IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19253/2019

In the matter between:

HYDRUS INVESTMENTS (PTY) LTD First
Applicant
(Registration No: 2019/206805/07

MAX PAAR (PTY) LTD Second
Applicant
(Registration No: 2019/214117/070)

and

K2011138459 (SA) (PTY) LTD (in business rescue) First
Respondent
(Registration No: 2011/138459/07)
(Registered Address: 276 Main Road, Monta Rosa Building, Paarl, Western Cape)

DE LA ROCHE INVESTMENTS (PTY) LTD Second
Respondent
(Registration No: 2017/366390/07)

NKL INVESTMENTS (PTY) LTD Third
Respondent
(Registration No: 2005/011159/07)

GEORGE DA SILVA RAMALHO N.O. Fourth
Respondent
(In his capacity as the duly appointed business rescue practitioner of the first respondent)

LECCE TRADE (PTY) LTD Fifth
Respondent
(Registration No: 2012/150464/07)

MAX CALEDON (PTY) LTD Sixth
Respondent

(Registration No: 2019/214117/07)

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Seventh Respondent

MARIE ROSALINE ANTOINETTE STEENKAMP Eighth Respondent

Coram: Justice J I Cloete

Heard: 13 August 2020 and 22 October 2020

Delivered electronically: 10 December 2020

JUDGMENT

CLOETE J:

Introduction

[1] The applicants ("Hydrus" and "Max Paar") seek orders that the resolution taken by the board of directors of the first respondent ("K2011") on 9 September 2019 to commence voluntary business rescue be declared a nullity, alternatively set aside, and placing K2011 in final, alternatively provisional, liquidation.

[2] In turn, the second, fifth and eighth respondents ("De La Roche", "Lecce" and "Mrs Steenkamp") seek orders, in the event of Hydrus and Max Paar succeeding on the relief pertaining to the resolution, that K2011 be placed again in business rescue and that the fourth respondent ("Ramalho") again be appointed as interim business rescue practitioner.

[3] In addition K2011 and Ramalho seek an order extending the statutory period in which Ramalho was to file his business rescue plan. There are also various interlocutory skirmishes which impact on the determination of the main issues. It is however convenient to first sketch the historical context and relevant background facts.

Historical context

[4] At the heart of the dispute lies the stalled development of the proposed De La Roche Lifestyle Village situated on erf 34880 Paarl in extent 9,6345 hectares ("the Paarl property"). Initially the Paarl property was owned by Marcelle Props 425 CC ("Marcelle Props") of which Mr Jeremy Steenkamp, the husband of Mrs Steenkamp, was at all material times the sole member.

[5] At some stage the Paarl property was sold to Altivex 730 (Pty) Ltd ("Altivex") for R19.5 million. The sole director of Altivex at the time was Mr Anton Visser, who was also the development's quantity surveyor. In order to fund this purchase Altivex obtained a loan for the full amount from Mainfin (Pty) Ltd, which registered a mortgage bond over the Paarl property as security for Altivex's indebtedness to it.

[6] On 20 September 2017 Mainfin launched an application for Altivex's liquidation on the basis that it had failed to comply with a statutory demand in terms of s 345(1)(a)(i) of the Companies Act 61 of 1973 and was commercially insolvent. Altivex opposed the application on various grounds, including that it was an abuse of process, that Mainfin was not its creditor, that

Mainfin held security for its claim, and generally disputing the debt. A final liquidation order was ultimately granted (it appears during 2018 when regard is had to the Master's reference number of C446/18).

[7] The first and final liquidation, distribution and contribution account signed off by Altivex's liquidators on 16 August 2019 recognised Mainfin's security, and it received almost the full amount due to it. The account also reflects inter alia that both Marcelle Props and Mrs Steenkamp were concurrent creditors for monies lent and advanced of R12.25 million and R1.855 million respectively, for which they received no payment but had to contribute, between them, a total of R2 274.06. Overall, Altivex had a significant shortfall of R46.7 million once most of Mainfin's claim was paid, and a contribution was payable by every creditor who had proven a claim.

[8] The Merlot Trust, Marcelle Props, De La Roche Ontwikkeling (Pty) Ltd and Mr and Mrs Steenkamp ("the Steenkamp group") were all related and were the key stakeholders in the development, not only when it was owned by Marcelle Props but also when it was owned by Altivex. They were involved as directors, shareholders and creditors and the cumulative loss allegedly suffered by the Steenkamp group upon Altivex's liquidation was R33.3 million (excluding contributions).

[9] Mrs Steenkamp asserts that the major contributing factor to Altivex's liquidation was the length of time it took for the Paarl property to be

subdivided from the main erf 8724. This subdivision took 8 years to complete and was only registered on 22 December 2016.

[10] During March 2019 (i.e. before Altivex's final account was lodged with the Master) Mr Mahomed Gaffoor was approached by Mr Neville Lentoor, the sole director and shareholder of the third respondent ("NKL") to consider investing in two property developments, the one in Paarl (Altivex) and the other in Caledon (Lecce, of which Mrs Steenkamp is the sole director and shareholder).

[11] It was explained that the Paarl property was intended to be a residential and commercial development, consisting of at least 182 houses and a middle portion of 142 assisted living units. The Caledon property was intended for the initial construction of a warehouse and a pre-agreement of lease had already been concluded for a fixed period of 10 years with Afgri Operations (Pty) Ltd ("Afgri"). Construction of the warehouse was to be done in accordance with Afgri's specifications. Future intended developments on the Caledon property included 250 housing units, a bank and a clinic.

[12] Negotiations followed between Mr Abdelmagid Gouraam, who manages Gaffoor's business interests, Lentoor and Mr Steenkamp. In a series of meetings in April 2019, Lentoor and Steenkamp requested Gaffoor to provide the financial backing for these projects. Gaffoor agreed, subject to the following arrangement.

[13] Max Paar and Max Caledon would be created as special purpose vehicles (SPV's) to hold Gaffoor's interests in the Paarl and Caledon developments respectively. Hydrus would be created as the SPV through which loan(s) from Gaffoor would be advanced to K2011, which in turn was in the process of purchasing the Paarl property from the liquidators of Altivex. Mrs Steenkamp was the sole director and shareholder of K2011 at the time. Other than its future liability in respect of the purchase price of the Paarl property, it was represented to Gouraam that K2011 was a "clean company" meaning that it was debt free.

[14] It was agreed that Gaffoor, via Hydrus, would advance R60 million to K2011, secured by way of a mortgage bond to be registered in favour of Hydrus over the Paarl property. The sum aforesaid would be used to purchase the Paarl property from the liquidators, purchase the Caledon property for R6.3 million, pay for construction of the warehouse on the Caledon property in the amount of R15 million and to pay for the construction of a show house and completion of the civil works on the Paarl property, which were necessary to kickstart the Paarl development.

[15] The repayment terms of the loan were as follows. Upon sale of each housing unit on the Paarl property, R450 000 would be paid to Hydrus until the entire capital sum was repaid in full. 100% ownership of the warehouse would be transferred to Max Caledon upon completion of its construction. As a return on its investment, Max Paar was to acquire a 37.5% shareholding in both K2011 and Lecce, which owned the Caledon property. Hydrus's attorney was

duly instructed to prepare agreements to give effect to the above arrangement.

Events leading to the current dispute

[16] Mr Werner Moolman ("Moolman") is the attorney who has intimate knowledge of the affairs of the Steenkamp group and also represents De La Roche, Lecce and Mrs Steenkamp in these proceedings.

[17] On 29 April 2019 he informed Ms Holmes (the attorney instructed by Hydrus to prepare the agreements) that the shares in K2011 would be allocated as follows: 37.5% to a company nominated by Gaffoor, 25% to a company nominated by Lentoor and 37.5% to *'a company for the benefit of the investors of Jeremy Steenkamp (which will be represented by me for the time being)'*.

[18] On 2 May 2019 the liquidators of Altivex concluded a sale agreement with K2011 in respect of the Paarl property for a purchase price of R21 million. In the sale agreement the Paarl property is described as a vacant erf. Payment of the purchase price was to be made by way of a deposit of R2.1 million within 3 days of signature and a guarantee for the balance of R18.9 million within 14 days of signature. The agreement also provides at clause 4.5 that the purchaser's *'Funding Shareholder shall be entitled to register a mortgage bond for at least R21 million'* simultaneously with registration of transfer.

[19] On the same date, the share sale agreement in respect of K2011 was concluded between Mrs Steenkamp (as sole shareholder), Max Paar (represented by Gaffoor), De La Roche (represented by Moolman as its sole director) and NKL (represented by Lentoor) in accordance with the agreed allocated percentage shareholdings.

[20] Although the signed copy of this agreement which is annexed to the founding papers bears only the signatures of Mrs Steenkamp and Moolman, in her answering affidavit Mrs Steenkamp admitted its conclusion and Moolman deposed to a confirmatory affidavit, thus by necessary implication also admitting this.

[21] In terms of clause 2.1 of this agreement the effective date of the share sale (for a cumulative purchase price of R100) was the date of registration of transfer of the Paarl property from Altivex to K2011. Clause 2.3.1 provided that Mrs Steenkamp was to deliver the share certificates to the purchasers on the effective date, accompanied by duly executed transfer forms with the purchasers reflected as transferees.

[22] On 7 June 2019 a written loan agreement was concluded between Hydrus, K2011, Lecce, NKL and De La Roche (the entities represented as before) with Hydrus as lender and K2011 as borrower of R60 million (“the capital sum”). Clause 2.1 records that K2011’s shareholders were Max Paar (37.5%), De La Roche (37.5%) and NKL (25%).

[23] Clause 3 contains the suspensive conditions to be fulfilled within 120 days or such later date as might be agreed in writing. For present purposes what is relevant is clause 3.1.1, which stipulates that the loan agreement would be of no force and effect until K2011's shareholders concluded a shareholder's agreement on terms acceptable to Hydrus. Also relevant is the common cause fact that most of the suspensive conditions were not met timeously or at all. Hydrus and Max Paar maintain that clause 3.1.1 was duly fulfilled. Mrs Steenkamp (in her various representative capacities) asserts it was not. I will return to her reasons for this assertion later.

[24] In terms of clause 4.3 of the loan agreement K2011 authorised Hydrus to pay the capital sum: (a) in such amounts and at such times as may be necessary for K2011 to perform its obligations in terms of clause 5; and (b) to such third parties to whom K2011 had financial obligations including, without limitation, Altivex or its conveyancing attorneys as Hydrus *'may in its discretion decide (but ensuring that such payments are in line with the purpose of the loan described in* [clause] *5 below), and payment to such third parties shall be deemed to be due discharge…'* of Hydrus's obligations.

[25] Clause 5 in turn provides that K2011 was obliged to use the capital sum to: (a) settle the purchase price and transfer costs for the Paarl property; (b) settle the purchase price and transfer costs for the warehouse property for Max Caledon in lieu of interest on the capital sum; (c) construct the show house and boundary wall on the Paarl property as well as at least 57 residential units thereon within 18 months from date of last signature, i.e. by

December 2020; (d) settle the purchase price and transfer costs of a separate, but seemingly related, erf 34891; and (e) construct the warehouse on the Caledon property by the date set in the Afgri lease, which K2011 undertook to construct on behalf of Max Caledon, also in lieu of interest on the capital sum.

[26] Clause 6 deals with repayment terms and, in addition to what was initially agreed, provides that the capital sum would be repaid in full within 3 years from date of last signature. In the same clause Moolman's firm was appointed as the transferring attorneys for the sale of the residential units on the Paarl property, and it was further recorded that the same firm was attending to the transfers for the Caledon development units. In clause 8 Lecce bound itself as surety and co-principal debtor to a maximum of R37 million.

[27] Clause 9 recorded the arrangement pertaining to the mortgage bond to be registered in favour of Hydrus over the Paarl property and Lecce's consent to a mortgage bond being registered in favour of Hydrus in a maximum sum of R37 million over the Caledon property.

[28] Between 30 April 2019 and 1 August 2019 Hydrus advanced to K2011, including making payments to various entities on its behalf, the total sum of R33 858 573.80. This included the purchase price and transfer costs for the Paarl property and R6.3 million into the trust account of Moolman's firm for the purchase price of the Caledon property.

[29] On 11 June 2019 NKL commenced construction of the warehouse on the Caledon property, it would seem on K2011's behalf, and a sale agreement was concluded between Lecce and Max Caledon in respect of that property on 20 June 2019.

[30] During July 2019 the shareholders agreement for K2011 was finalised between Holmes and Moolman. Clause 5 records that all the issued shares in K2011 *'are currently held as follows'* in accordance with the previously agreed percentage split contained in Moolman's email of 29 April 2019 and the share sale agreement. Clause 7 stipulates that: (a) the board will comprise of no less than two and no more than five directors; (b) Max Paar was entitled to appoint two of the directors; (c) De La Roche could nominate two and NKL one; and the shareholders were compelled to accept such nominated directors. In an email despatched on the morning of 23 July 2019 Holmes requested Moolman to provide the share registers reflecting such shareholdings as well as CIPC confirmation that *'the directors have been appointed'.*

[31] Later on the same day Mrs Steenkamp addressed an email to Nicole Martin of Louw and Schwab Accountants (who attend to the accounting affairs of the Steenkamp group) annexing the final, but yet unsigned, shareholders agreement, and instructing her to issue share certificates in accordance with the agreed percentage shareholdings. (A similar instruction was given in the same email for the agreed shareholding split in Lecce of 51% (Lecce), 37.5% (Max Paar) and 11.5% (NKL). The email ended with the request to have the

share certificates ready for signature before 09h00 the following morning. The share certificates for K2011 were duly prepared by Martin and signed by Mrs Steenkamp as sole director on 24 July 2019.

[32] The shareholders agreement was signed by Lentoor on behalf of NKL, and Moolman on behalf of De La Roche, on 29 July 2019. Gaffoor signed it on behalf of Max Paar and Hydrus in Los Angeles on 1 August 2019.

[33] On 31 July 2019, i.e. the day before Gaffoor appended his signature, the Paarl property was transferred to K2011 and a mortgage bond registered in favour of Hydrus for R60 million, together with R6 million as additional security. In the bond K2011 acknowledged itself to be truly and lawfully indebted to Hydrus for all monies advanced or to be advanced. Clause 1.1 stipulates that the bond would constitute continuing covering security for all current and future amounts owing to Hydrus *'from whatever cause arising'.*

[34] On 19 August 2019 Gouraam met with Moolman, Lentoor, Mr and Mrs Steenkamp and Mr Goolam Ally Gaffoor. According to Gouraam the purpose of this meeting, amongst other things, was to address the non-disclosure of Moolman's interest in De La Roche until 29 July 2019, logistics regarding bank accounts, and the appointment of directors in K2011 and Lecce. This is admitted by Mrs Steenkamp and Moolman, save for Gouraam's allegation concerning Moolman's alleged non-disclosure of his involvement in De La Roche. Importantly therefore both admit that one of the reasons for the meeting was the appointment of directors in K2011.

[35] It is also common cause that at the meeting the documents for the transfer of the Caledon property from Lecce to Max Caledon were signed. However Gouraam maintains that Moolman advised him, for the first time, of an addendum to the sale agreement for the Caledon property, which contemplated Max Caledon being bound by an agreement between Lecce and Tsogo Sun Caledon (Pty) Ltd pertaining to the latter's entitlement to refuse consent to the sale and the waiver of certain restrictions. This is denied by both Mrs Steenkamp and Moolman, who maintain that Mrs Steenkamp previously informed Lentoor of this during June 2019 at a meeting at which he purportedly also represented Gouraam and Mohamed Gaffoor.

[36] There is no affidavit by Lentoor confirming this. The applicants deny that he had any authority to represent them. Gouraam and Gaffoor maintain they were unaware of the details allegedly discussed at that June 2019 meeting. Moreover Tsogo Sun itself was unaware of the transaction between Lecce and Max Caledon, as confirmed in an email dated 2 October 2019 from Mr Dave Seaton to Gouraam, in which he also advised that Tsogo Sun had never previously had sight of the consent or addendum presented to Gouraam by Moolman.

[37] What is not in dispute is that on 19 August 2019 (the same day of that meeting) Mrs Steenkamp, in her capacity as sole director of K2011 as well as Lecce, resolved to appoint additional directors to the boards of both these companies. The K2011 resolution records that Mrs Steenkamp *'has appointed the below individuals as directors of…'* K2011, namely Mohamed Gaffoor,

Gouraam Gaffoor and Lentoor. Each of them countersigned the resolution (Gouraam did so on Mohamed Gaffoor's behalf) and it was witnessed by Mr Carlof Schwab of Louw and Schwab Accountants.

[38] On 20 August 2019 the relationship between various parties involved proceeded to disintegrate. According to Gouraam, this was as a result of the many restrictive conditions imposed by Tsogo Sun on the Caledon property which were never previously disclosed to him. Following a meeting that day, Gouraam discovered what he considered to be further material misrepresentations. As a result, he insisted on greater security prior to Hydrus loaning any further money to K2011.

[39] According to Mrs Steenkamp (supported by Moolman) no misrepresentations had been made, and the purported need for greater security was *'nothing more than a stratagem to escape liability for payment of the balance of the capital sum required for the development of the Paarl and Caledon properties.'* However, Mrs Steenkamp took no steps to compel payment of such balance, in her representative capacities or otherwise, and nor did Moolman. On 28 August 2019 Moolman informed the various role players involved in the development of the warehouse and Caledon properties that the sale agreement between Lecce and Max Caledon had lapsed.

[40] On 2 September 2019, unbeknown to Gouraam or the Gaffoors, Mrs Steenkamp appointed Moolman as a director of K2011. The CIPC

records were updated accordingly on 6 September 2019, without also reflecting the appointment of the Gaffoors and Lentoor as directors as well.

[41] Gouraam maintains that this was an underhand attempt to negate the appointment of the additional directors, and the previous issue of the share certificates, in K2011. Mrs Steenkamp's response is essentially twofold. First, that Gouraam's *'new list of requirements'* was unduly onerous and did not accord with the terms initially negotiated between the parties; accordingly, neither she nor Moolman were prepared to accept them. Second, despite admitting the conclusion of the K2011 share sale agreement, and the signature of the share certificates pursuant to finalisation of the shareholders agreement (subject to signature), Mrs Steenkamp maintained that the transfer of her shares in K2011 was always conditional upon the various agreements (but particularly the K2011 shareholders agreement) being "successfully" concluded. According to her, this was never done; and the share certificates were only *'prepared in anticipation'* thereof. She claimed that therefore the shares were never issued and K2011's share register never updated.

[42] On 9 September 2019, and without the knowledge of Gouraam and the Gaffoors, Mrs Steenkamp and Moolman passed a resolution in their capacity as the "board of directors" of K2011 to place it in voluntary business rescue, and to appoint Ramalho as business rescue practitioner. The resolution records:

> *'The Board has reasonable grounds to believe that:*

(a) The company is financially distressed because it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; and

(b) There appears to be a reasonable prospect of rescuing the company.'

[43] In her affidavit in support thereof, Mrs Steenkamp alleged that K2011 would be able to sell the first phase of the stands on the Paarl property once services, a show house, the boundary wall and entrance gate were completed; the funder had amended its terms for providing the loan; the shareholders and related companies (who were required by the funder to provide further security) were not willing to relent to these new demands; the funder was unwilling to provide further funds; K2011 had insufficient funds available to complete the services necessary to start selling the stands in the first phase; K2011 would only be in a position to repay the funder and other creditors if it was afforded the opportunity to proceed with the completion of the first phase; it would be able to raise the funds for this purpose if given the opportunity without pressure from creditors and legal action against it, or threats of liquidation; and K2011 had a reasonable prospect of rescuing itself since *'when the first phase has been sold out the company should have enough money to repay its debt and thereafter business rescue would no longer be necessary, and the company will be able to sell phases 2 and 3 for profit'.* She also alleged she was confident that, given the opportunity and the "proposal" of a structured business plan, the business rescue practitioner would be able to trade K2011 out of financial difficulty and finalise the project.

[44] K2011 was placed in voluntary business rescue on 10 September 2019. Gouraam, the Gaffoors and, it seems, Lentoor were not informed. On 11 September 2019 a further meeting was held between Moolman, Lentoor and Gouraam regarding revised loan and shareholders agreements, without success. On the same day, Mrs Steenkamp wrote to Nicole Martin, contending that the share certificates for K2011 were only meant to be issued once the shareholders agreement had been signed. According to her, the request to Martin had been to issue *'shares'* upon receipt by her of a signed shareholders agreement. She also vaguely alleged that *'at some stage, we required documentation because it was necessary for the bank… it ought never to have been physically issued… it must urgently be changed back to me alone, please. And I hope that it cannot be found in the register, because then it would place me in a difficult situation…'* [this is a translation of the Afrikaans text].

[45] The applicants contend that Mrs Steenkamp's email flies in the face of the loan agreement, the K2011 and Lecce share sale agreements, and the fact that the share certificates were issued. To my mind, her assertions also fly in the face of the contents of her own email to Martin of 23 July 2019 instructing Martin to issue the share certificates. Literally translated from Afrikaans to English, the relevant portion of her email reads as follows: *'Please see attached shares agreement. (I am attaching it for the identities of those to which the share certificates must be issued please).'* On 13 September 2019 Ramalho was appointed as business rescue practitioner.

Events subsequent to Ramalho's appointment

[46] Given Ramalho's appointment as business rescue practitioner on 10 September 2019 he was statutorily bound, in terms of s 150(5) of the Companies Act 71 of 2008 ("the Act") to publish K2011's business rescue plan ("the plan") within 25 days of his appointment, i.e. by 16 October 2019, unless authorised by a court to do so on a later date, alternatively by the holders of the majority of the creditors' voting interests – there is no suggestion that the latter occurred at any stage.

[47] It is common cause that Ramalho did not publish the plan by 16 October 2019 and nor did he apply to court for an extension prior to expiry of the statutory period. The applicants launched the present application on 31 October 2019. The counter-application for the extension of the period until 31 January 2020 was launched on 19 November 2019 but was never heard. No further applications have been brought, nor has Ramalho sought to amend his counter-application to seek any further extension.

[48] Section 132(3) of the Act stipulates that if a company's business rescue proceedings have not ended within 3 months of commencement or such longer period as the court, on application by the practitioner, may allow, the practitioner must: (a) prepare a report on the progress of the business rescue proceedings and update it at the end of each subsequent month until the proceedings end; and (b) deliver the report and each update to every affected person and the court. Ramalho has done none of this. He has also only held one creditors' meeting, on 30 September 2019.

[49] In his answering affidavit deposed to on 14 November 2019 Ramalho asserted it appeared reasonably unlikely that K2011 would be able to settle its debts as they became due and payable within the immediately ensuing 6 month period, alternatively that it was reasonably likely that K2011 would become insolvent within that period unless rescued. That 6 month period came to an end on 13 May 2020.

[50] He opposed the winding-up of K2011 on the ground that this would result in the closure of K2011's "business" and the sale of its assets well below their true value. Having taken various technical points such as lack of urgency and a purported material dispute of fact, neither of which were rightly pursued in argument, he also made common cause with Mrs Steenkamp and Moolman in relation to the impugned resolution (surprisingly, given his duty to be independent).

[51] He alleged having ascertained from his "investigations" into K2011 that: (a) it only employed two fixed contract employees although very little work had commenced and this number might increase; (b) he was not yet in a position to draw a plan, but had prepared a cash flow projection for the construction and sale of the first phase of the Paarl development comprising of 56 units.

[52] This cash flow projection was based entirely on available funds to get the development going of approximately R6 million held in K2011's bank account, which Ramalho claimed was readily available to commence the first phase of the development. However this R6 million, as pointed out by the applicants,

was the sum paid into Moolman's firm's trust account for the specific purpose of purchasing the Caledon property, the sale of which had lapsed. It was never earmarked for the Paarl property. Ramalho has no personal knowledge to dispute this. Mrs Steenkamp initially resorted to a bald denial.

[53] Ramalho also alleged *'I understand that the municipal plans have been substantially approved, but further costs will be incurred in obtaining final municipal approval. I do not know what the costs are, but I doubt whether it will be substantial'.* He did not disclose the source of this information, but it is evident from Mrs Steenkamp's answering affidavit that it was her who supplied it. As pointed out by the applicants, there is no such thing as "substantial municipal approval" and no indication was given as to when such approval might be granted either by Ramalho or Mrs Steenkamp.

[54] Self-evidently construction of the first phase cannot commence until municipal approval is obtained. This includes the show house. Ramalho also did not explain how a show house is to be constructed before bulk services have been installed, and his "cash flow" projection contemplates that only once each stand is sold individually, a portion of the sale proceeds is to be used to install those services, seemingly stand by stand. He gave no indication that the local authority had consented to this. Ramalho also relied on impermissible hearsay to bolster his projection, such as what unidentified builders and estate agents had allegedly told him.

[55] Perhaps more concerning were Ramalho's allegations relating to the mortgage bond registered in favour of Hydrus over the Paarl property. One has an eerie sense of *déjà vu* when regard is had to the stance adopted by Altivex in opposition to Mainfin's application for liquidation.

[56] Ramalho claimed to suspect that the current application was brought in bad faith, and the applicants' real motive is to try to realise its security by being awarded K2011's sole asset (the Paarl property) on liquidation and then *'no doubt, take over the development and make the expected monumental fortunes for their own benefit'.*

[57] The irony is that at the same time Ramalho contended that because the loan agreement was not "signed", there was no *causa* for that mortgage bond. He persisted in this stance, notwithstanding that it was indeed signed by the parties on 7 June 2019, although it subsequently lapsed in October 2019 after the bond was registered. In making this allegation, Ramalho relied, without investigation, on Mrs Steenkamp's assertion that no single agreement would be able to survive without all of the other agreements being concluded.

[58] Of course, none of this had deterred Mrs Steenkamp at the time when monies were being advanced by Hydrus in good faith, nor did she at any stage take issue with the registration of that mortgage bond two days after she, Moolman and Lentoor had signed the shareholders agreement and one day before Gaffoor signed it in Los Angeles. Moreover, only she could have signed the power of attorney on behalf of K2011 to register that bond. This is because

the mortgage bond itself records that the conveyancer concerned was authorised to register it by power of attorney signed on 3 July 2019. At that stage Mrs Steenkamp, on any version, was still the sole director of K2011.

[59] The extent to which Ramalho sought to protect Mrs Steenkamp's and Moolman's interests rather than those of K2011 (as was his duty) is further demonstrated by his allegation that *'the mortgage bond is registered as security for the loan by Hydrus of R60 million in terms of the agreement of loan (although Mrs Steenkamp and Mr Moolman informed me that this version of the loan agreement has never been given to me)'.* It is therefore clear that Ramalho was largely content to rely on the say-so of Mrs Steenkamp and Moolman alone.

[60] Also disturbing is that in her answering affidavit Mrs Steenkamp admitted that on 19 August 2019, as one of the documents required for the transfer of the Caledon property, Goolam Gaffoor (duly authorised by resolution of Max Caledon's directors) executed a written instruction to Moolman's firm to invest trust monies for that specific conveyancing transaction. This ties in with proof of payment of R6.3 million into the aforementioned trust account earlier on 12 July 2019, with the "purpose of payment" reference being "Caledon Purchase".

[61] This was also conceded by Moolman, given his confirmatory affidavit. Ramalho nonetheless maintained that *'I intend to publish a plan in*

accordance with my cash flow projection once I have fully consulted with all relevant parties and once claims have been submitted'.

[62] Given his express attitude towards Hydrus's claim, and in particular its security (about which, for present purposes, it is not necessary to make any finding), on Ramalho's own version the likelihood of such a plan being finalised within the foreseeable future is remote. In addition the applicants have made clear that they will not sit back and allow Ramalho to use that money to try to kickstart the Paarl development. The resolution of these disputes could take years.

[63] In her replying affidavit in the counter-application deposed to on 19 February 2020, Mrs Steenkamp simply ignored her earlier admission about the written instruction. She blithely denied it was ever agreed that "utilisation" of amounts advanced to K2011 would fall within Hydrus's sole discretion. Therefore, so she contended, even if the R6.3 million was initially earmarked for payment of the purchase price of the Caledon property, this did not mean that it could never be applied towards K2011's *'other obligations in respect of the development'.*

[64] She also appears to have forgotten that in her affidavit filed in support of voluntary business rescue she alleged that K2011 had insufficient funds available to complete the services necessary to commence with sales of the stands in the first phase of the Paarl development. This was at a time when the R6.3 million was already in Moolman's firm's trust account and after

Moolman had informed the relevant role players (on 28 August 2019) that the Caledon sale agreement had lapsed.

[65] On 6 March 2020, and without leave of the court, Ramalho purported to file a business rescue report. Mrs Steenkamp's replying affidavit and the filing of this "report" gave rise to a flurry of opposed striking out applications.

[66] Having considered the parties' respective arguments in respect of these applications, it is my view that, cut to their bare bones, there are only two issues materially relevant to the determination of the main dispute. These are: (a) the new case raised by Mrs Steenkamp in her replying affidavit insofar as the impugned resolution is concerned; and (b) whether or not I should exercise my discretion in terms of s 130(5) of the Act and admit Ramalho's report. It is convenient to deal with the last issue first.

Admission of business rescue practitioner's report

[67] Section 130(5) of the Act reads in relevant part as follows:

> *'(5) When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may---*
>
> *(a)…*
>
> *(b) afford the practitioner sufficient time to form an opinion whether or not---*
>
> *(i) the company appears to be financially distressed; or*
>
> *(ii) there is a reasonable prospect of rescuing the company,*

and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company;…'

[68] The relief sought by the applicants to terminate business rescue is founded on s 130(5) of the Act, and accordingly I am vested with the discretion referred to in s 130(5)(b). It bears mention that although the matter was first argued before me on 13 August 2020, Ramalho took no steps between 6 March 2020 and 13 August 2020 to update his report or ask for leave to file it. At the end of argument on 13 August 2020 (when the matter had to be postponed for further argument to 22 October 2020, predominantly due to the unavailability of counsel) I ruled that no further affidavits or reports could be filed. The papers already ran to 1005 pages, and in my view there was a limit as to how much a court should tolerate Ramalho's dereliction of his statutory duties.

[69] Counsel for the applicants argued that I should refuse to accept the report, given Ramalho's flagrant disregard of sections 132(3) and 150(5) of the Act, coupled with the filing of his "report" without leave at a time after he had entered into the arena and after all affidavits had been filed.

[70] Counsel for Ramalho was candid that he would not attempt to excuse his conduct, but urged me to admit the report on the basis that it would assist in determining whether or not, simply put, business rescue should either continue or be reinstated in the event that the resolution is set aside. He

submitted that to exclude it because of Ramalho could well prejudice K2011, which is the focus. This is a persuasive argument and I have reached the conclusion that it should be admitted. However for the reasons that follow, it is my view that Ramalho's report does not assist the respondents, and in particular K2011.

[71] First, in the affidavit to which the report is annexed, Ramalho submitted that no useful purpose would be served by filing a business rescue plan until such time as the "triable issues" in the main application have been determined. He did not explain precisely what he meant by this, but perusal of the two paragraphs preceding this submission, as well as his report, indicate that he was referring to the disputes concerning the validity of the loans and Hydrus's security. However these are not triable issues before me, since none of the parties (Ramalho included) have sought any relief in that regard. To this extent therefore the position that pertained prior to the report is unchanged, and the stalemate continues.

[72] Second, Ramalho persisted in his reliance on the R6 million (or more properly R6.3 million) to get the Paarl development going. I have already set out why I consider this to be a non-starter for purposes of retaining K2011 in business rescue, since his entire cash-flow projection rests on Ramalho utilising that disputed amount. This is singularly unhelpful to me in circumstances where there is no certainty, nor even a probability, that the applicants will capitulate and allow him to apply those funds as he plans to do.

[73] Third, it remains undisputed that K2011 is financially distressed and, apart from that R6.3 million, no other potential sources of funding have even been suggested by him. This is long after the 6 month period referred to in his answering affidavit of 14 November 2019. These considerations militate strongly against a continuation of business rescue. Creative calculations and speculative cash flow projections have no value to the court if they are founded on a hotly disputed entitlement to their substratum.

The new case raised by Mrs Steenkamp in the replying affidavit in relation to the impugned resolution

[74] In her answering affidavit in the main application Mrs Steenkamp alleged that the only reason why she signed the resolution dated 19 August 2019 appointing the Gaffoors and Lentoor as co-directors of K2011 (the "directors resolution") was because Gouraam wanted a document to be presented to the bank confirming that he would be added as a signatory on K2011's bank account. She maintained that since Gouraam was only to be a signatory on the bank account, this is why he signed that resolution and Mohamed Gaffoor did not.

[75] However as pointed out by the applicants, it is not required of a company to appoint additional directors to its board in order to give a third party signing power on its bank account. Moreover, not only is Gouraam not mentioned in the directors resolution, but its express purpose, on its plain wording, was to confirm that Mrs Steenkamp had appointed the Gaffoors and Lentoor as co-directors without any qualification whatsoever.

[76] Gouraam's version that he countersigned the directors resolution on Mohamed Gaffoor's behalf falls squarely within the objective evidence and the inherent probabilities. Gaffoor was based outside South Africa; Gouraam was his authorised representative for this deal; it therefore makes sense that Mrs Steenkamp was content for him to sign it in this capacity.

[77] Mrs Steenkamp also maintained that because it was never *her* intention that the share certificates would be issued before "conclusion" of the shareholders agreement, the directors resolution of 19 August 2019 is of no force and effect.

[78] In her replying affidavit in the counter-application Mrs Steenkamp came up with a new, further defence based on a point of law. Relying on s 66(1) of the Act, she maintained that she could not validly have appointed co-directors in her capacity as sole director since K2011's Memorandum of Incorporation does not permit this.

[79] It was open to Mrs Steenkamp to raise any point of law supported by the factual matrix and there is thus no basis upon which this later defence falls to be struck out. Her argument is therefore that, on either ground, she was perfectly entitled, in her capacity as sole shareholder, to appoint Moolman as co-director on 2 September 2019, and accordingly the impugned resolution was validly taken.

[80] The technical ground relied upon by the applicants in the founding affidavit to set aside the impugned resolution itself was that K2011 failed to comply with the "procedural requirements" contemplated in s 129 of the Act as envisaged in s 130(1)(a)(iii) thereof, including that its board of directors was not properly constituted at the time.

[81] This was misguided, since in *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) it was held that:

> *'[23] The passing of a resolution to commence business rescue cannot readily be described as a procedural requirement. It is merely the substantive means by which the company may take that step. The board is under no obligation at all to take such a resolution, although, if it is financially distressed, it may be obliged to inform shareholders and creditors of the reasons for not doing so (s 129(7)). It cannot then be described as a "requirement", much less a procedural requirement…'*

[82] Accordingly nothing turns on this. Moreover, as pointed out by counsel for the second, fifth and eighth respondents, it plays no role in the counter-application either, because that turns on the sole issue of whether or not there is a reasonable prospect of rescuing K2011. If there is no reasonable prospect then the resolution, valid or not, falls to be set aside.

Whether business rescue should terminate

[83] In *Panamo* at para [32] it was held that over and above establishing one or more of the grounds in s 130(1)(a) of the Act, the Court must be satisfied that in light of all the facts it is just and equitable to set aside the resolution and terminate the business rescue.

[84] It is common cause that K2011 remains in financial distress. I have already dealt in some detail with the reasons why, in my view, there is no reasonable prospect, at least in the foreseeable future, of rescuing the company. The requirements in s 130(a)(i) and (ii) have thus been met. The only relevance of the s 129 point is that the applicants were nonetheless obliged to approach court to have the impugned resolution set aside (*Panamo* at para [29]).

[85] It is also just and equitable for the business rescue to terminate. More than a year has passed, yet no steps have been taken to "trade" K2011 out of financial difficulty. There is no end in sight.

[86] The history of this scheme, and the approach taken by those role players trying to cling to it, cries out for the appointment for an entirely independent liquidator(s). This will largely prevent those role players from what *Panamo* referred to at para [34] as *'exploiting technical issues in order to subvert the business rescue process or to turn it to their own advantage'.*

[87] Moreover a liquidator(s) should be appointed at the earliest opportunity to investigate *inter alia* the various transactions; determine Hydrus's entitlement to payment and whether or not it may rely on its security; and investigate how

trust funds earmarked for a specific development came to be sanctioned by Moolman, the attorney whose firm was entrusted with them, for appropriation to another development. This is not intended as an exhaustive list. Creditors need to be protected and a firm and independent hand applied for this purpose.

[88] There is no dispute that the applicants have the required *locus standi* to seek a winding-up order for K2011. They ask (as first prize) for a final order. I do not believe that such an order is appropriate at this stage for the reason that no notice has been given to any other creditors. According to Ramalho no claims were received from any creditor by the time he filed his report in March 2020; there are, on his version, affected employees; SARS must be given notice (all that Ramalho asserts is that there is apparently no tax liability); and there are at least three other creditors referred to by Ramalho in his report who are not parties to these proceedings.

[89] **The following order is made:**

1. The resolution that the first respondent voluntarily commence business rescue proceedings, adopted by its board of directors in terms of section 129(1) of the Companies Act 71 of 2008 on 9 September 2019 is set aside.

2. The first respondent is hereby placed under provisional liquidation.

3. A rule *nisi* is issued calling upon the first respondent, and any other interested party, to appear and to show cause, if any, to this Honourable Court on THURSDAY 18 FEBRUARY 2021 at 10H00 or as soon thereafter as counsel may be heard:

3.1 why the first respondent should not be placed under final liquidation; and

3.2 why, in the event of opposition, any respondent who opposes this application, should not be not ordered to pay the costs hereof, jointly and severally, with any other respondent who opposes the application alternatively, if this application is not opposed by any of the respondents, why the costs of this application should not be costs in the liquidation of the first respondent.

4. Service of this order shall be effected:

4.1 by the Sheriff on the first respondent at its registered office and principal place of business;

4.2 by the Sheriff on the South African Revenue Service;

4.3 by the Sheriff on the first respondent's employees (if any) and any trade union(s) which may represent the first respondent's employees;

4.4 by one publication in each of the Cape Times and Die Burger newspapers; and

4.5 by the applicants' attorney to all known creditors of the first respondent with claims in excess of R25 000 by registered mail.

5. The Registrar of this Court, in accordance with section 357(1)(a) to (c) of the Companies Act 61 of 1973, shall transmit a copy of this Order to the Sheriff of the area in which the registered office of the first respondent is situate and to the Sheriff of every province in which it appears that the first respondent conducts business.

6. The Sheriff of the area in which the registered office of the first respondent is situate and the Sheriff of every province in which it appears that the first respondent conducts business shall attach all property which appears to belong to it and transmit to the Master an inventory of all property attached by him or her in terms of section 19 of the Insolvency Act 24 of 1936 read with section 339 of the Companies Act 61 of 1973.

_____

J I CLOETE