *Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP) para 13; this decision was overturned on appeal on other grounds.

available to return to work. Their employment contracts were not suspended; the respondent companies took a decision not to operate on any basis during the lockdown and thus did not require their employees to attend to their ordinary functions.

[28] Even if it is accepted that the employment contracts somehow became 'suspended', the effect of that suspension would not impact on the standing of the applicants, as the contracts did not terminate, and they remain employees of the respondent companies. This is clear from the various memoranda sent to the employees. In addition, the trust companies could only apply for UIF/TERS on behalf of employees.

[29] There has never been any indication at all from the respondent companies that the applicants were no longer employed by them. On the contrary, in their memorandum dated 4 May 2020 they expressly stated that '*Employees will be notified in due course and with sufficient notice as to when they are required to return to work.'* [Emphasis added]

[30] The applicants contended that the respondent companies' contention that *force majeure* applies is unsubstantiated both factually and in law. Other than the Mezepoli Nicolway lease agreement and the employment contracts referred to below, the respondent companies have not disclosed other written agreements or the employment contracts, nor have they alleged any term which excuses them from their obligations to make payment to their creditors during the national lockdown. It is clear from the affidavits filed by some of the creditors that they do not consider their contracts with the respondent companies to be unenforceable.

[31] The employment contracts which are attached to the application papers, being those of Mun Manal and Mr Lwazi Nyoni ('Nyoni' – the applicant in the Mezepoli Nicolway application), do not contain any express provisions dealing with *force majeure* and both contain whole agreement clauses, demonstrating that no such provision applies.

[32] The Mezepoli Nicolway lease expressly provides that:

'*Should the LESSEE be prevented from having access to the PREMISES as a result of any fire, riot, organised labour strikes, natural peril disaster. or any other reason whatsoever. then*

the LESSEE shall not have any claim against the LESSOR nor Its agents or employees for any remission in rental or for any other damages, nor any right of cancellation of the agreement of lease.'

[33] The respondent companies sought rental relief from their landlords. The landlord of Mezepoli Melrose indicated that it has granted a level of 'relief' and that a portion of the payment due in respect of May 2020 would be deferred. Plaka Eastgate's landlord addressed a letter to its tenants, in which it sets out the rental relief which it is offering. There would be no need for any rental relief to be requested or granted if *force majeure* applied. No question of force majeure was raised by the respondent companies in relation to these lease agreements. Nor have they raised this defence when payment has been demanded by other creditors.

[34] If the respondent companies were of the view that *force majeure* excused them from their obligations to their employees, it would have been expected that they would have told them as much in late March or early April. Instead, the employees of the respondent companies were only advised that they would not receive payment of their April salaries on the day that they fell due for payment, 28 April 2020.

[35] It thus appears that the respondent companies are only raising *force majeure* in relation to the employment contracts.

Impossibility of performance

[36] If provision is not made contractually by way of a *force majeure* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Performance is not excused in in all cases of *force majeure.*[11] In *MV Snow Crystal*,[12] the Supreme Court of Appeal (per Scott JA) said as follows:

'As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to "look to the nature of the contract, the relation of the parties, the circumstances of the case,

[11] *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others* [2007] JOL 21043 (O); (4621/99) [2002] ZAFSHC 2 (28 March 2002) at 10.
[12] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 28 (footnotes omitted).

and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied". The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.'

[37] In *Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC*,[13] the court, citing *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank* Ltd,[14] stated as follows:

'The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation.'[15]

[38] In *Unibank* it was held that—

'Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.'[16]

[39] The obligation which the trust companies owed to their employees, to pay them their salaries, has always been capable of performance and was at no time rendered impossible. It is trite that the duty to pay, and the commensurate right to remuneration, arises not from the actual performance of work, but from the tendering of service.[17] The Regulations which were in force during level 5 of the National Lockdown make it clear that employers are not excused from their obligation to pay their employees' salaries, because it includes in the list as an essential service the 'Implementation of

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[13] *Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC* (18549/2015) [2016] ZAGPJHC 373 (29 July 2016) para 7.
[14] *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W).
[15] *Unlocked Properties* (note 13 above) para 7. In *Unibank*, the court has stated as follows: 'A contract is … terminated only by objective impossibility (which always or normally has to be total). Subjective impossibility to receive or make performance at most justifies the other party in exercising an election to cancel the contract.'
[16] *Unibank Savings* (note 14 above) at 198D.
[17] *Johannesburg Municipality v O'Sullivan* 1923 AD 201.

payroll systems to the extent that such arrangement has not been made for the lockdown, to ensure timeous payments to workers.'[18]

[40] The applicants contended that the trust companies have also been permitted to trade in some form throughout the entire lockdown.

40.1. During level 5 of the National Lockdown, from 27 March 2020 to 30 April 2020, they were permitted to conduct limited trade (the sale of cold foods, of which there are many on the restaurants' menus).[19]

40.2. The restaurants also operate a deli, which does not sell hot cooked food and was thus permitted to trade throughout the level 5 lockdown period.

40.3. Under level 4, the respondent companies were entitled to trade in any foods on a 'delivery only' basis.[20]

40.4. Under level 3, which came into force on 1 June, the respondent companies will be permitted to sell all food for collection or delivery.[21]

40.5. The respondent companies are not excused from its obligations to its employees because it has decided not to trade in circumstances where it is able to do so, but has elected not to, in anticipation that such trading will not be profitable. Trading may be more burdensome or economically onerous, but economic hardship is not categorised as being a force majeure event;[22] it does not render performance objectively and totally impossible.

[41] In my view, *force majeure* cannot be relied upon by the respondent companies as a defence to their obligations owed to their employees. In any event, the applicants are clearly 'affected persons' as set out in s 131 and s 128(1)(*a*) of the Act, who are

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[18] As per the regulations published in terms of s 27(2) the Disaster Management Act 57 of 2002: GN 318 of 2020 in GG No. 43107 (18 March 2020), as amended by s 6(*e*) of GN R419 in GG No. 43168 (26 March 2020), Annexure B para 32.
[19] See Regulation 11B(1)(*b*) and (*c*) read with Annexure B, Category A, para 1(*i*) and Category B, para 4 of the Regulations (GN 318 of 2020).
[20] See Regulation 28(1), GN R480 of GG 43258 read with Table 1 to the Regulations, Part I, which provides as follows: 'Accommodation and Food Services Activities Permitted: Restaurants only for food delivery services (9H00-19H00) and subject to restriction on movement (no sit down or pick-up allowed).'
[21] Regulation 46(1) read with specific economic exclusions set out in Table 2 of the Regulations, GN 605 of GG 43364 (28 May 2020).
[22] *Unibank Savings* (note 16 above).

entitled to bring these proceedings and participate therein. Thus, they have the necessary *locus standi* required for these applications.

The respondent companies have failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters

[42] Once it is accepted that the defence of *force majeure* is not available to the respondent companies, it follows that, in failing to pay their employees their salaries on 28 April 2020, the respondent companies failed to pay over an amount in terms of an obligation under a contract, with respect to employment related matters.

[43] All that the employees received in respect of April 2020 was either a R3 000 or R1 000 *advance* on funds which the respondent companies hoped to obtain from the UIF relief scheme. The respondent companies remain liable for the payment of the at the employees' salaries from April 2020.

[44] The fact that UIF payments were made to *some* of the employees does not excuse the respondent companies of their obligations to pay employee salaries, particularly in circumstances when, on the respondent companies' own version, cash reserves and other forms of funding are available.

[45] The requirement at section 131(4)(*a*)(iii) of the Act is thus met.

Are the respondent companies financially distressed?

[46] Although the respondent companies strenuously opposed the suggestion that they are financially distressed, this is contrary to what they stated to the employees in the memos:

46.1. On 1 April 2020, it was stated that, '*The restaurants are small businesses which are in distress'.*

43.2 On 28 April 2020, it was stated that, '*as a direct result of the down-trading and continued losses incurred during the recent months [we have exhausted] any historic profits there may have been*.'

[47] ‘Financially distressed’ is defined in s 128(1)(*f*) of the Act to mean that—

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

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

[48] The respondent companies’ admissions in this regard appear to satisfy both these tests. They have provided scant information to demonstrate that they are not financially distressed. They have not disclosed details of all their creditors, showing outstanding balances and age analysis; no financial statements or balance sheets are disclosed. Other than the relief granted by the landlords of Mezepoli Melrose Arch and Plaka Eastgate, there is no evidence that any creditors regard the respondent companies’ obligations as unenforceable. On the contrary, if regard is had to the affidavits from creditors Meze Foods and Golden Coast Fisheries, they regard the debts as overdue.

[49] In regard to the affidavits filed by other employees and creditors, which form part of the proceedings, the respondents contended that an application should have been made for them to be admitted. In *Cape Point Vineyards* (*Pty*) *Ltd v Pinnacle Point Group Ltd*,[23] Rogers AJ intimated that he did not think the Legislature contemplated that an affected person would have to apply for leave to intervene in order to participate in the legal proceedings. He did however state that courts would need to regulate the procedure to be followed, where affected parties wanted to file affidavits relevant to the application, in order to ensure fairness to all the parties involved.

[50] The respondents were offered the opportunity to deal with the affidavits of these affected parties. Having perused the affidavits, the respondent companies accepted the contents thereof, save for the amount allegedly owing by Brand Kitchen to Golden Coast Fisheries, which they disputed.

[51] Brand Kitchen produced a Schedule / Income statement (the ‘Schedule’) for the trust companies. Taking that information into account, Mun Manal contended that,

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[23] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd & Another (Advantage Projects Managers (Pty) Ltd intervening)* 2011 (5) SA 600 (WCC).

even if one ignores the costs of sales and accepts a reduced liability insofar as salaries and wages are concerned and the rental relief which has been granted, the fixed monthly expenses of the respondent companies amount to approximately R2 million.

[52] Mun Manal prepared various schedules setting out the income and expenditure of each of the respondent companies. As a result of the lockdown and subsequent cessation of trade, the respondent companies have made significant losses, as set out below:

52.1. Brand Kitchen: R238 941.33 for the period January to March 2020;

52.2. Plaka Eastgate: R698 758.10 for the period January to March 2020;

52.3. Mezepoli Melrose Arch: R385 216.98 for the month of March 2020.

52.4. Mezepoli Nicolway: R250 405.82 for the month of March 2020.

52.5. Although not set out in the affidavits, further losses for April and May 2020 must have been incurred in respect of all the respondent companies in at least the amounts referred to for March 2020. Thus, the estimated losses in total from January to May 2020 for the respondent companies are in the region of R3 million.

[53] The respondent companies dealt with this contention dismissively, by stating that the monthly expenses are not relevant because the obligation to pay them is suspended during the national lockdown. As set out above, this contention is both factually and legally untenable.

[54] The applicants contended that whether the expenses which are estimated by Mun Manal or the expenses which are set out in the Schedule are used, the respondent companies are clearly in financial distress because the only funds which they identify as being available to them to meet these ongoing expenses are the following:

54.1. Cash reserves available to Mezepoli Melrose Arch in an investment account in the amount of R592 632.52.

54.2. Funds available from access bonds held by entities which are not involved in the businesses conducted by the trust companies, being Merchant Property (Pty) Ltd, in the amount of R731 060.14, and Masterprops 388 CC, in the amount of R610 649.67.

54.3. Funds which can be borrowed from the KAM Trust. Even though the Trust's financial position is not disclosed, the applicants contended that the Trust would be unable to provide any funding because:

(a) Mezepoli Melrose loaned the Trust R1 832 406.63. Such loan has not been repaid; the inference must be drawn that it is unable to do so;

(b) Froneman stated the following under oath in an affidavit deposed to on 25 March 2020:

'44. The Kam Trust attaches hereto the balance sheet of the Kam Trust as well as its management accounts as annexures GL 2 and GL3.

45. As is evident from the balance sheets the Kam Trust expenses exceed its income. If the properties are not sold the Kam Trust will not be able to meet its financial commitments and the Kam Trust will have to be wound up.' [Emphasis added].

54.4. Even if it is to be accepted that the respondent companies have access to the funds, they are insufficient to service the debts of all the respondent companies, which are set out by Mun Manal.

[55] In the case of Mezepoli Melrose, Froneman has annexed 'a cash flow projection' in which he assumes that normal trading will resume from June, July or August 2020. He also assumes that by December, pre-lockdown sales will be reached. These projections are highly speculative having regard to the present lockdown regulations, the likely contraction of the economy and the extensive financial hardship being experienced by many people.

[56] The decision to remain closed until the end of the lockdown will result in tremendous financial hardship to the respondent companies and their employees,

particularly when there is no indication as to when the lockdown will reach the level at which restaurants will be permitted to resume normal trading.

[57] In respect of Plaka Eastgate, it is common cause that:

57.1. it is running at a loss and is financially distressed;

57.2. it does not have funds available to pay its creditors;

57.3. an offer to purchase the business of Plaka Eastgate (including its liabilities) was made by Kosta on 27 April 2020.

[58] From the Schedule and Mun Munal's estimates, the applicants submitted that:

58.1. If the trust companies trade on a 'delivery' basis they *will* make a gross profit (even if they make a net loss) because all of their costs of sales are variable costs, which together constitute approximately 56% of sales. When trading on a delivery/collection only basis, the trust companies have a gross profit margin in the order of 44%.

58.2. If they trade on any basis, which consequently results in a gross profit, there will be some funds available with which to make payment of their fixed costs – which include employees' salaries and rental. There is accordingly a benefit to the affected persons of the trust companies if trade is conducted on any basis.

58.3. The undertaking to provide PCF should the respondent companies be placed under business rescue is such that the initial funding of R4 million, which has been provided will fund the *net* losses which the respondent companies project they will incur from trading on a 'delivery only' basis for nearly 14 months, such that the respondent companies will not have to rely on their own resources in order to trade. That, the applicants submitted, is the position on the respondent companies' own projected model.

58.4. If they do not trade, as the respondents have decided (until lockdown has been lifted), the trust companies generate no income at all. If *force majeure* does not apply their obligations in respect of their fixed expenses continue to accrue each and every month. This cannot be in the interests of the affected persons or the

trust companies because there is and will be no income from which to pay the fixed costs such as salaries and rental, and their indebtedness thus grows exponentially taking the respondent companies from 'financially distressed' to both commercially and factually insolvent.

[59] The trust companies submitted that they are not able to trade on a 'delivery only' basis, as they would suffer a loss. However, the applicants submitted that not trading at all will result in much greater losses and the ultimate demise of all of the respondent companies.

[60] Despite having the sources of funding which the respondent companies state they have, there is no explanation why these funds have not been used to pay the employees and/or any other creditors, who are demanding payment. It is trite that a debtor proves his solvency by paying his debts.[24]

[61] Another issue which is extremely concerning and which appears from the financial information disclosed to the court, is that Mezepoli Melrose apparently declared or paid a dividend to the Trust in the amount of R7 438 000 between 1 March and 30 April 2020, just prior to or after lockdown had commenced. Mezepoli Melrose moved from a position of net profit to a substantial net loss. There is no explanation for this from the respondent companies.

Just and equitable for financial reasons

[62] A court can in any event order business rescue if, in terms of ss (4)(*a*)(iii), it 'is otherwise just and equitable to do so for financial reasons.'[25] In making this decision, I have considered the PCF provisions contained in s 135 of the Act which make specific provision for employee entitlements (for the period after the business rescue process has commenced) to be treated as part of the PCF. Employees are afforded special protection under Chapter 6 of the Act. They are included in the definition of 'affected persons' who enjoy a wide array of powers and rights. Business rescue has

[24] *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W) at 869C-D. The applicants do not however have to demonstrate that the respondent companies are either commercially or factually insolvent – just distressed.
[25] *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another intervening)* 2017 (3) SA 74 (WCC); [2016] ZAWCHC 124 (21 September 2016) para 17.

no impact on employment. Employees continue to be employed on the same terms and conditions.[26] There is, furthermore, in business rescue a statutory preference for unpaid salary and benefits before all other non-secured creditors.[27] Employees' salaries due and payable during business rescue, but not paid, form part of any PCF provided to the company.[28]

[63] It is undisputed that by not trading at all, the respondent companies will not generate any income from which to pay the salaries and other fixed monthly expenses which they continue to incur.

[64] If the respondent companies are placed in business rescue, the moratorium will allow them to avoid the consequences of their failure to meet these expenses whilst in business rescue, thereby affording them the time required until trading recommences and they are able to trade profitably again.

[65] The BRP will be in a position to independently consider the financial positions of each respondent company, including the decisions taken not to trade on a delivery/collection basis. He will be able to use the moratorium to ensure that whatever funds are available are used fairly, in order to pay employees' salaries (or a portion thereof) and alleviate the hardship being faced by them.

[66] The devastating effect that the failure to pay salaries has had on the employees of the respondent companies cannot be overstated. Employees have been unable to *inter alia* pay their rental, afford basic necessities like food, and pay their children's school fees. This poses a very real threat to the lives and livelihoods of the employees who find themselves in a desperate and destitute situation.

[67] The directors appear to move funds between all the entities which they control and the Trust, without disclosing a complete financial picture, notwithstanding that these are all separate companies that are all financially distressed. Placing the respondent companies under business rescue will allow the BRP to attain a clear and

[26] Section 136(1)(*b*) of the Act.
[27] Section 135(1) and (3) of the Act.
[28] Ibid.

complete understanding of the financial positions of the respondent companies, so that an attempt can be made to rescue them or, if that is not possible, wind them up.

[68] It is thus just and equitable for financial reasons that the respondent companies be placed under business rescue.

Can the companies be rescued?

[69] In April 2020, Margarita ascertained that the trust companies did not intend to pay anything to their staff on 28 April 2020. She procured that payments be made to each employee to the extent of approximately 30% of that employee's salary. Each waiter, who ordinarily only earns commission on sales and no fixed salary, was paid R1 500.

[70] The applicants in their founding affidavit referred to funding which Margarita was willing to provide apparently in her personal capacity. She stated that she was prepared to provide PCF for:

70.1. Payment of 30% of the employees' salaries/wages until no longer required.

70.2. Contributions toward rental obligations.

[71] The detail surrounding the PCF in the founding affidavit was sparse. The availability of such funding from Margarita was challenged in the respondents' answering affidavits. In reply, the applicants contended that having had regard to the financial position of the respondent companies as contained in the answering affidavits (insufficient as it was), they were able to provide more detail of the PCF which would be procured by Margarita, from the Konmar Trust (Konmar) of which she is a beneficiary and trustee.

[72] It was stated that Margarita has now procured, through Konmar, PCF for the respondent companies in the event that they are placed under business rescue. The initial funding available for this purpose is R4 million.

[73] The respondents did not, on receipt of the replying affidavit, seek to strike out these allegations; nor did they request an opportunity to file a further affidavit to deal with the allegations. They did however, in their heads of argument, request that the

Court ignore the allegations. They submitted that the applicant's case must be made out in the founding affidavit.[29]

[74] In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd*,[30] the court held that the rule was not absolute and that the court has a discretion to permit new material in the replying affidavit.[31] In considering whether to allow new material introduced for the first time in the replying affidavit, the court exercises a judicial discretion. The indulgence of allowing new material in the replying affidavit will generally be allowed when warranted by special circumstances.[32]

[75] The rule does prohibit the applicant from explaining or expanding upon matters contained in the founding affidavit.[33] The court may also, after permitting the use of new material in a replying affidavit, allow for further answering affidavit by the respondent.

[76] The approach to adopt, in considering whether to allow new matter in the replying affidavit, was referred to in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*,[34] where the Court held that:

'In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom…'

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[29] In *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd,*[29] the court upheld the principle that the applicant in motion proceedings has to make out his or her case in the founding affidavit and was not permitted to supplement it in the replying affidavit unless done due to special circumstances

[30] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA); (363/2011) [2012] ZASCA 49 (30 March 2012).

[31] *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others* 2003 (5) SA 1 (C); (4542/02) [2002] ZAWCHC 15 (24 March 2002) at 6D-F.

[32] *Faber v Nazerian* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013).

[33] *Nedbank Ltd v Hoare* 1988 (4) SA 541 (E) at 543E.

[34] *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 705H-B.

[77] In exercising a judicial discretion in this regard, I take into account the wording of s 131(4)(*a*) of the Act which provides that a court should, in deciding whether to place a company under business rescue, have regard to whether it is just and equitable to do so for financial reasons and whether the company can be rescued. The applicants state that only after receipt of the answering affidavits, were they given some detail about the financial position of the companies. They then expanded upon the issue of the PCF in their replying affidavit.

[78] The applications are urgent and by applying the strict rules relied upon by the respondent companies, this Court will be flouting its duties provided for in the Act. This matter concerns, inter alia, the livelihood of some 158 employees. A refusal to take into account the issue of the PCF as set out in the replying affidavit, and dismissing the application for want of details relating to the PCF in the founding affidavit, would be extremely prejudicial to these employees, other creditors and the respondent companies themselves.

[79] This Court must consider the financial implications of the respondent companies not paying any salaries and wages to its employees. If business rescue can assist them and prevent disastrous consequences for them and their families, the Court should indulge the parties in allowing them to deal in detail with whether PCF is available to avoid the consequences of non-payment of the employees' salaries and wages. I therefore offered the respondents the opportunity to deal with the allegations relating to the PCF contained in the replying affidavit. They accepted such offer. The applicants were then granted leave to clarify certain allegations which the respondent companies disputed in their response. Both parties filed further affidavits in this regard. There is no prejudice to any party in this regard.

[80] In the replying affidavit, Margarita, on behalf of Konmar, provided the following undertakings to provide PCF, on condition that the respondent companies are placed in business rescue and Mr Murray is appointed as the BRP:

80.1. To wholly fund the operations of the respondent companies so as to immediately permit that trading may resume on a delivery-only basis, or on any other basis permitted by the regulations which are applicable from time to time during the lockdown, to the extent that such funding is necessary;

80.2. Konmar will fund the fixed and variable costs if trading is resumed on any other basis, to the extent that such funding is necessary;

80.3. If harsher restrictions on trade are instituted in due course, Konmar will continue to make reduced salary payment to the employees of the respondent companies to the same monthly extent as the payments which were made in respect of April 2020, and to pay any reduced fixed costs (save for those due to other entities controlled by the KAM Trust) to ensure that the businesses remain in good standing and the respondent companies are able to reopen for trade, should that be possible.

[81] Margarita stated that:

81.1. Konmar has an amount of approximately R4 million immediately on hand to provide for the above and has access to further funding if necessary.

81.2. A resolution has been passed by the trustees of Konmar resolving *inter alia* to provide the above funding, and each trustee has confirmed these facts.

[82] The respondents, in their further affidavit, challenged the allegation that PCF can be made available from the Konmar Trust. They submitted that:

82.1. No trust deed was attached, from where one can adduce whether the acting trustees are authorised to make this loan.

82.2. No financial information is proffered to determine Konmar's ability to make the funds available and from where these funds will emanate.

82.3. In regard to the PCF, they submitted that Konmar does not have the resources to provide the PCF because on the divorce of Angelo and Margarita, certain distributions were to be made to the Konmar Trust from the Kam Trust namely:

(a) A members' interest in Erf 971 Hurlingham CC, which only asset is an immovable property described as 8 Middelvlei Hurlingham Manor Hurlingham Ext 5.

(b) Zimbali Condominium Suite 114 Sectional Title Development.

(c) 50% of the shares held in Trashcan Kidz Ltd.

82.4. The Zimbali property was transferred to the Trust, which at the time of the transfer was valued at R2 800 000.00.

82.5. To date the Konmar Trust has to date failed to raise the necessary finance to take transfer of the member's interest in Erf 971 Hurlingham CC which at the time of signature of the agreement was valued at R2 389 290.19.

82.6. The Kam Trust is thus still the sole shareholder in Erf 971 Hurlingham CC. Currently the loan over the property (over which a bond is required) is R2 500 000.00.

82.7. As far as the 50% shareholding in Trashcan Kidz, they have not been able to find any information regarding this.

[83] It was thus submitted by the respondent companies that it is highly doubtful that Konmar is in possession of the necessary finance to loan and advance the PCF, and to fund the business rescue on the terms and conditions as set out in Konmar's resolution to the papers.

[84] In response to this, the applicants alleged that:

84.1. Their attorney had received payment on 28 May 2020 of the amount of R4 million from Konmar, which funds were held in trust for the purpose of providing the PCF.

84.2. In addition, Konmar has offered to lend and advance to the first respondent companies such amounts as may be required to fund the rescuing of the companies and to—

'fund the payments of all employees of the companies for the duration of the lockdown and any amended lockdown regulations, and at a minimum at the level of 30% as was previously paid by Margarita. Should employees be permitted to return to work to earn increased salaries, such funding shall be provided as needed and agreed to with the appointed business rescue practitioner'.

84.3. Konmar is permitted to provide the PCF in terms of the provisions of the Konmar Trust Deed, read with the definitions of 'Capital Beneficiary' and 'Income Beneficiary' respectively. That is because Kosta is a beneficiary of both the KAM Trust and Konmar; and

84.4. The Trust Deed and necessary resolutions of the trustees and their confirmatory affidavits were attached to this response.

[85] The question before this Court is whether there is sufficient information before the Court to determine whether the respondent companies can be rescued if the PCF is provided. This issue was succinctly summarised by Brand JA in In *Oakdene Square Properties (Ply) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* where he stated:

'I have indicated my agreement with the statement in Propspec that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b).'[35]

…

'Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process.'[36]

[86] In *Nedbank Ltd v Bestvest*,[37] the following was said:

'[It was] *argued that an application for business rescue should, to all intents and purposes, contain a summary of the proposed business rescue plan.* [It was] *contended that only once this had been done could a court decide whether there was a reasonable prospect of the company being saved from insolvency. I do not agree with that submission. In my view, it should be left up to the business rescue practitioner to formulate the rescue package once he/she has had an opportunity to properly assess the company, its prospects going forward and, most importantly, the reasons for its commercial distress.'*

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[35] *Oakdene* (note 4 above) para 31.
[36] Ibid.
[37] *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and others* 2012 (5) SA 497 (WCC) para 40.

[87] The court in *Oakdene* confirmed that the achievement of any one of the two goals referred to in s 128(1)*(b)* of the would qualify as 'business rescue' in terms of s 131(4). Referring to *Oakdene*, the appropriate test was described by Maya JA in *Newcity*[38] as follows:

'It is plain from the wording of these provisions that a court may not grant an application for business rescue unless there is a reasonable prospect for rescuing the company i.e. facilitating its rehabilitation so that it continues on a solvent basis or, if that is not possible, yields a better return for its creditors and shareholders than what they would receive through liquidation. ….

As to what "reasonable prospect" means, Brand JA, in Oakdene Square Properties (Pty) Ltd, properly described it as a yardstick higher than "a mere prima facie case or an arguable possibility" but lesser than a "reasonable probability" – a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings. He elaborated as follows:

*"*Self-evidently it will be neither practical nor prudent to be prescriptive about the way in which the [applicant] must show a reasonable prospect in every case. Some reported decisions laid down, however, that the applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement … But in considering these decisions Van der Merwe J commented as follows in Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and another 2013 (1) SA 542 (FB) para 11:

'I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.'

And in para 15:

'In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary

[38] *Newcity Group (Pty) Limited v Pellow NO* 2014 JDR 2155 (SCA); *Newcity Group (Pty) Limited v Pellow N.O. and Others* (577/2013) [2014] ZASCA 162 (1 October 2014).

cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company , as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'

"… I agree with these comments in every respect … [Thus] the applicant is not required to set out a detailed plan … but must establish grounds for the reasonable prospect of achieving one or two goals in s 128(1)(b)." [39]

[88] Having regard to this test, I am satisfied that the PCF is sufficiently detailed to achieve either of the two purposes set out in s 128(1)(*b*)(iii).

[89] Placing the respondent companies under business rescue will allow them reasonable prospects of rescue because:

89.1. The moratorium which ensues will protect the respondent companies from their creditors enforcing claims against them.

89.2. The PCF will provide funding to the respondent companies until they are in a position to resume profitable trade.

89.3. The wide powers of the appointed BRP will allow for the business as a whole to be streamlined and for the profitable parts of the business to support the unprofitable parts of the business until they are able to return to profitability.

89.4. The BRP will be able to investigate the financial positions of the respondent companies individually and collectively and restructure the businesses to increase profitability. He will further be able to ascertain the circumstances under which the dividend of some R7 million was paid to the Trust, taking Mezepoli Melrose from the position of a net profit to a net loss of some R5 million.

89.5. The initial PCF of R4 million is sufficient to sustain the trust companies' operations on a delivery and take-away only basis for nearly 14 months. This provides some certainty and relief for creditors and employees. On the basis

[39] Ibid paras 15-16.

of the respondent companies' model, if opened to trade on a 'delivery only' (or take-away and delivery only) basis.

89.6. The restaurants will collectively make a monthly gross profit of at least R490 079.

89.7. This will be available to make payments towards the fixed monthly expenses of the trust companies; as well as to other trade creditors.

89.8. At least 50% of the salaries and wages will continue to be paid. That affords a monthly benefit of R300 000 to the employees of the trust companies.

89.9. The restaurants will incur a collective net monthly loss of approximately R280 000 after fixed expenses (rental, utilities, salaries & wages and operational costs) have been paid.

89.10. The R4 million which Margarita has procured from Konmar as PCF is sufficient to fund the cumulative net trading losses of all the restaurants for almost 14 months.

89.11. This will undoubtedly be to the benefit of creditors and employees since employees are currently not being paid anything at all, which is, literally, a matter of life or death for them.

89.12. The cash reserves that Mezepoli Melrose has will not need to be utilised, nor will the funds of the Trust and the unrelated entities which it controls, need to be accessed.

89.13. Irrespective of what the future holds for these restaurants, there will certainly be a better outcome for creditors, and in particular, the applicants, in the event that the respondent companies are ultimately wound up.

89.14. Due to the fact that Brand Kitchen is solely dependent on the fees that are payable to it from the other respondent companies, directly or via Plaka Holdings and Mezepoli Holdings, any income generated by these restaurants will in turn support Brand Kitchen's viability.

89.15. In the case of Plaka Eastgate, which it is common cause is financially distressed, Froneman alleged that having regard to Plaka Eastgate's 'trading history there is no point in re-opening'. He relies in support of this assertion on the income statement of Plaka Eastgate for the period June 2019 to April 2020.

89.16. The most recent financial statements available as at the date of Angelo's passing are those for the financial year end 31 May 2018. The applicants contended that these financial statements reveal the following:

(a) During 2017 and 2018, Plaka Eastgate was profitable. In 2018, the business made a profit of approximately R300 000.

(b) Since Froneman and Elpida took over as directors, Plaka Eastgate's financial position has deteriorated rapidly, to the point where the directors now allege that it is incapable of being rescued and ought to be liquidated.

(c) Renovations to the Plaka Eastgate restaurant took five months. This had a temporary but material impact on the revenue generated by Plaka Eastgate. Revenue improved once the renovations were complete.

89.17. Placing Plaka Eastgate under business rescue will afford it a reasonable prospect of being able to trade out of its precarious financial position. At the very least, the PCF procured by Margarita will allow Plaka Eastgate to break even for at least 14 months. Much can be achieved in 14 months and, critically, its employees (50 of them) will be able to feed their families. The BRP can also continue the negotiations for Kosta to purchase Plaka Eastgate.

[90] For these reasons, I am of the view that it is reasonably possible that the respondent companies will be returned to solvency; alternatively, there will be a better outcome for shareholders, and creditors, in particular the employees, than that which they would receive through liquidation, thus satisfying the test set out in s 128(1)(*b*)(iii) of the Act.

Ulterior motive

[91] Finally, the respondent companies submitted that these applications have been brought for an ulterior purpose in order to wrest control from the current management and vest control in Kosta, Margarita or Mun Manal. The applicants contended that:

91.1. Business rescue proceedings are a temporary state of affairs which end in the circumstances provided for in s 132(2)(*a*) to (*c*) of the Act.[40]

91.2. Under business rescue, the existing board of directors will remain in place. What changes is that the BRP temporarily has full management control of the company in substitution for its board under s 140(1)(*a*) of the Act.[41]

91.3. The relief sought by the applicants accordingly does not have the effect for which the respondent companies contend.

[92] I agree with these contentions. The BRP satisfies the requirements to be appointed. No dispute was raised in this regard.

For these reasons, on 1 June 2020, the following order was granted:

1. The first respondent in:

    a. **CASE NO: 2020/10556, MEZEPOLI MELROSE ARCH (PTY) LTD;**

    b. **CASE NO: 2020/10555, MEZEPOLI NICOLWAY (PTY) LTD;**

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[40] Section 132(2) of the Act provides:

(2) Business rescue proceedings end when-
- *(a)* the court-
    - (i) sets aside the resolution or order that began those proceedings; or
    - (ii) has converted the proceedings to liquidation proceedings;
- *(b)* the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or
- *(c)* a business rescue plan has been-
    - (i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or
    - (ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

[41] Section 140(1)(*a*) sets out that, 'During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter has full management control of the company in substitution for its board and pre-existing management'.

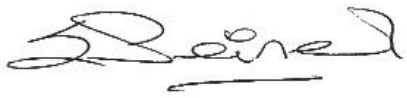
c. **CASE NO: 2020/10955, PLAKA EASTGATE RESTAURANT CC;**

d. **CASE NO: 2020/10956, BRAND KITCHEN HOSPITALITY (PTY) LTD**

is placed under supervision and business rescue proceedings be commenced under section 131(4)(a) of the Companies Act, 2008.

2. Mr Cloete Murray, practising at Sechaba Trust (Pty) Ltd, is appointed as the interim business rescue practitioner of each of the first respondents referred to in paragraph 1 above, subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147 of the Companies Act.

3. The costs of this application be paid as an expense in the business rescue process of each of the first respondents the first respondents referred to in paragraph 1 above; alternatively, be paid as costs in the administration of the liquidation of each of the first respondent.



S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	27 May 2020
Date of order:	1 June 2020
Date of judgment:	3 June 2020

Appearances:

Counsel for the Applicants:	Adv. GW Girdwood SC;
	Adv. A Kolloori; Adv. MFB Clark

Instructing Attorneys:	Christophers & Oosthuizen Inc
Counsel for the First Respondents:	Adv. M Smit
Instructing Attorneys:	Nance-Kivell Attorneys