IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.:14520/2021

In the matter between:

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

and

FIRSTRAND BANK LTD	First Respondent
CHRISTOPHER VAN ZYL N.O.	Second Respondent
JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O.	Third Respondent
LEOPONT 193 (PTY) LTD	Fourth Respondent
TRUSTEES FOR THE TIME BEING, JAGUAR TRUST	Fifth Respondent

REASONS DELIVERED ELECTRONICALLY ON 22 SEPTEMBER 2021

MANGCU-LOCKWOOD, J

I. INTRODUCTION & BACKGROUND

[1] On 27 August 2021, I granted an order dismissing this application with costs. I hereby provide the reasons for the Order.

[2] On 25 August 2021 the applicant brought an *ex parte* application on an extremely urgent basis (after 5pm), seeking the issue of a *rule nisi*, which was to operate as an interim interdict pending the return day, in the following terms:

> *"Interdicting the respondents from selling/approving the sale of the immovable property belonging to the fourth respondent, commonly known as Waldorf, being Erf 117068, Cape Town, situated in the City of Cape Town… with its physical address situated at 82 St. Georges Street, Cape Town ("the property") pending the transfer of the properties known as Princess Crossing (owned by Bestinver Company SA (Pty) Ltd) and Moffet on Main (owned by Joburg Skyscraper (Pty) Ltd)".*[1]

[3] It is not disputed that the notice of motion and founding affidavit were emailed to the respondents' legal representatives at 17h40 on 25 August 2021. The notice of motion did not indicate when the application was to be heard. The covering email indicated it would be heard *"this evening"* on an *ex parte* basis. No telephonic notice was afforded to the respondents or their legal representatives regarding the extremely urgent *ex parte* proceedings.

[4] On the evening of 25 August 2021, at the intervention of the first respondent's counsel, the matter was postponed to Thursday 26 August 2021 for hearing before me, and, pending that hearing, the respondents were prohibited from selling or authorizing the sale of the property.

[5] The application was defective in several respects, some of which will become apparent below when I deal with a brief history of the matter. The applicant, Ms

[1] In addition, the applicant sought a costs order against any respondents who were to oppose the application.

Yasmina Baba, did not have *locus standi* to launch the proceedings. Contrary to the averments made in the founding affidavit that she was a shareholder of the fourth respondent, the sole shareholder of the fourth respondent is Bestinver Holdings (Pty) Ltd (*"Bestinver"*). But Bestinver was not cited in the founding papers, and there was no indication that Ms Baba was its representative in any capacity. In addition, one of the business rescue practitioners appointed to the fourth respondent, Mr Jakobus Hendrikus Janse Van Rensburg N.O was not cited. Instead, there was an unexplained misjoinder of one Jacques du Toit N.O. Furthermore, the purchaser of the Waldorf property (the subject of these proceedings), namely the Trustees for the time being of the Jaguar Trust (*"the Jaguar Trust"*), was not cited as a party to the proceedings. The application was not served on all the creditors of the fourth respondent, on whose behalf Ms Baba purported to be acting.

[6] The defects were pointed out in the respondents' answering affidavits, which were delivered subsequent to the postponement order of 25 August 2021. By the time the matter was argued before me on 26 August 2021, the applicant had delivered applications firstly for the intervention of Bestinver as second applicant; secondly, the joinder of Jaguar Trust as fifth respondent; thirdly correcting the misjoinder of Jacques Du Toit N.O; and, in his stead, joining the correct business rescue practitioner. The applications to cure the defects remained opposed.

[7] The correct business rescue practitioners and Bestinver are necessary parties which have a direct interest in this litigation. As a result, the interlocutory applications

correcting the misjoinder of Mr Jacques du Toit N.O, joining Mr Janse Van Rensburg N.O, and permitting Bestinver to intervene as the second applicant must be granted. [2]

[8] However, there remain defects which continue to loom large in these proceedings, namely the *locus standi* of Ms Baba to launch these proceedings; the failure to give notice to the creditors; and the failure to comply with section 133(1) of the Companies Act 71 of 2008 (*"the Companies Act"*).

II. LOCUS STANDI

[9] In the founding affidavit Ms Baba stated that she is *"an adult female businessperson and shareholder of the fourth respondent (Leopont). As such, I am an affected person in terms of chapter 6 of the Companies Act 2008 in relation to the fourth respondent."* The respondents denied these averments, pointing out that Ms Baba is neither a creditor, shareholder nor employee of Leopont, and accordingly is not an affected person as contemplated in Chapter 6 of the Companies Act 2008. When the respondents raised these issues in their answering affidavits, Ms Baba explained as follows in a further affidavit in which she applied for the intervention of Bestinver as the second applicant: *"In my haste to depose to this affidavit I did not consider that I was not the registered shareholder of Leopont. As the Bestinver group of companies is a family held property owning group, the formal shareholdings escaped my mind at the time of deposing to the founding affidavit."* The further affidavit continues to state that in fact the registered and sole shareholder in Leopont is Bestinver.

[2] See *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA1 (CC) at 5A-D.

[10] I find the explanation given in Ms Baba's further affidavit for the error in this regard unsatisfactory. The Court remains in the dark about the connection between the averment that the Bestinver group of companies is a family-held, property-owning group and the alleged error made in the founding affidavit. One is left to draw inferences about Ms Baba's connection to the Group, the family and Leopont. All this, in circumstances where Ms Baba is legally represented.

[11] What is particularly disconcerting is that, had the respondents not raised the issue of Ms Babs's *locus standi* in their affidavits of 26 August 2021, the Court would have been none the wiser as to the true state of affairs, and might well have granted the *ex parte* urgent application on the evening of 25 August 2021 on the basis of what Ms Baba stated in her founding affidavit under oath, namely that she is a shareholder of Leopont. A litigant who approaches a court on an *ex parte* basis has a duty to make full and frank disclosure of the material facts, especially those which might influence the Court in reaching a just conclusion.[3] Even on the basis of a negligent omission (or wilful suppression) a Court may, on that ground alone dismiss an *ex parte* application.[4] In this regard, I point out that this is not the only respect in which the founding affidavit turned out to be inaccurate, and this becomes apparent in the discussion on the merits of the application below.

[12] To my mind, the lack of *locus standi* on the part of Ms Baba is linked to the failure to give notice of these proceedings to the creditors of Leopont and Bestinver.

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[3] *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).
[4] *Schlesinger v Schlesinger* at 348E – 350B.

Although the joinder of the creditors is not a requirement,[5] the giving of notice regarding legal proceedings remains a requirement.[6] In this matter, save in the instance of the first respondent, the Court remains unaware of the remaining creditors' views regarding these proceedings. This is quite clearly contrary to the provisions of the Companies Act.

[13] The failure to give notice to the creditors is especially important in the circumstances of this case where Ms Baba purports to act on behalf of the interests of the fourth respondent and the Bestinver Group, both of which are in business rescue. The creditors have, after all, adopted the business rescue plans which are, effectively under attack in these proceedings.

III. NON-COMPLIANCE WITH SECTION 133(1) OF COMPANIES ACT

[14] There is another point *in limine* raised on behalf of the business rescue practitioners, namely the non-compliance with section 133(1) of the Companies Act. The relevant parts of the section provide as follows:

> *"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"*

[5] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA) at paras [17] – [20].
[6] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd at* para [19].

[15] It is not in dispute that the applicants did not seek the written consent of the business practice practitioners, or the leave of this Court before instituting these proceedings. There remains no explanation for the failure to do so.

[16] Section 133(1) is a general moratorium provision that applies in relation to the assets and liabilities of the company at the stage when business rescue comes into effect.[7] It protects the company against legal action in respect of claims in general, save with the written consent of the business rescue practitioner and failing such consent, with the leave of the court. The Supreme Court of Appeal ("SCA") has stated the purpose of s 133(1) as follows:

> *"It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process."*[8]

[17] The provision is pertinently relevant to these proceedings because, as will become apparent in the discussion of the merits below, what Ms Baba seeks affects the business rescue practitioner plans which have been approved by creditors. The launching of these proceedings in the circumstances of this case is the very opposite of providing the crucial breathing space or a period of respite to enable the company to

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[7] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 28.
[8] *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a WesBank* 2015 (3) SA 438 (SCA) para 14. See also *Chetty* fn 10 para 28.

restructure its affairs, as contemplated in *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a WesBank* above.[9]

[18] In my view, the cumulative effect of the defects mentioned above, as well as the manner in which these proceedings were launched, leaves much to be desired, and adds a shade of unfairness towards the respondents. I am furthermore not persuaded that the *ex parte* manner in which these proceedings were launched was necessary or appropriate. On the evidence presented before me, it is was most non-collegial, given that the parties and their legal representatives had, until the launching of the proceedings, been in correspondence.[10]

[19] For all the above reasons, I am of the view that the application should be dismissed with costs. However, even when regard is had to the substantive application, my view is similarly that the application must fail.

IV. THE FACTS

[20] The fourth respondent (*"Leopont"*) is one of four companies which form the Bestinver group of companies (*"the Group"*). The Group owns various immovable properties from which it generates rental income. The other companies in the Group are Joburg Skyscraper, Bestinverprop01 (Pty) Ltd (*"Bestinverprop"*) and Bestinver Company South Africa (Pty) Ltd (*"Bestinver SA"*). Joburg Skyscraper, Bestinverprop

[9] See also *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA).
[10] See in this regard the judgment of Sutherland J in *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ) (17 December 2015) at paras 22 - 26.7

and Leopont are currently in business rescue, while Bestinver SA is now in final liquidation after also being in business rescue.

[21] The common cause background is that various companies in Bestinver, including Leopont, previously signed suretyship agreements in favour of the first respondent for amounts owed by other companies in the Group, and the first respondent has accelerated the debts owed to it. Leopont is indebted to the first respondent for an amount of R318,6 million in terms of the suretyship facilities, from an initial amount of R570 million which was reduced following a sale of immovable property by Bestinverprop for R261 million.

[22] On 19 June 2020, the Group was placed in business rescue in terms of section 131(1) of the Insolvency Act 24 of 1936. On 18 December 2020 the business rescue plans for the three companies in business rescue were adopted by the Group's creditors, though the plans were opposed by Ms Baba for amongst other things, failure to include a transaction known as *"the Stein Transaction"*. The applicant's challenge to the business rescue plans is currently awaiting appeal.

[23] The Stein Transaction entailed the sale of a retail enterprise, including the immovable property known as Princess Crossing to Stein (Pty) Ltd (*"Stein"*) for the sum of R280 000 000, as well the provision of a loan by Stein to Bestinver SA in an amount of R105 000 000. According to the founding affidavit, if the Stein Transaction was successful, it would bring in approximately R385 000 000, which the Group could use to settle the first respondent's claims, and make a significant contribution to

the other concurrent creditors. Leopont owes other creditors an amount of R24 million.

[24] On 13 August 2021 the powers of the Bestinver SA liquidators were extended to permit them to sell Princess Crossing pursuant to the Stein Transaction. Stein's offer to purchase was signed by the liquidators, and the first respondent offered to finance the transaction. As a result, in the founding affidavit the applicants claim that the Stein transaction *"is therefore all but complete"*.

[25] While the Stein Transaction was being negotiated the business rescue practitioners appointed to companies in the Group were considering selling the other properties as follows: Moffett on Main, which is owned by Joburg Skyscraper for a price of R125 million; and the Waldorf, which is owned by Leopont for a price of R100 million.

[26] According to the applicants, Leopont stands to be prejudiced by the arrangements made by the business rescue practitioners because the Waldorf is actually valued at R145 100 000, and therefore its proposed sale would constitute an undervaluation by R45 100 000. Furthermore, Ms Baba points out that Leopont is principally indebted to concurrent creditors for no more than R24 million and does not directly owe the first respondent other than by way of the cross suretyships for the Group. The respondents dispute the averments set out in this paragraph by Ms Baba.

The immediate events leading to this application

[27] According to an email dated 10 August 2021 the first respondent afforded the Group an opportunity to secure the Stein Transaction funding to settle creditors' claims in the Group. In this regard, the first respondent initially imposed a deadline of 13 August 2021 for Stein to provide acceptable guarantee to finance the sale of Princess Crossing, failing which the first respondent would approve the sale of the Waldorf.

[28] This deadline, however, could not be met because Stein's finance application was only to be reviewed by the first respondent's credit committee on 23 August 2021. As a result, on 10 August 2021 the Group's attorneys requested an extension of the deadline from 13 August 2021 to 26 August 2021. In an email dated 12 August 2021 the first respondent's attorneys granted the extension requested by the Group's attorneys, and the Group's attorneys confirmed the terms of that agreement in an email dated 17 August 2021. The terms agreed between the parties have become important for purposes of this application, and were set out as follows:

> *"1. Our client [first respondent] undertakes not to confirm the Waldorf sale on 26 August 2021 subject to the following conditions being met on the deadlines stipulated below:*
>
> *a. Stein providing acceptable guarantees/proof of funding in the amount of R280 million to the liquidator in respect of the purchase of Princess Crossing, which guarantees/proof of funding is to be provided by no later than 17h00 on 25 August 2021.*
>
> *b. Stein making payment of the amount of R100 million to our client by no later than 17h00 on 25 August 2021/Stein by no*

later than 17h00 on 25 August 2021, delivering acceptable guarantees to our client in the amount of R100 million, which guarantees are payable upon demand;

in the alternative to b above

c. *Stein and the [business rescue practitioners] concluding an offer to purchase agreement for Moffet on Main in the amount of not less than R125 million and acceptable guarantees being delivered for the purchase price by no later than 17h00 on 25 August 2021.*

d. *the transactions listed in b and c above should be unconditional.*

2. *Should the conditions in 1 be met timeously and the transactions envisaged in terms of a and b or c above proceed; the proceeds thereof will be utilized to settle the debt due to our client. Should a shortfall remain, our client will notify your clients accordingly and afford your clients a period of 5 days from receipt of the notice to pay the shortfall to our client. Should the shortfall not be paid within the 5 day period, the [business rescue practitioners] and liquidators will proceed with their respective processes in selling the properties to make payment of the debts due to the creditors.*

3. *Should the conditions in 1 not be met, our client will confirm the Waldorf sale on 26 August 2021, and the [business rescue practitioners] and liquidators will proceed with their respective processes in selling the properties to make payment of the debts due to the creditors."*

[29] As I have already indicated, the Group's legal representatives agreed to the above arrangement in an email dated 17 August 2021. According to Ms Baba, the negotiations with Stein reached an impasse on the evening of 24 August 2021. It transpired that, whereas the Group envisaged an 'out and out' sale and an arm's length loan from Stein, Stein wanted to acquire the properties, including the Waldorf, for itself. In a letter addressed to the applicant's attorneys and dated 25 August 2021,

Stein's attorneys offered to buy Moffat-on-Main for R110 million, the Waldorf for R100 million, and Princess Crossing for R250 million. As a result, the guarantees required in terms of the agreement between the parties could not be provided.

[30] On the morning of 25 August 2021 Ms Baba's attorneys enquired whether the first respondent still intended to authorize the sale of Waldorf in light if the impasse reached with Stein. The first respondent indicated that the sale of Waldorf was to proceed if the guarantees were not provided by close of business of 25 August 2021.

[31] The founding affidavit states that if the sale of the Waldorf were authorised it would be unconditional and not easily capable of being reversed given, amongst other things, the rights of the purchaser. Further, if the interdict were not granted, the first respondent would almost certainly grant authorisation for the sale of the Waldorf on the morning of 26 August 2021.

V. THE LAW

[32] The requirements for an interim interdict are well-known. The applicants must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other available remedy. If a clear right is established, there is no need to establish element of the apprehension of irreparable harm.[11]

[11] Erasmus, *Superior Court Practice* at D6-20.

[33] The applicable test in this regard is that which is set out in *Webster v Mitchell*[12], as qualified by *Gool v Minister of Justice and Another*[13], in terms of which the applicants must show that on their version, together with the allegations of the respondents that they cannot dispute, they should obtain relief at the trial. If, having regard to the respondents' contrary version and the inherent probabilities serious doubt is then cast on the applicants' case, the applicants cannot succeed.

VI. ***PRIMA FACIE*** **RIGHT**

[34] According to the notice of motion the applicants seek to interdict the respondents *"from selling or approving the sale of the Waldorf"*. Upon enquiry from the Bench, the applicants' counsel advised that the applicants no longer sought to interdict the respondents *"from selling"* the Waldorf, but now only sought to interdict the respondents from "*approving the sale of the Waldorf"*. This is because, according to the common cause facts, the sale of the Waldorf had already taken place on 14 July 2021, well before these urgent proceedings were instituted, and the applicants' attorneys were provided with a copy of the sale agreement on 19 July 2021.

[35] As regards the approval of the sale of the Waldorf, that issue is regulated by the terms of the sale agreement between Leopont and the Jaguar Trust. The sale agreement provides for two conditions precedent for the sale of the Waldorf in clauses 3.1.1 and 3.1.2, as follows:

> *"3.1.1 to the extent necessary and within 30 Business Days of the Signature Date, FirstRand Bank Limited, as a secured creditor of*

[12] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 11189.
[13] *Gool v Minister of Justice and Another*, 1955 (2) SA 682 (C) at 688E.

the Seller and the bond holder in respect of the Property, provides written consent to the sale and registration of transfer of the Property as contemplated in this Agreement; and

3.1.2 with reference to clause 11 below, and within 30 Business Days of the Signature Date, the Seller obtains agreement from FirstRand Bank Limited or any other financial institution to finance or effect payment of all Clearance Figures payable in respect of the Property.

3.2 The Suspensive Condition[s] contemplated in clauses 3.1.1 and 3.1.2 are imposed for the benefit of the Seller and may be waived and relaxed by the Seller by written notice of such waiver or relaxation as the case may be to the purchaser at any time before the due date for fulfillment thereof."

[36] Thus, in terms of clause 3.1.1 of the sale agreement, it is the first respondent that was to provide written consent for the sale and registration of the transfer of the Waldorf. And once the consent was granted by the first respondent, the sale became unconditional. The applicants have not sought to impugn the provisions of the sale agreement in these proceedings. Yet what is sought in essence is a unilateral amendment of a contractual undertaking. This, in circumstances where no such case is made out. The applicants do not have a *prima facie* right to stop the first respondent from granting the written consent contemplated in clause 3.1.1.

[37] Confronted with the above terms of the sale agreement, the applicants state in the replying affidavit that in terms of clause 3.2, the business rescue practitioners can simply waive or extend the condition that the first respondent approve the sale, pending the return day of the *rule nisi*. In my view, this brings into purview the application of section 133(1) of the Companies Act. One does not know how the business rescue practitioners might have responded had they been requested to waive

or extend the condition for approval. There is no indication that such a request was made to them prior to the institution of these proceedings. In any event, this belated request for the business rescue practitioners to waive or extend the condition is another attempt to unilaterally amend the terms of the sale agreement, and is inappropriate, given the *ex parte*, urgent manner in which these proceedings were brought. This request is furthermore made in the replying affidavit, in circumstances where the applicants were aware the respondents could not respond, given the urgency with which the matter proceeded.

[38] Another aspect of the notice of motion that requires scrutiny is the period of its operation. The interdict is sought pending the transfer of Princess Crossing and Moffet-on-Main. There is no indication in the papers of when the transfer of Princess Crossing and Moffett-on-Main are to be expected. And in any event, it is not clear what is to occur once the transfers do take place. In this last respect, it appears that the relief sought is final in nature. Given that the interdict is sought pending the happening of the event(s) of the transfers of the Princess Crossing and Moffet-on-Main, I inquired in this regard at the hearing, and no answers could be provided on behalf of the applicants from the bar.

[39] Furthermore, as I have stated, the basis on which this application was launched was that the Stein Transaction is *"all but complete*" and *"so near completion"* and *"imminent"*. However, on the very facts averred by Ms Baba in the founding affidavit, the Stein Transaction had not gone according to plan because Stein did a *volte face.*

There is otherwise no evidence of the alleged imminence of the Stein Transaction. Apart from contradicting the very basis on which this application was launched, the fact that the Stein Transaction had already not materialized also undermines the alleged interim nature of this application.

[40] The relief sought in the notice of motion is therefore, on its face, incompetent, for the reasons discussed above. However, there are more reasons as to why the application falls to be dismissed.

[41] According to the founding affidavit, the applicants' *prima facie* right is said to be that Leopont has a clear right to benefit from the true value of the Waldorf, which was to be infringed by its sale to the Jaguar Trust. It is also said that the rights of creditors of the Group will be negatively affected by the unnecessary sale of the Waldorf while the Stein Transaction is so near completion.

[42] Firstly, the offer from Stein in respect of the Waldorf amounted to an amount of R100 million, the same amount as the purchase price to the Jaguar Trust. Thus, the alleged true value of the Waldorf is gainsaid by the very Stein Transaction that the applicants appeared to pin their hopes on for this application. The alleged true value is, in any event disputed by the respondents. In reply, the applicants attached to the replying affidavit a valuation which they state is the only extant valuation of the Waldorf, and that it was received by the business rescue practitioners *"post coronavirus"*. The business rescue practitioners deny this alleged true value. Furthermore, the document provided by the applicants itself does not support the

averments made by the applicants. It states that "*the last valuation as at 01/04/2020"* is R145,100,000, and shows that the document was printed on 17 September 2020. This is not evidence of an extant evaluation which was obtained "post coronavirus", as the deponent of the replying affidavit claims. The result is that the alleged prejudice to Leopont, which forms the basis for this application, is not established.

[43] By contrast, the respondents state that the rights of creditors will be adversely affected if the Waldorf is not sold. This is because the business rescue plan approved by the creditors contemplates the sale of the assets of the Group, including Leopont's, in order to pay creditors a better dividend than they would receive if Leopont were liquidated. In terms of section 128(b) of the Companies Act, this is a valid form of "rescue". This makes the sale a lawful pursuit, and takes it outside the realm of unlawful conduct.

[44] As I have already indicated, the evidence shows that the alleged imminence of the Stein Transaction, as regards the Waldorf, had not materialised by the time these proceedings were launched. The respondents point out that even if the Stein Transaction were successful it would only cover the debt due to the first respondent, and not the R24 million owed to other creditors. In the replying affidavit the applicants state that Stein's offer to purchase Princess Crossing and Moffet-on-Main is adequate to settle all the creditors' claims - the first respondent's and the other creditors' - and will result in a surplus of R32 400 000,00, and that this was pointed out to the respondents in an email of 29 July 2021. I deal with this email

correspondence below. But first, I note that according to the first respondent, Stein had in fact previously concluded a written offer to purchase Princess Crossing with the liquidators of Bestinver SA for R280 million, and that Stein's recent offer of R250 million seems to be a repudiation of that earlier agreement with Bestinver SA's liquidators. Indeed, in the agreement of 17 August 2021 quoted earlier, the guarantee to be provided in respect of Princess Crossing was R280 million. The replying affidavit is silent in this regard.

[45] Secondly, the calculations relied upon in the replying affidavit are different from those which were the basis for launching these proceedings. According to the founding affidavit the Stein Transaction was to result in the sale of Princess Crossing to Stein for the sum of R280 000 000, as well the provision of a loan by Stein to Bestinver SA in an amount of R105 000 000, which would bring in approximately R385 000 000, and allow the Group to settle the first respondent's claims. In the replying affidavit, there is no longer reliance placed on a loan amount of R105 000 from Stein, presumably because of the concomitant acknowledgement that the Stein Transaction had not materialized. The significance is that the applicants attempted to change their case in the replying affidavit, which is impermissible.

[46] As regards the email correspondence of 29 July 2021, the reliance thereon is problematic in several respects. First, on the common cause facts, the email of 29 July 2021 was sent before the parties agreed to the arrangement that resulted in the applicant being granted until end of 25 August 2021 to provide a guarantee from Stein. It must be remembered that the basis on which the applicant approached this

Court was that the Stein Transaction was imminent. It was not on the basis that the issues raised in the email of 29 July 2021 were not complied with by the respondents. A litigant must stand or fall by their founding papers. Second, there is no evidence that the parties had agreed that, if the Stein Transaction failed, the parties would resort to the position set out in the email of 29 July 2021. Third, the averments relating to the correspondence of 29 July 2021 are made in a replying affidavit, in an urgent application, in circumstances where the respondents did not have an opportunity to respond.

[47] In the replying affidavit, and at the hearing of the matter, the applicants relied on a statement made by Nel AJ in *Baba v Janse van Rensburg NO* (case number 2594/2021) in the context of section 140(3)(c)(ii), that the business rescue practitioners should *"carefully navigate the sales of the properties and monitor the concomitant debt reduction from the proceeds of such sales, in order to ensure that properties are not sold unnecessarily"*. Again, this is not the basis on which the applicants approached the Court. In any event, there is no evidence that the business rescue practitioners have transgressed these sentiments of the Court.

[48] Instead, the business rescue practitioners have set out how and why the sale of the Waldorf became necessary. According to the business rescue practitioners all income earned from the Waldorf was, at the time of these proceedings, ceded to the first respondent, and could therefore not be used without the latter's consent. Absent access to the encumbered rental income, the business rescue practitioners had

insufficient funds to meet day-to-day operational expenses and business rescue costs, and liquidation would have been inevitable.

[49] Furthermore, according to the business rescue practitioners the Group has been afforded every opportunity, since the commencement of the business rescue on 19 June 2020, to rescue their business through refinancing, including by pursuing the Stein Transaction, but to no avail. At the same time, they state that it has always been clear that the funding was urgently required, and if not urgently acquired, properties would need to be sold. Indeed, this is borne out by the agreement of 17 August 2021 between the parties.

[50] As a result of the circumstances set out immediately above, a formal, private tender process was pursued for the sale of the Waldorf. Seven offers were received – the lowest for R50 million, and the highest, from the Jaguar Trust, for R100 million. Following that process, the business rescue practitioners entered into a formal deed of sale with the Jaguar Trust, for R100 million, on 14 July 2021. Thereafter, the parties agreed to the arrangement that allowed the Group to pursue the Stein Transaction.

[51] The applicants have not shown anything irregular about any of the events leading up to 25 August 2021. Instead, it is the Group that appears to have failed to meet the conditions of the agreement to provide a guarantee from Stein by end of 25 August 2021. There is no basis for the Court to intervene in these circumstances. Importantly, the applicant has failed to make out a *prima facie* case for the relief sought.

VII. THE REMAINING REQUIREMENTS FOR INTERIM INTERDICT

[52] Turning to the requirement of irreparable harm, the founding affidavit stated that once the first respondent approves the sale it will become unconditional and there is nothing that the Group, including Leopont, could do to prevent the sale. Again, on this aspect the applicant relies on the alleged imminent Stein Transaction which I have already discussed *ad nauseum*.

[53] I have already made a finding against the applicants' allegation that the sale of the Waldorf to the Jaguar Trust is for less than its true value. It therefore remains an allegation that is not established on the evidence. As a result, the applicant has failed to demonstrate that Leopont and the Group will suffer irreparable harm.

[54] It is also relevant in this regard that the creditors were not given notice of these proceedings, for their interests are also affected by this application.

[55] As regards the balance of convenience, the applicants again relied on the alleged imminent Stein Transaction, which is contrary to the established evidence. In addition, for this requirement Ms Baba cursorily alleged that she, the fourth respondent and the Group would be severely prejudiced if the interdict is not granted. Nothing more is stated to substantiate this averment. Accordingly, no case is made out in this regard.

[56] By contrast, as I have stated, the respondents state that if the Waldorf is sold, the proceeds can be used to pay the creditors, as contemplated by the business rescue plan.

[57] In considering the alternative remedy, I am mindful that, on the facts of this case, the applicants have been afforded ample opportunity, since the institution of the business rescue proceedings and later, the adoption of the business rescue plans, to make alternative arrangements. This last opportunity, which expired on 26 August 2021, was one such opportunity. Furthermore, should it transpire that the applicants do find alternative funding before the transfer of the Waldorf, the applicants could apply to interdict the transfer on the basis of a firm offer which is acceptable to all the parties affected by this case.

[58] In all the above circumstances I am not persuaded that an interdict ought to be granted in the circumstances of this case.

VIII. COSTS

[59] There is no reason why the costs should not follow the result. Furthermore, given the unsatisfactory manner in which these proceedings were launched, and which I have set out earlier in this judgment, I consider it appropriate for the applicants to bear the costs. The unsatisfactory manner of proceeding continued well into the replying affidavit, where it is clear that the applicants now wished to distance themselves from the basis on which these proceedings were launched on such an extremely urgent basis, namely that “the Stein Transaction is imminent”. In fact the replying affidavit was constrained to admit that the transaction did not materialize. In my view, this issue alone is sufficient to mulct the applicants with costs.

[60] In the circumstances, the following Order was granted on 27 August 2021:

a. The application is dismissed with costs.

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N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	**:**	**Adv M Greig**
Instructed by	**:**	**Mr L Timothy**
		Timothy and Timothy Attorneys
For the 1st respondent	**:**	**Adv B Manca (SC)**
Instructed by	**:**	**Ms A van der Merwe**
		Werksman Attorneys
For the 2nd, 3rd and 4th respondents	**:**	**Adv R Goodman (SC)**
Instructed by	**:**	**Ms J Hutton**
		Bowmans