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

CASE NUMBER 2594/2021

In the matter between

YASMINA BABA	1st Applicant
BESTINVER HOLDINGS (PTY) LTD	2nd Applicant

and

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O	1st Respondent
CHRISTOPHER VAN ZYL N.O	2nd Respondent
JACQUES DU TOIT N.O	3rd Respondent
LEOPONT 193 (PTY) LTD (IN BUSINESS RESCUE)	4th Respondent
JOBURG SKYSCRAPER (PTY) LTD (IN BUSINESS RESCUE)	5th Respondent
BESTINVER01 (PTY) LIMITED	6th Respondent
BESTINVER COMPANY SOUTH AFRICA PROPRIETY LIMITED	7th Respondent
FIRSTRAND BANK LIMITED	8th Respondent
EMPLOYEES OF THE FOURTH TO SIXTH RESPONDENTS	

AS PER ANNEXURE "A"	9th Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	10th Respondent
CHRYSALIS CAPITAL (PTY) LTD	11th Respondent
HERIOT PROPERTIES (PTY) LTD	12th Respondent
FURTHER CREDITORS OF THE FOURTH TO SIXTH RESPONDENTS PER ANNEXURE "B"	13th Respondent
REGISTRAR OF DEEDS	14th Respondent

JUDGMENT DELIVERED ELECTRONICALLY 24 MARCH 2021

KUSEVITSKY, J

[1] This is an urgent application for interim relief pending the determination of an application set down for hearing on the semi-urgent roll on 14 April 2021. I will refer to the First to Third Respondents interchangeably as the business rescue practitioners or ("BRP's") and the Applicants, as 'the company'.

[2] In the main application, the Applicants seek to *inter alia*;

2.1 Set aside creditors' and shareholders' meetings of the Fourth to Sixth Respondents held in terms of section 151 of the Companies Act, 2008 on 18 December 2020, where business plans were approved; and

2.2 replace the Second Respondent as business rescue practitioner.

[3] In the urgent application, the Applicants, in its practice note, moved for an order that:

3.1 pending the hearing on 14 April 2021, and save for one identifiable immovable property sold to the Eleventh Respondent, the business rescue practitioners, i.e. First to Third Respondents, shall not sign transfer documents relating to the immovable properties of the companies under supervision; the Fourth to Sixth Respondents; and that;

3.2 the application be postponed to 14 April 2021 for the hearing relating to the balance of the relief, together with the main application.

[4] This relief differs substantially to what was initially sought in the notice of motion, which was the following:

4.1 Directing that the supplemental relief be heard on the basis of urgency;

4.2 Joining the Fifteenth to Nineteenth Respondents as respondents;

4.3 Directing that, pending the return day of the *rule nisi*, under the above case number on 14 April 2021:

4.3.1 The First to Third and fifteenth to nineteenth Respondents and their successors shall be interdicted and restrained from:

4.3.1.1 Implementing any business rescue plans or practitioners' remuneration purportedly approved at meetings in relation to the Fourth to Sixth Respondents held on 18 December 2020 in terms 151 and 143 (3)(b) of the Companies Act, 2008 ("the Companies Act");

4.3.1.2 Disposing of or otherwise alienating or further encumbering any properties or assets of the Fourth to seventh Respondents.

4.4 The Fourteenth Respondent shall register a caveat in relation to the properties registered in the name of the Fourth to the Seventh Respondents referred to in annexure "C", reflecting the terms of paragraph 3.1.2 above.

4.5 Alternatively, placing the seventh Respondent under supervision and directing that business rescue proceedings in respect of it are commenced in terms of section 131 (4) of the Companies Act.

4.6 Appointing Mr Jacques Du Toit as business rescue practitioner to the seventh Respondent with all the powers and duties contemplated in the

Companies Act, pending ratification of such appointment by the creditors of the Seventh Respondent at their first hearing.

4.7 Directing that the costs of the application on the scale as between party and party, and the Eighth Respondent's applications for the winding-up of the Seventh Respondent, are to be costs in the business rescue proceedings.

[5] The Applicants further sought leave to amend their notice of motion under the above case number by:

5.1 The insertion of the words *"in terms of section 151 of the Companies Act"* at the end of paragraph 5.1; and

5.2 The addition of the following paragraph as paragraph 5.2, and the consequential renumbering thereof:

"*5.2 Setting aside as irregular and invalid the shareholders' meetings in relation to the Fourth to Sixth Respondents held on 18 December 2020 in terms of section 143 (3) (b) of the Companies Act".*

[6] The matter was duly opposed.

[7] Notwithstanding the vast array of relief sought, as mentioned above, the Applicants now sought relief on a very narrow basis; that relating to immovable property known as *Marble Towers*.

[8] In a draft order presented, the Applicants were agreeable to an order which authorised the business rescue practitioners of the Fifth Respondent to sign transfer documents relating to the sale of *Marble Towers*; to postponing the application for hearing on the semi-urgent roll to 14 April 2021; and pending the hearing on 14 April 2021, and save for the sale of *Marble Towers*, the business rescue practitioners of the Fourth, Fifth and Sixth Respondents were barred from signing transfer documents relating to the immovable properties of the Fourth, Fifth and Sixth Respondents.

[9] It is common cause that Eighth Respondent, which was owed R 507 million by the companies[1], launched applications for the winding-up of the companies. On 19 June 2020, the companies were placed in provisional business rescue, and on 26 October 2020, the order was made final.

[10] According to the Applicants, the First to Third Respondents concluded sale transactions with Heriot Properties, which, if implemented would mean the end of the companies businesses, the end of the employment of all of the companies employees, a substantial loss for concurrent creditors and a substantial loss of equity for the companies' shareholders.

[11] With regard to urgency, it says that another stakeholder, Stein, remains interested in concluding a transaction which would be more favourable to all stakeholders than the sale of properties to Heriot. On 9 March 2021, the business rescue practitioners were informed of another deal, the Paramount deal, which it

[1] The Fourth to Seventh Respondents

believed would yield a better return for stakeholders than the Stein transaction. Applicants belief is that the business rescue practitioners have a duty to properly consider the Stein and Paramount transactions, which they say will be more beneficial to all stakeholders than the sales to Heriot Properties.

[12] In a letter dated, 19 February 2021, the business rescue practitioners advised that:

12.1 they would not consider the Stein proposal given that it seemed that it was an interim proposal and that a revised, final proposal should be received by them by no later than 4 March 2021;

12.2 they were not satisfied with the proof of funds provided and requested that applicants provide them by 4 March 2021, to either place the full amount referred to in the Stein proposal, i.e. R650 million in freely available cash in the attorneys trust account, together with an undertaking in favour of Bestinver Companies, or alternatively a written irrevocable guarantee by a registered financial institution, *on terms acceptable to our clients.*

[13] The Applicants state that they were unable to provide proof of funds as required by the BRP's given the short deadline imposed. However, on 4 March 2021, the Applicants advised that they sent revised details of the Stein transaction to the BRP's attorneys which was also accompanied by a letter from ABSA bank which contained an 'Expression of Interest' by them to make R 500 million available for the Stein deal.

[14] On 5 March 2021, the BRP's attorneys responded by acknowledging the expression of interest in the amount of R500 million. However, they reiterated the following:

> "2. As previously confirmed by us, by no later than 4 March 2021, your clients were to furnish the joint business rescue practitioners of the Bestbier companies (our clients) with confirmation of R650 million in freely available cash held in an attorney's trust account, or provide a written irrevocable bank guarantee furnished by a registered South African financial institution in the same amount. While our clients have not yet had the opportunity to fully peruse and consider the agreements provided by you earlier today, we are instructed to record that your clients have failed to comply with the aforesaid requirements set out in our letter of 19 February 2021.
>
> 3. In the circumstances, our clients will implement the business rescue plans (the Plans) adopted in respect of the Bestbier companies as they are obliged to do in terms of Chapter 6 of the Companies Act 71 of 2008."

[15] The BRP's attorneys accordingly gave the Applicants seven business days' written notice, in terms of clause 5 of the court order dated 25 February 2021[2], of their intention to give effect to the sales concluded in respect of the immovable properties known as 1 Thibault Square, and Marble Towers by signing the necessary transfer documents.

URGENCY

[16] According to the Applicant, on 13 March 2021, the Applicant's attorney sent a letter to the BRP's attorneys requesting a compromise to the order. Both the BRP's and FirstRand Bank rejected the offer. Applicants aver that they have a clear right in that, they are entitled to the efficient rescue and recovery of the companies in a manner that balances the rights and interests of all relevant stakeholders; or to

[2] Clause 5 states as follows: *"Pending the above hearing on the semi-urgent roll, the first to Third Respondents shall not sign transfer documents to give effect to the sale of any immovable properties pursuant to the business rescue plans approved on 18 December 2020 at the creditors' meeting held in terms of section 151 of the Companies Act (which the applicants contend were not validly adopted) in relation to the Fourth to Sixth Respondents; provided that, after 4 March 2021, the First to Third Respondents may, after giving the Applicants seven business days' written notice, proceed to do so unless otherwise ordered by this Court."*

restore the companies to a solvent going concern, or at least to facilitate a better deal for creditors and stakeholders than they would secure from a liquidation process. They say this will not be achieved if the Stein and Paramount proposals are not considered properly and not given a proper chance to come to fruition and the plans are implemented before 14 April 2021. They also aver that the implementation of the business rescue plan will result in employees of the companies losing their employment. They also state that the interim interdictory relief seek to preserve the *status quo*; allow the transactions to come to fruition and prevent an undesirable situation of the business rescue plans being implemented or partially implemented in circumstances where the meetings which endorsed such plans may later be ruled to be invalid.

[17] It is clear from the Applicants own concession at the hearing of the matter, that the balance of the relief sought was not urgent, hence the proposal that those matters stood to be adjudicated at the hearing of the main application on 14 April 2021. If this is the case, as a matter of course, those Respondents who opposed the matter and filed papers should, be entitled to their costs in opposing the urgent application.

[18] However, the content of the relief sought in the urgent application needs to be interrogated. It will not be done chronologically.

The relief sought in prayers 5 to 7

[19] The relief sought is to place the Seventh Respondent, Bestinver Company, under supervision and directing that business rescue proceedings in respect of it are commenced in terms of section 131 (4) of the Companies Act, 2008.

[20] According to the answering affidavit of the FirstRand Bank, the Eighth Respondent is currently in provisional liquidation. This was pursuant to FirstRand Bank's application to declare the business rescue proceedings in respect of Bestinver terminated and to provisionally wind it up. The Applicants now wish to introduce applications to place Bestiver again under the supervision of a business rescue practitioner.

[21] In my view, this is an abuse of the court process. The Applicants knew that Bestinver had been in business rescue before and that those proceedings had been converted into a winding up application. According to FirstRand Bank, the Applicants opposed that application, stating that the company was not insolvent and that it should be returned to them. Curiously now, the Applicants contend that Bestinver is financially distressed and needs to be placed under supervision in terms of section 128 of the Companies Act. Why the Applicants sought to revisit the matter in a seemingly hybrid urgent application, when the correct approach would be to deal with that matter at the hearing of the final application for liquidation, is inexplicable. Not only was it required for an urgent judge to be seized with these papers, but the application was already ventilated previously, which saw it converted into liquidation proceedings. In any event, it was argued that sections 131 (6) and (7) of the Companies Act, 2008, makes it clear that a business rescue application for a

company which is in provisional liquidation, should be made in those proceedings. Furthermore, the contradictory statements of the financial liquidity of Bestinver, as highlighted by FirstRand Bank, furthermore adds to the inescapable conclusion, that this application is nothing but an abuse of the process, and in my view, would ordinarily warrant a punitive cost order. In any event, the contention by FirstRand Bank that the Applicants previously used a company in which it had a 30% voting interest to vote against a business rescue plan for Bestinver, ostensibly to control the outcome of the assets, is a matter to be ventilated in those proceedings. In my view, the Applicants have failed to make out a case for the relief sought and there would furthermore be no need to join the joint provisional liquidators of the Seventh Respondent, the Fifteenth to Nineteenth Respondents, in terms of prayer 2 of the Notice of Motion.

The relief sought in prayers 8

[22] The Applicants seek to amend their notice of motion. Again, this urgent court was asked to consider an amendment of a notice of motion, set down for hearing on 14 April 2021. The Applicants fail to explain why the normal rules of court in terms of rule 28, were not utilized. It seems as though everything was thrown into a basket, irrespective of the lack of urgency, and this court was tasked to consider an amendment on an urgent basis. Again, this is nothing but an abuse of the court process and, of the time of an urgent court judge.

The relief sought in prayers 3 and the sub-paragraphs thereof

[23] It is common cause that the relief that is sought is a carbon copy of the relief sought in an urgent application which was launched by the Applicants on 10 February 2021, barring the addition of clause 3.1.2, which seeks to interdict and restrain the First to Third Respondents from disposing or otherwise alienating or further encumbering any properties or assets of the Fourth to Seventh Respondents.

[24] It is also common cause, that pursuant to the hearing of the matter, an agreed settlement was reached which was made an order of court on 5 March 2021. The Applicants contend, as I have dealt with above, contend that this application was necessitated given the rigid conduct by the First to Third Respondents to ostensibly not consider new proposals tabled by them, which they say, would be beneficial to the company and shareholders.

[25] Most certainly, clause 5 of the 5 March 2021 court order, is central to this urgent application and to the general proceedings at large. It is common cause that in the main application, to be heard on 14 April 2021, the Applicants seek to interdict and restrain the BRP from implementing any business rescue plans purportedly approved at a creditors meeting held on 18 December 2020 in terms of sections 151 and 143(3)(b) of the Companies Act. If the Applicants succeed in that application, then any transactions and steps that have been taken in the interim to implement the business plan, would ostensibly be set aside.

[26] However, if one considers clause 5 of the agreed order in the main application, the parties agreed to the following:

> 26.1 that pending the hearing of the main application, the First to Third Respondents *shall not sign transfer documents* to give effect to the sale of any immovable properties pursuant to the business rescue plans approved on 18 December 2020, *provided that*;
>
> 26.2 after 4 March 2021, the First to Third Respondents may, after giving the Applicants seven days' *written notice*;
>
> 26.3 proceed to do so unless otherwise *ordered by the court*.("my emphasis")

[27] It is therefore clear that the parties anticipated, by the insertion of the words "*unless otherwise ordered by this Court*" that the Applicants would be entitled to approach a court for a reconsideration of this aspect. The question that therefore needs to be asked, is whether the Applicants, although entitled to approach a court, was entitled to do so on an urgent basis, given the relief that it ultimately seeks.

[28] I start first with a general observation and I do so without pre-empting a finding in the main application. On the face of it, clause 5 of the court order, ostensibly gives the business rescue practitioners the authorisation to proceed with the sale of immovable properties, after seven days' written notice to the Applicants. How such a provision could even be contemplated, given what relief is being sought

in the main application; which is essentially an order to reverse decisions made by the business rescue practitioners to implement a business rescue plan, is inexplicable. The practical effect of the selling of immovable assets upon giving notice – and then seeking to set aside a decision authorising the very sale of the assets, seems absurd. What it does perhaps indicate, is that the Applicants would like to retain their proverbial "*cake and eat it".*

[29] Be that as it may, I start with the Eleventh Respondent, Chrysalis Capital (Pty) Ltd, ("Chrysalis"). Mr Woodland for Chrysalis argued that there was no reason for them to be dragged into these proceedings. According to the answering affidavit of Mr Mark Pienaar, who is the director of Chrysalis Capital Fund, Chrysalis is a creditor of the Fifth Respondent and they[3] are also the bondholder in respect of the property owned by Joburg Skyscraper, commonly known as *Marble Towers*.

[30] Chrysalis did not oppose the application in the main application. However, given the fact that the Applicants now also, in this application, seek to interdict and restrain the First to Third Respondents from disposing or otherwise alienating any properties or assets of Fourth to Seventh Respondents, including the property owned by Joburg Skyscraper, *Marble Towers*, they were constrained to oppose the application.

[31] According to the answering affidavit, the Chrysalis entities are creditors of Joburg Skyscraper only and their only interest is in respect of the implementation of the business rescue plan in respect of that company. On 20 October 2020, an

[3] Chrysalis Security SPV, they are also a secured creditor in the business rescue of Joburg Skyscraper

agreement of sale was entered into in respect of the *Marble Towers* property with an entity known as the Goldenrod Group (Pty) Ltd. The purchase price was R 87 million - R88 million, less R 1 million in commission. The purchaser also undertook to pay all outstanding rates and taxes, which are substantial, due on *Marble Towers* in order for the rates clearance certificate to be obtained and for the transfer to proceed. Accordingly, documentation for the transfer had to be signed on 17 March 2021.

[32] Given that the Applicants are *ad idem* that the transfer of the *Marble Towers* property can proceed, I am in agreement with Mr Woodland that it was not necessary for Applicants to have sought any relief against the Eleventh Respondent. The Eleventh Respondent is entitled to its costs.

Relief sought in prayers 3.1.1

[33] This prayer is the same relief as contemplated in the main application, save for the inclusion of 'practitioners' remuneration'. This relief was postponed for hearing in the main application. One would assume that the practitioners' remuneration would form part of the decisions taken at a creditors meeting where the adoption of a business plan would be presented. There is nothing urgent about this. The relief therefore falls to be dismissed.

Relief sought in prayer 3.2

[34] This prayer is the same relief as contemplated in the main application which was postponed for hearing in the main application. This relief falls to be dismissed with costs.

Relief sought in prayer 3.1.2

[35] The main thrust of Applicants argument is that the business rescue practitioners are not considering two proposals, the Stein and Paramount proposals, to the detriment of the shareholders and employees of the company. That, it seems, is the basis for the relief in seeking to interdict the business rescue practitioners from selling or alienating the assets of the Fourth to Seventh Respondents.

[36] In a letter dated 10 March 2021, the attorneys for the First to Third Respondents stated that they did not have any objection to engaging with Paramount in order to do a due diligence investigation. In another email dated 10 March 2021, the provisional liquidators of Bestinver[4], Mr Cloete Murray of Sechaba Trust (Pty) Ltd, wrote the following:

> "Mr Timothy,
> The provisional liquidators are not currently clothed with the authority to dispose of any of the assets of the company. Such authority can only be obtained from the Master of the High Court in terms of section 386(2B) or the High Court. In both instances the board of directors will be notified well in advance of such applications. You [sic] insistence that we provide you with an undertaking is legally misguided."

[37] According to the answering affidavit of Mr Cornelius Verster, Head of Recoveries for FirstRand Bank Limited, during March 2019, FirstRand accelerated

[4] Bestinver Company South Africa (In provisional Liquidation)

the debts owed to it by the companies. At the time, the debt was in the region of R 510 million. The debt is large and impacts on the financial results of FirstRand, a public company, responsible to its shareholders. The failure on the part of the companies to settle the debt had already resulted in four winding-up applications, four business rescue applications, various meetings in the business rescue proceedings as well as urgent applications.

[38] The companies were afforded time to find alternative finance to repay the debt. By December 2019 they were unable to do so. On 19 December 2019, FirstRand Bank instituted four separate winding-up applications. These were opposed. Then Covid-19 happened. Subsequent to that, the winding up applications were postponed to the return day of the business rescue orders. Various affected persons' meetings were held from 29 to 30 July 2020 and 14 August 2020.

[39] I do not propose to traverse the entire timeline of events in this matter. Of importance are the following. The shareholders disputed the payment of the professional fees conservatively from 24 October 2020 when the now late Kaplan and Van Zyl were appointed. It was stated that the position was so dire that by 5 November 2020, the practitioners threatened the winding up of the four companies. FirstRand however came to the rescue as it holds a cession of the rental income in respect of the four companies. On 27 November 2020 the business plans were published and subsequent to that decision, the main application was launched followed by various correspondence and now another urgent application. It is therefore apparent that the Applicants have been aware of the dilemma that the companies face, since December 2019.

[40] In the matter of *SA Bank of Athens v Zennies Fresh Fruit 2018 (3) SA 278*, I had the opportunity to consider *inter alia*, what the purpose of business rescue proceedings were. The court held that a substantial degree of urgency was envisaged once a company decided to adopt the relevant resolution beginning business rescue proceedings. The mechanism of business rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors.[5]

[41] Whilst cognizance is taken of the impact that the Covid pandemic has taken on the economy, there can be no question that these proceedings need to come to finality. When one considers the requirements for an interdict, it is so that most of the relief that is sought, will be ventilated at the main hearing. The Respondents would suffer more irreparable harm than the Applicants should this relief be granted. The balance of convenience does not favour the Applicants. Although they are affected parties *qua* shareholders of the companies, their rights *qua* shareholders will not be affected.

[42] As I have stated before, the crux of the application is the perception that the business rescue practitioners are not considering proposals which would ostensibly be more financially beneficial. This, despite their undertaking that they would proceed with a due diligence on the Paramount deal once all of the signed agreements have been submitted. Here is it of course also important to remember that Absa had a mere Expression of Interest.

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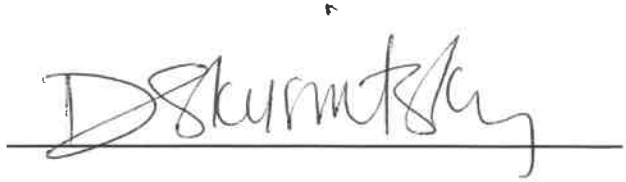
[5] At paras 42 to 45

[43] The general powers and duties of a business rescue practitioner is contained in section 140 of the Companies Act. He is also an officer of the court[6] and has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77[7] of the Companies Act. In terms of section 140(3)(c)(ii) of the Companies Act, a practitioner may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner. These are the alternative remedies available to Applicants.

[44] Lastly, notwithstanding all of the above, this relief would in any event be incompetent since none of the purchasers were cited in this application and given that their interests as purchasers would be intrinsically threatened, the application would be fatally defective.

For all the reasons above, I make the following Order:

1. The application is dismissed with costs.



DS KUSEVITSKY

Judge of the High Court, Western Cape Division

[6] section 140 (3)(a)
[7] section 140 (3)(b)

COUNSEL FOR THE APPLICANTS: ADVOCATE RUDI VAN ROOYEN SC

ADVOCATE MARK GREIG

INSTRUCTED BY: TIMOTHY AND TIMOTHY ASSOCIATES

COUNSEL FOR FIRST TO THIRD REPONDENTS: ADVOCATE RICHARD GOODMAN SC

INSTRUCTED BY: BOWMAN GILFILLAN

COUNSEL FOR THE EIGTH RESPONDENT: ADVOCATE BRENDAN MANCA SC