IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
(HEARD IN THE PIETERMARITZBURG DIVISION)

Reportable/Not Reportable
CASE NO: D1322/2021

In the matter between:

BRYAN NATHAN	**FIRST APPLICANT**
ADELE KASSUTO	**SECOND APPLICANT**
and	
AUBREY NATHAN	**FIRST RESPONDENT**
DEVANDRAN GOUNDER	**SECOND RESPONDENT**
FISHWICKS PRINTERS (PTY) LTD	**THIRD RESPONDENT**
KENNETH LOGAN STEWART	**FOURTH RESPONDENT**
HARRY SIDNEY SPAIN N.O.	**FIFTH RESPONDENT**
DAVID LIONEL LEVINE N.O.	**SIXTH RESPONDENT**
HAROLD LEVINE N.O.	**SEVENTH RESPONDENT**
MAX SELWYN NATHAN N.O.	**EIGHTH RESPONDENT**
JULIAN COLIN NATHAN	**NINTH RESPONDENT**
HARRY SIDNEY SPAIN	**TENTH RESPONDENT**
DAVID LIONEL LEVINE	**ELEVENTH RESPONDENT**
HAROLD LEVINE	**TWELFTH RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	**THIRTEENTH RESPONDENT**
THE CREDITORS OF THIRD RESPONDENT AS IDENTIFIED ON THE LISTING FURNISHED BY THE FOURTH RESPONDEN	**FOURTEENTH RESPONDENT TO ONE HUNDRED AND SIXTIETH RESPONDENTS**

REASONS FOR JUDGMENT

BEZUIDENHOUT AJ

[1] This matter was argued before me as an urgent interlocutory application on 15 June 2021 in Pietermaritzburg, after being transferred from the KwaZulu-Natal Local Division, Durban by Masipa J on 11 June 2021. Due to the urgency of the matter and because I wanted to frame the reasons for my decision properly, I simply made an order, dismissing the application with costs, such costs to include the costs of two counsel where so employed, with my reasons to follow. These are the reasons for the order I made

[2] The applicants brought an application on an urgent basis for inter alia the following relief:

Part A

(a) That this application be heard as a matter of urgency in terms of Uniform Rule 6(12).

(b) That the court grants leave to bring this application in terms of section 133(1)*(b)* of the Companies Act 71 of 2008 (the Act).

Part B

(a) That this application be heard as a matter of urgency in terms of Uniform Rule 6(12).

(b) That pending the outcome of the main application under the above case number, which is enrolled for hearing on 22 July 2021, the fourth respondent be interdicted and restrained from convening a meeting for the consideration by creditors of the third respondent (and of shareholders if applicable) of any business rescue plan or from taking a vote from creditors in regard to any business rescue plan.

(c) That the costs of the application be paid by the fourth respondent *de bonis propriis* on such penalty scale as the court deems just, alternatively that the costs of the application be paid by the fourth respondent in his capacity as business rescue practitioner.

[3] Part A of the notice of motion was set down to be heard at 9h30 and Part B set down to be heard at 10h00.

[4] The main application referred to in the notice of motion is set down for hearing on the opposed roll in the Durban High Court on 22 July 2021. The applicants are claiming the following relief in the main application:

(a) That the fourth respondent be interdicted and restrained from selling the business of Fishwicks Printers pending the outcome of an action to be instituted by the applicants within ten days, for an order that the resolution to place Fishwicks Printers in business rescue taken by the first and second respondents be set aside, on the basis that it constituted an abuse by the first, second, fifth, sixth, seventh, tenth, eleventh and twelfth respondents, in that it was taken in order to circumvent the order granted by Mngadi J on 9 October 2020. Alternatively, that the resolution constituted an attempt to circumvent the undertaking which was furnished by the fifth, sixth and seventh respondents' attorney to the first and second applicants on 6 August 2019, that should the fifth, sixth and seventh respondents receive an offer for the purchase of the business of Fishwicks Printers which they were prepared to consider, then they would give the first and second applicants a reasonable opportunity of matching that offer.

(b) Costs are sought against the first and second respondents *de bonis propriis*, together with the tenth, eleventh and twelfth respondents on such penalty scale as the court deems just, jointly and severally the one paying the other to be absolved (together with any other respondent who chooses to oppose this application).

[5] Of some 161 respondents, only the third respondent, Fishwicks Printers (Pty) Ltd and the fourth respondent, Mr Kenneth Logan Steward, cited in his capacity as the business rescue practitioner to the third respondent, actively took part in these proceedings.

[6] The fourth respondent, in his answering affidavit, raised three points *in limine*, namely:

(a) The applicants lacked *locus standi*;

(b) Non- joinder of the fourth respondent's employees; and

(c) The applicants' failure to make out a case for the relief sought in terms of s 133(1) of the Act.

[7] The first applicant, Mr Bryan Nathan and the second applicant, Ms Adele Kassuto are brother and sister. There are two more siblings, namely Mr Aubrey Nathan, the first respondent and Mr Julian Colin Nathan, the ninth respondent. The first respondent is at present a director of the third respondent.

[8] All four siblings are beneficiaries of The United Nathans Holding Trust (the trust). The trust at present has four trustees, who have been cited as the fifth to eighth respondents. The eighth respondent is Mr Max Selwyn Nathan, who is also the father of the four siblings. At present, an application is pending for the appointment of a curator bonis to the estate of the eighth respondent, which is only due to be heard on the opposed roll in the Durban High Court on 22 February 2022.

[9] The trust is a 45.33% shareholder in the third respondent. The order of Mngadi J referred to in the notice of motion of the main application was granted on 9 October 2020, pursuant to an urgent application brought by the first and second applicants and another entity not relevant to these proceedings. The papers before me only contain the transcript of Mngadi J's judgment, and not the actual court order which was granted, interdicting and restraining the three trustees of the trust (excluding Mr Max Nathan) from selling the business of the third respondent or the assets of such business to a third party, pending the outcome of the application for the appointment of a curator bonis to the estate of Mr Max Nathan.

[10] Prior to the application before Mngadi J, the shareholders of the third respondent considered selling the business to a third party. In terms of an undertaking given by the trustees of the trust on 6 August 2019, the applicants would be given an opportunity to match any offer made. The applicants duly made an offer, which offer was rejected by the shareholders (the trust however voted in favour of accepting the offer). The shareholders comprise of, as mentioned above, the trust (45.33%), Quiredome Ltd (27.33%), the Gounder family trust (24%) and Mr Devandran Gounder (3%) - who is presently a director of the third respondent and is the second respondent in these proceedings. Although the trust voted in favour of the applicants' offer, the shareholders' refusal appears to have added fuel to already volatile relationships between the applicants and their two other siblings, the trustees of the trust as well as the shareholders of the third respondent.

[11] Shortly after the matter before Mngadi J, another matter was heard in the Durban High Court before Topping AJ under case no D9478/2019. In this matter, the applicants brought an application wherein they sought an order directing the Master of the High Court to remove the trustees of the trust and other related relief, apparently because the trustees were colluding with and favouring their other two siblings. Topping AJ dismissed the application with costs. A comprehensive analysis of all the correspondence and history of the matter, the history of the conflict between the siblings and the attempts to resolve it, was undertaken in the unreported judgment handed down on 8 March 2021. Of interest is what was said in para 127 of that judgment:

'All the siblings were, to various extents, actively involved in the running of Fishwicks' business and it follows that any conflict between them would impact negatively on its profitably and continued existence.'

I understand that the applicants are applying for leave to appeal against the judgment.

[12] It is common cause that on 28 January 2021 the first and second respondents, the two directors of the third respondent, took a resolution placing the third respondent in business rescue. On 29 January 2021 the thirteenth respondent, the Companies and Intellectual Properties Commission endorsed the nomination of Mr Kenneth Logan Stewart, the fourth respondent, as the business rescue practitioner of the third respondent.

[13] On 16 February 2021, the applicants issued the main application, asking for the relief set out above. As in the present application, the 148 creditors were also joined, but not the employees of the third respondent.

[14] In his founding affidavit in the main application, the first applicant states that 'the placing of Fishwicks Printers into Business Rescue was not necessary, that it was not done in good faith and it was taken in support of an ulterior motive'. He also alleged that the third respondent was not financially distressed based on an opinion obtained from Gilbey Forensic and Financial Services.

[15] The first applicant explains the relief being sought as being on the basis that the resolution to place the third respondent in business rescue 'constitutes an abuse by the trustees of the UNHT and the directors of Fishwicks Printers to circumvent the order granted by the Honourable Mr Justice Mngadi', alternatively that it constitutes an attempt to circumvent the undertaking previously furnished to the applicants to make an offer to purchase the business of the third respondent.

[16] The main application is being opposed and, as mentioned, is due to be argued on 22 July 2021. The fourth respondent raised similar points *in limine* as in the present application before me.

[17] The fourth respondent is in the meantime carrying on with what is required in terms of the provisions of the Act relating to business rescue. He has convened and conducted meetings with the creditors' committee as well as the employees' committee. It is common cause that he is of the view that the only option is to sell the business of the third respondent. He referred to various management accounts and attached his second practitioner's report in terms of which the third respondent's loss for February 2021 was R3 267 745, the loss for March 2021 was R644 504 , the loss for April 2021 was R1 491 169, and the loss for May 2021 was predicted to be R1.9 million.

[18] The fourth respondent arranged an overdraft facility with Nedbank for the third respondent for between R5 million and R7 million. The third respondent has furthermore been utilising the funds of pre-business rescue trade creditors totalling about R16.5 million as post-commencement funding, after these funds were ring-fenced in terms of the Act. There are however numerous factual disputes about the financial state of the third respondent. As mentioned above, the applicants allege that the financial position of the third respondent was not as bad as portrayed by the fourth respondent, and as proof annexed inter alia a bank statement reflecting the transactions of 1 June 2021 only, showing a cash positive balance in excess of R4 million. It is unclear why the rest of the month's statement was not annexed or the previous month's statement, for that matter. From the bank statement itself it appears that an amount of around R3.5 million was transferred into the account from another account on 1 June 2021, leading to the so-called positive cash balance.

[19] Relevant to the present application is the fact that the fourth respondent submitted a draft proposed business rescue plan to the applicants on 20 May 2021, to which two formal offers for the business were annexed. The fourth respondent subsequently published the business rescue plan and intended to put it to the vote of the creditors on 17 June 2021.

[20] In correspondence dated 21 May 2021, referred to as a 'Notice No.18 to Creditors', the fourth respondent referred to a creditors' committee meeting held on 7 May 2021, during which the committee urged him to publish his proposed business rescue plan. He informed the creditors that the first applicant is contemplating the bringing of an urgent application to prevent him from tabling the proposed business rescue plan. He also informed the creditors that Nedbank has given notice that 'if the company is not sold by 6 August 2021, they reserve the right to withdraw the post-commencement finance they have provided to the company'.

[21] The creditors were then asked to indicate whether the fourth respondent should publish the plan and shortly thereafter convene the meeting to consider the plan, alternatively to hold matters over until after the hearing of the main application on 22 July 2021. Creditors representing claims totalling R10 217 333 indicated that they wanted the fourth respondent to publish the plan and to convene a meeting in terms of s 151 of the Act. Creditors representing claims totalling only R1 002 983 supported the proposition that publication should be delayed. The majority accordingly supported the proposal that the business rescue plan should be published, and that a meeting should be convened to consider the plan.

[22] At the commencement of the hearing before me, I asked counsel appearing for the applicants, Ms Pudifin-Jones, to concentrate her efforts on the points *in limine* raised by the third and fourth respondents, in particular the issue of locus standi and whether a case had been made out for the relief sought in terms of s 133(1)*(b)* of the Act. A failure to establish locus standi would clearly mean that the applicants do not even get out of the starting blocks, similarly so will a failure to make out a case in terms of s 133(1) of the Act.

[23] It is appropriate to firstly deal with s 133(1) of the Act, which reads as follows:
'(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
(*a*) with the written consent of the practitioner;
(*b*) with the leave of the court and in accordance with any terms the court considers suitable. . .'.

[24] Bearing in mind what is stated by P Delport et al in *Henochsberg on the Companies Act 71 of 2008* (October 2020, Service Issue 24) at 526(6) to 526(8) , I should consider the following two questions when dealing with the application, namely:
(a) Do matters pertaining to the meeting of creditors and the implementation of the business rescue plan fall within the ambit of s 133?
(b) Should there be a separate application wherein the applicants first obtain leave to commence with the legal proceedings or can it be brought in one combined application?
In my view a third question also needs to be considered, namely whether the applicants have presented a well-motivated application to enable me to apply my mind to the facts and law, if necessary, and to then be in a position to make a ruling.

[25] As far as the first question is concerned, neither counsel for the applicants nor counsel for the third and fourth respondents ('the respondents') Mr Combrick SC, addressed me on this issue, and clearly proceeded with their argument on the basis that the nature of the relief being sought falls within the ambit of s 133. There are numerous conflicting decisions on this issue and I do not deem it necessary to add my views, save to say that I regard a party's constitutional right of access to court as a fundamental aspect of the rule of law (see *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and another* 2017 (4) SA 51 (WCC) paras 41-43).

[26] The second question deserves more attention as counsel for the respondents specifically raised in his heads of argument, the applicants' failure to launch a separate application to seek the court's leave prior to the institution of these

proceedings. I might just express my gratitude for the comprehensive heads of argument filed by both sets of counsel, at very short notice.

[27] There are once again divergent decisions as to whether the application to institute legal proceedings can be done in one application. Counsel for the respondents referred me to a decision in this division, *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and others* 2015 (4) SA 485 (KZD), in which matter the applicant sought an order to be provided with certain documents by way of an application. The application for leave in terms of s 133(1) was incorporated in the same application. Ploos van Amstel J said the following at paras 11 to 13:

'[11] The construction which the applicant seeks to place on s 133(1)*(b)* is that the proceeding may be commenced without the leave of the court and that leave to do so may be sought as part of the relief in the main application. This is inconsistent with the wording of the section. It will also defeat one of the purposes of the moratorium, which is to give the company and the business rescue practitioner space and time to deal with the rescue of the company without having to deal with litigation by creditors. The practitioner will in each such proceeding have to deal not only with the application for the court's leave in terms of s 133(1)*(b)*, but also with the merits of the claim, because it is all part of one application.

[12] There are other indications that the applicant's construction of the section is incorrect. Firstly, it will result in the court being asked, when the matter is argued, for leave for the proceeding to be commenced with, at a time when it had already commenced. Secondly, the leave of the court is also required to proceed with a legal proceeding against a company during business rescue proceedings. This contemplates a company which goes into business rescue after legal proceedings against it had commenced. It seems to me that the proceedings come to a halt when the company goes into business rescue, and may only proceed with the leave of the court. On the applicant's construction the proceedings simply proceed and all the plaintiff or applicant is required to do is to seek leave at the hearing for the matter to proceed. Thirdly, it is significant that in granting leave for the legal proceeding to be commenced or proceeded with the court may impose such terms as it considers suitable. This suggests to me that the court's leave must be obtained before the

proceeding is commenced or proceeded with, as that will be the time to impose the terms contemplated in the section.

[13] I conclude that the applicant commenced the present application without the leave of the court and that it was in terms of s 133(1)*(b)* not entitled to do so. The fact that the business rescue proceedings in respect of the first respondent later ended does not change this. The launching of the application without the leave of the court was not competent and it must therefore be dismissed.' (Footnote omitted.)

[28] In an earlier judgment, also by Ploos van Amstel J, of *Msunduzi Municipality v Uphill Trading 14 (Pty) Ltd and others* [2015] JOL 33101 (KZP) para 8, the following was said:

'Counsel for the municipality, in his reply, said he was asking the leave of the court for the application to proceed, as contemplated in section 133(1)*(b)*. This is not what is contemplated in the subsection. The leave of the court is required before the matter may be proceeded with. It is not permissible to proceed without the leave of the court and when the point is taken, apply for such leave from the bar. Such an application must be a substantive one, on affidavits, and the company under business rescue must have a proper opportunity to oppose it. The court will be required to have regard to all the relevant circumstances, including the reasons advanced by both parties as to why leave should or should not be granted.'

[29] The authors of *Henochsberg supra* at 526(10) indicated that it would depend on the facts of a particular case and that it must be borne in mind that 'business rescue should be a speedy process, something that would be hampered if a separate substantive application must be brought'. In *Booysen supra* para 56, the following was said by Sher AJ:

'. . . Where the facts of a particular matter dictate that, prior to commencing with certain legal proceedings, a court would be required to impose certain terms and conditions, it would obviously be sensible and proper to approach the court for the necessary leave and guidance in this regard, before such proceedings are commenced. But, as I have already indicated, there may well be instances where proceedings have to be launched as a matter of urgency. . .'

[30] I believe in the present matter, and because of the particular facts and circumstances, the applicants were justified in bringing the application to institute legal proceedings in the same application as the urgent application. The facts of the present matter clearly differ substantially from the facts in the matters that came before Ploos van Amstel J. The applicants' counsel informed me that this issue has recently been argued in the Supreme Court of Appeal, but at the time of writing these reasons, no such judgment has yet been handed down.

[31] The third question is significantly more problematic for the applicants. In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* 2013 JDR 1019 (GSJ) para 67, Kgomo J said the following:

'A court being asked for leave to proceed against a company under business rescue, thus during a moratorium, must receive a well-motivated application for that so that it could apply its mind to the facts and the law if necessary and then be in a position to make a ruling in accordance with any terms it may consider suitable in the peculiar circumstances.'

No indication was given as to what would constitute 'a well-motivated application'.

[32] Counsel for the respondents referred me to *Arendse and others v Van der Merwe and another NNO* 2016 (6) SA 490 (GJ) para 28 where Boruchowitz J said the following:

'What needs to be fully set out in any application for leave are the reasons why legal proceedings against the company in business rescue are necessary and appropriate . . . As mentioned above, the court has a wide discretion which must be dictated by the interests of justice. There is no closed list of the factors that may be taken into account in deciding whether or not to grant leave as each case must be determined on its own facts. Without being prescriptive in any way, the following considerations are relevant: *(a)* The effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders; *(b)* the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health; and *(c)* whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in ss 7*(k)* and 128*(b)* of the Act.'

[33] The authors in *Henochsberg supra* referred to *Mabote and others v Van der Merwe NO and another* [2016] ZAGPJHC 185 para 16 where it was required that an applicant seeking to obtain leave must as a minimum requirement, establish a prima facie case against the company in business rescue. The authors also referred to the factors listed in *Arendse supra* to which a court will look when exercising its discretion.

[34] I am of the view that there is merit in the factors listed in *Arendse*, as well as the requirement of a prima facie case as mentioned in *Mabote*, and that these aspects are very relevant to the present matter before me. Before I however undertake the exercise of analysing the facts of the present matter in light of the above factors, I deem it necessary to deal with the issue of the applicants' locus standi.

[35] Section 130 of the Act deals with objections to the company resolution placing a company in business rescue, and reads as follows:

'130. Objections to company resolution.

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

(*a*) setting aside the resolution, on the grounds that—

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 129;

(*b*) setting aside the appointment of the practitioner, on the grounds that the practitioner—

(i) does not satisfy the requirements of section 138;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

. . .

(5) When considering an application in terms of subsection (1) (*a*) to set aside the company's resolution, the court may—

(*a*) set aside the resolution—

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;

. . .

(*c*) if it makes an order under paragraph (*a*) or (*b*) setting aside the company's resolution, may make any further necessary and appropriate order, including—

(i) an order placing the company under liquidation; or

(ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76 (4) and (5). . .'

[36] Section 152(1) of the Act deals with the consideration of the business rescue plan and reads as follows:

'152. Consideration of business rescue plan.

(1) At a meeting convened in terms of section 151, the practitioner must—

(*a*) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

(*b*) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(*c*) provide an opportunity for the employees' representatives to address the meeting;

(*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; and

(*e*) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (*d*) (ii).'

[37] In terms of s 128(1)*(a)* of the Act an '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.'

[38] The applicants are clearly not affected persons. As beneficiaries of the trust they, at most, have a secondary interest to a limited extend in the third respondent.

[39] In response to the respondents' point *in limine* regarding the issue of locus standi, the first applicant responded as follows in his replying affidavit:

'8. The first point in limine is without merit. To Stewart's knowledge the application is not brought by Second Applicant and I as affected persons in terms of the 2008 Companies Act ("the Act"). It is brought by us, (in our capacities as the Applicants who obtained the Order before Mr Justice Mngadi and to whom the Trustees granted the right to match any Offer for the business of Fishwicks Printers), in order to set aside the bad faith Resolution taken by First and Second Respondents in support of the ulterior motives set out in the founding affidavit. Simply put there was never any genuine intention of placing Fishwicks Printers into business rescue in order to achieve the objects of the Act. If Stewart were allowed to carry out his plan, he with the connivance of First, Second, Fifth, Sixth and Seventh Respondents would have succeeded in deliberately circumventing an Order of this Court and a binding undertaking given to Second Applicant and I to match any offer for the business of Fishwicks Printers.'

[40] The applicants' allegation that the resolution was taken to deliberately circumvent the so-called binding undertaking given to them to make an offer for the business of the third respondent is clearly incorrect. From the papers before me it transpires that the fourth respondent has on numerous occasions referred to the first

applicant's interest in purchasing the business at creditors' committee meetings and in correspondence with the first applicant directly:

(a) In the minutes of the fourth creditors' committee held on 23 March 2021, the following was recorded towards the conclusion:

'In closing may I say that Bryan [Nathan – the First Applicant] has expressed an interest in the past in purchasing Fishwicks, so he is perfectly entitled to submit an offer himself if he thinks this business is worthwhile rescuing or worthwhile bidding for, then he's more than welcome to make an offer.'

(b) In an e-mail dated 1 April 2021, the first applicant wrote to the fourth respondent as follows:

'I acknowledge your suggestion that I make an offer for the business of Fishwicks Printers (Pty) Ltd (the Business).

I am in the process of obtaining legal advice as to how I can respond.

In the event that I am advised that I can make an offer, please furnish me with the following information:

1) Would I be entitled to conduct a due diligence?

2) Would you and the creditors be open to the same agreement that I had reached with the current Shareholders of the Business, that I would be entitled to match any offer made for the purchase of the business of Fishwicks Printers?'

(c) On 6 April 2011, the fourth respondent responded in an e-mail to the first applicant and indicated that he would like to obtain the best price for the business as it would be sold for the benefit of not only the creditors but also the shareholders. He further indicated that 'on the assumption that you will be submitting a serious offer you will be permitted the same facilities as the other potential purchasers which will include the right to conduct a due diligence'.

(d) In the minutes of the fifth creditors' committee meeting held on 13 April 2021, which the first applicant was invited to attend, the following was recorded:

'17.1 Bryan: just two things, in principle understanding if there was an offer if I was able to match at that time, the Shareholders none of them agreed to me having a last stand, so if we can get clarity on that point?

17.2 Practitioner: I did write to you about this. If the other potential purchasers were aware that any of their offers can be matched by Bryan Nathan, I think they would be little discombobulated! Of course, you can put in any condition you like into your offer.'

(e) In the verbatim transcript of the sixth creditors' meeting held on 7 May 2021, which is attached to the first applicant's founding affidavit, one of the creditors, Mr Asif Kaka said the following:

'. . . Bryan Nathan can continue fighting the trust till kingdom comes. It's I think well documented that you gave him an opportunity to put in a proposal, he never put in a proposal. Time's up. In my opinion, so I don't know, creditors need to speak now, what do we do?'

(f) In an e-mail dated 20 May 2021, written by the fourth respondent's attorney to the applicants' attorney, the following is stated at para 4:

'Your client is hereby invited to submit an offer himself for the purchase of the business. In this regard we place on record that the financial information requested by your client last Friday, 14 May 2021, was provided to him yesterday i.e. 19 May 2021.'

[41] When asked why the first applicant is not simply putting in an offer to purchase the business, counsel for the applicants indicated that Mngadi J's order prohibits him from doing so. That is not borne out by the papers as the first applicant, without reference at all to any alleged prohibition by Mngadi J's order, engaged with the fourth respondent regarding the possibility of putting in an offer.

[42] On my reading of Mngadi J's order, nothing would prohibit the applicants from purchasing the business of the third respondent through the business rescue process.

[43] Furthermore, to claim locus standi based on this issue is clearly not tenable.

[44] The applicants also rely on the fact that they are the applicants who obtained the order before Mngadi J, and that they intend applying for an order setting aside the so-called 'bad faith resolution' as a further ground establishing locus standi. Such a cause of action does not exist outside the provisions of the Act. The applicants' counsel submitted that they will be asking a court in due course to 'make new law' by permitting persons not fitting the definition of affected persons to also be allowed to challenge a company's resolution to go into business rescue.

[45] The applicants, in their heads of argument, for the first time referred to the decision to place the third respondent in business rescue as being 'dishonest' and 'fraudulent'. The applicants now suddenly want to rely on a court's common law power to unravel a fraud as a basis to try and establish locus standi. In the papers before me, the first applicant not once makes an allegation that the directors of the third respondent fraudulently entered into the business rescue process. When I asked the applicants' counsel to direct me to anywhere in this application as well as the main application papers where an allegation of fraud was made, the best she could do was to refer me to a paragraph in the main application where the first applicant, referring to the undertaking to allow him to match any offer, said the following:

'As stated aforesaid the trustees went to extreme lengths to evade complying with this undertaking (to the extent of misrepresenting to Adele and I that the company was unable to pass the requisite special resolution to sell the business to us). It is submitted that this conduct constitutes mala fide abuse.'

I was referred to two further portions of the first applicant's affidavit which contain absolutely no reference to fraud or fraudulent actions.

[46] Any party wanting to rely on fraud must not only plead it, but also prove it clearly and distinctly. There are also a number of essential allegations that have to be made when relying on a claim based on fraud (see L T C Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 204). The applicants' counsel referred me to *Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and others* 2014 (5) SA 406 (SCA) where it was held that allegations of fraud cannot be resolved in application proceedings. I am however of the view that the applicants should, at the very least, have mentioned somewhere that they considered the resolution to have been taken fraudulently if they wanted to invoke a court's common law power to unravel the fraud, and to come to their rescue. The submissions regarding a dishonest and fraudulent resolution was clearly an afterthought after counsel realised where the shoe was pinching, and I place no reliance on these submissions.

[47] I am of the view that the applicants have failed to establish that they have locus standi.

[48] In the event of me being wrong in this regard, I will however still deal with the factors referred to in *Arendse supra*, when considering whether it is appropriate to grant leave in terms of s 133 of the Act. The first applicant did not specifically address s 133 in his affidavit. There is accordingly no separate, substantive, well-motivated application.

[49] The first factor refers to the effect the grant or refusal of leave in terms of s 133 would have on the applicants' rights, as opposed to other affected persons and stakeholders.

[50] I referred above to the fact that a substantial majority of creditors supported the suggestion that the fourth respondent should publish the plan and convene a meeting to consider the plan. The creditors' attitude in this regard runs like a golden threat through the correspondence, minutes of creditors' committee meetings and the transcript of the sixth creditors' committee meeting held on 7 May 2021. One of the creditors, Mr Asif Kaka said the following at para 60 of the transcript:
'For as long as the company remains under business rescue and it's dragged out, we as creditors don't see any money and money that the money could not pay us is being used for, um, for the litigation. I'm not saying it is, but it may be used for litigation and paying salaries and that we sit here without any moneys and we can't really.'

[51] Another creditor, Mr Alan Wells said the following at para 74 of the transcript:
'Ken, from my side. Sorry, go ahead and publish the plan, and I can see this can't be trading out not a dealership in deadlock and staff also thinking about moving on whatever. It's been in this position now for a long, long time now . . . Liquidation I wouldn't want. So yes, publish the Plan and let's take it from it there and see what happens.'

[52] The employees of the third respondent are affected persons and their interests seemed to have been mostly ignored by the applicants. It is common cause that they were not joined to these proceedings as they should have been. The applicants did not even supply a list with all the names of the employees. The

applicants however, in a belated attempt to rectify the shortcoming, served the application papers on a portion of the employees by e-mailing it to them and apparently affixed, from what appears from a photo annexed to a service affidavit, a copy of the notice of motion to a notice board.

[53] The third respondent has around 135 employees. The first applicant attached minutes of an employees' committee meeting held on 7 May 2021 with the fourth respondent. It was recorded that the fourth respondent asked the members of the committee if they would support him in selling the company, assuming the offers were accepted. The minutes read as follows at para 21:

'The unanimous answer was yes, it would be the best way forward. Notices were already sent out. It would be in the newspapers. RD stated that once the plan has been published, then we can take it from there.'

The applicants however claim that the majority of members of the employees' committee "voted" for a plan not to be published and supported a suggestion that fourth respondent should wait for the outcome of the main application. The employees were however not asked to vote and according to fourth respondent they previously indicated by overwhelming majority that the plan should be published.

[54] Apart from the creditors who favoured the publication of the plan as well as the employees, sight must not be lost of the pre-commencement creditors who are owed the R16 million being used as 'ring-fenced' capital during the business rescue process.

[55] The path of litigation being envisaged by the applicants involves not only the main application but also action proceedings to determine the motive behind the resolution to place the third respondent in business rescue. Such an action could take between three and five years to come before a court. All the while the third respondent is supposed to remain in business rescue, which was intended by the legislature to be a speedy process. Just the financial implications of remaining in business rescue for such a long period would be severely prejudicial to the rights and interests of creditors. The applicants' counsel could not provide any explanation as to why the applicants have not yet instituted the contemplated action proceedings. Nothing prohibited them from doing so as soon as they became aware of the

business rescue proceedings and the so-called ‘bad faith resolution’ taken to commence the business rescue proceedings.

[56] Bearing in mind that Nedbank has indicated it may withdraw its overdraft facility of R7 million if the business is not sold by 9 August 2021, it is clear that the impact of the anticipated proceedings will be severe and will have dire consequences for the well-being of the third respondent, and its ability to regain its financial health, as referred to in *Arendse*.

[57] As far as the last factor mentioned in *Arendse* is concerned, namely whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in ss 7*(k)* and 128*(b)* of the Act, the answer must be a resounding no.

[58] Counsel for the respondents submitted that the applicants want to draw a line through the Act and proceed on a basis not dictated by the legislature, thereby creating their own process, which should not be permitted.

[59] In my view it is clear from the above that the applicants have not established a prima facie case. Bearing in mind the factors listed in *Arendse* and the particular facts of this matter, and after having applied my mind to the facts and the law and in exercising my discretion in this regard, I was of the view that the applicants had failed to make out a case for the relief sought. It is for these reasons that I had dismissed the application with costs, such costs to include the costs of two counsel, where so employed.

[60] Even if I am wrong in refusing leave in terms of s 133 of the Act, I am in any event of the view that the applicants have failed to make out a case for the interdictory relief sought in Part B of the notice of motion.

[61] The facts set out above clearly show that the applicants have not established a prima facie right to the relief sought, nor have they showed that they will suffer irreparable harm. The fact that the meeting might render the main application moot

becomes insignificant if consideration is given to the interests of all the other affected parties involved.

[62] This brings me to the balance of convenience, which clearly weighs against the applicants, especially bearing in mind the interests of the creditors and employees of the third respondent, in a process where they are recognised as affected persons.

[63] The applicants have also failed to convince me that they have no alternative remedy. They clearly have a claim for damages against the trustees of the trust. Bearing in mind the facts set out above, the applicants have in my view in any event failed to make out a case for the interdictory relief.

BEZUIDENHOUT AJ

Appearances:

Date of hearing:	15 June 2021
Date of reasons:	30 June 2021
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