IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15418/2021

In the matter between:

JOHANNES JAKOBUS ZWIEGERS **Applicant**

and

JACQUES DU TOIT N.O. **First Respondent**

CHRIS VAN ZYL N.O. **Second Respondent**

JUDGMENT DELIVERED ELECTRONICALLY: WEDNESDAY, 4 MAY 2022

NZIWENI AJ

Condonation Applications

[1] The developments in this case justified the late filing of the replying affidavit and the filing of additional affidavits. Both parties did not object to the non-compliance with the Rules.

[2] Consequently, the non-compliance with the Rules, is condoned.

Introduction

[3] This application concerns granting the Applicant leave to institute legal proceedings against the First and the Second Respondents ("the Respondents), in their representative capacities as duly appointed business rescue practitioners. The companies were placed under business rescue by orders of the court, dated 02 July 2020. The Respondents are the appointed business rescue practitioners to supervise and manage the companies' affairs and businesses.

[4] The Applicant, in the amended notice of motion, seeks an issuance of declaratory relief in the following terms:

> *"1. It is declared that the Joburg Skyscraper Pty Ltd (the company) is indebted to the Applicant in the net amount of R 2 516 458, 71 as at 26 October 2021;*
>
> *2. Declaring that the claim constitutes post-commencement finance in the business rescue of Joburg Skyscraper (PTY) Ltd as envisaged by section 135 (1) (a) of the Companies Act 71 of 2008 ("the Act).*
>
> *3. Directing the Respondents to pay the claim during the implementation of the business rescue plan of the company as follows:*
>
> > *3.1 the Applicant's current salary and expenses shall be paid in full on or before the last day of each and every month as part payment of the claim pending final implementation of the of the business rescue plan; and*

3.2 The remaining balance of the claim shall be paid in accordance with the preference prescribed in terms of section 135 (3) (a) of the Act in the course of the implementation of the business rescue plan".

[5] In this matter, the Respondents never disputed that the Applicant was owed monies by the companies. It was also not in dispute that the Applicant was the only employee of Joburg Skyscrapper not being paid in full.

[6] When the application was launched, the Applicant was employed by Bestinver and Joburg Skyscraper (the companies), as the Chief Financial Officer. Employment agreements and remuneration packages between the Applicant and his respective employers were entered into on about 12 August 2015 and 16 February 2017, respectively. According to the Respondents, as at the commencement of the business rescue proceedings, the Applicant was also the company secretary of both companies.

Applicant's submissions

[7] In his replying affidavit, the Applicant indicates that the relief as contained in the amended notice of motion is only sought against Joburg Skyscrapers. This is so because Bestinver has since been placed under provisional liquidation. Consequently, the Applicant asserts that any reference to Bestinver as well as any mention of the conduct of the Respondents, as it pertains to his employment contract with Bestinver, is merely to demonstrate the *mala fide* conduct of the Respondents.

[8] According to the Applicant, the Respondents have stepped into the shoes of the respective directors. Thus, their failure to make payment of his [Applicant's] full salary, and other amounts payable is tantamount to the breach of contract.

[9] Before the Applicant amended his papers, it was strongly contended by the Applicant that the Respondents, in their representative capacities, have persistently and wilfully breached the agreements, by failing or refusing to pay his full monthly remuneration for the months of July 2020; August 2020 and September 2020. The Applicant contended that at the time he deposed to his affidavit, the amount which remained in arrears was R 215 334.39.

[10] The Applicant originally asserted that he would have earned for the remainder of the contract an amount of R10 561 500, 00. However, due to changes in the circumstances of this matter, the accelerated claimed amount of R10 561 500, 00 has decreased to R 2 516 458.71, and it is only applicable to Joburg Skyscrapers.

[11] Additionally, on 28 October 2021, the Applicant filed an additional affidavit, wherein he admits that the Respondents have since resumed paying his full net salary per month, for the following dates:

- 24 July 2020;
- 25 July 2020;
- 24 September 2020 and
- 23 October 2020.

[12] The Applicant also contends as Chief Financial Officer, he is well aware that the companies are receiving income other than ceded rentals. The Applicant holds the view that the Respondents have breached the agreements, which he has with the companies, hence, he seeks to enforce clauses 11.1 to 11.3 of the agreements concluded with the companies.

[13] The Applicant asserts that the breaches of the agreements constitutes an irretrievable breakdown in the employment relationship between the companies and himself as envisaged in clause 11.1 of the agreements. According to the Applicant, because of the irretrievable breakdown in the employment relationship, he is entitled to an acceleration of the full outstanding remuneration. The Applicant contends that, in terms of the agreements he is entitled to claim the balance of what is due to him for the remainder of the term of the respective contracts.

[14] The Applicant further asserts that, in light of the fact that the companies are under business rescue, the orders which he seeks will not be prejudicial to the Respondents and will not hinder them in discharging their duties as Business Rescue Practitioners, of the companies. It is the contention of the Applicant that the order sought will allow him to prospectively assert his claim for payment as against the companies in the ongoing business rescue process.

Respondents' submissions

[15] The Respondents aver that, in terms of section 140 of the Companies Act, they are in full management control of the companies in substitution of their respective boards and pre-existing management. In the Respondents' heads of arguments, the relief sought by the Applicant has been described as 'shifting sands'. Furthermore, the Respondents make the following assertions:

1. *"There is no basis for the Applicant to breach the moratorium as contemplated in section 133 (1) of the Act.*
2. *The Applicant has no contractual right to claim the balance of what is due to him in respect of his employment contracts from the Respondents and his reliance on terms of the contracts in question, to do so is without merit;*
3. *The Applicant is not entitled to be paid the R10 561 500. 00; and*
4. *Even if the Applicant was entitled to claim the balance of what is due to him in respect of his employment contracts from the Respondents (which he is not), the amount in question is not R 10 561 500.00. The aforesaid amount is based on incorrect information and as such, there are clear factual disputes which render this dispute unsuitable for resolution by way of an application."*

[16] It is further asserted on behalf of the Respondents that the notice of motion fails to distinguish between the relief sought against Bestinver and Joburg Skyscraper, when he demands the payment of the net capital sum of R10 561 500.00. According to the Respondents, in light of the fact that the companies are separate and distinct legal entities, there is no basis for claiming the payment of the full amount from both.

It is the view of the Respondents that this is a fatal flaw to the application of the Applicant as the application fails to adequately to substantiate the quantum claimed by the Applicant. In addition, the Respondents aver that the amount claimed in terms of clauses 11.1 to 11.3, is based on incorrect information.

[17] It is the assertion of the Respondents that, the Applicant's actuaries report which purports to indicate that the Applicant lost earnings to the amount of R10 561 500, 00, is incorrect *inter alia* because:

1. Contrary to what is stated in the Applicant's actuaries report; the Applicant did receive remuneration in October and November and will do so going forward.
2. Given the fact that the Applicant is a preferrent creditor in terms of section 135 (1) of the Act, he is certain to receive a significant distribution; as far as to the extent that he has not received his full remuneration during each month of the business rescue proceedings of the companies, when distribution business rescue plans are implemented.

[18] The Respondent also asserts the following regarding the claim of R10 561 500,00, and breach of contracts by the directors or shareholders of the companies:

1. the Applicant has no contractual right to require payment of R10 561 500,00, from them;

2. They are not aware of any breach of employment agreements by a director or a shareholder of the companies, clause 11.3 is thus not applicable. The reason for the failure to pay the Applicant in full is because the companies did not have enough funds to pay the Applicant in full.

2.1 On the Applicant's own version, the Respondents have breached the agreement and not the director or shareholder of either of the companies. The Respondents agree that they have breached the agreements due to the unavailability of funds. According to the Respondents, the breach was not wilful; as such, their conduct was lawful and did not in contravene the Applicant's statutory rights.

2.2 The Applicant fails to allege any breach of clauses 11.3 by a directors or shareholders.

2.3 The failure to pay the Applicant the full amount owing to him each month is, at best, a breach of employment agreement by the companies duly represented by the Respondents.

2.4 Clauses 11.1 and 11.2 of the agreements caters for termination of agreements by a company [Bestinver or Joburg Skyscraper], and clause 11.3 refers to breaches by any director or shareholder of each of the companies.

2.5 According to the Respondents, neither the companies nor the Applicant have terminated his [Applicant] employment contracts to trigger the operation of clauses 11.1 and 11.2.

[19] The Respondents makes the following submissions regarding the business rescue plan:

19.1 A business rescue plans (the plans) have been published.

19.2 The plans contemplates, inter alia, that employees who were not fully paid during business rescue proceedings will be paid in full.

19.3 If there are arrears applicable to the Applicant's monthly remuneration, in terms of the plans currently drafted, he will be paid in full.

19.4 The Respondents will not dispute any claim by the Applicant related solely to the shortfall in his monthly remuneration due to him during the business rescue proceedings.

19.5 Respondents admits that despite various demands by the Applicant for payments; they did not pay the Applicant the full amount due to him in terms of his employment contracts, for the months of July, August, September, October and November 2020.

19.6 The Respondents concedes that the Applicant has a claim for R208 248,25 against Bestinver and R165 859,73 against Joburg Skyscraper. The shortfall amount is not R215 334. 39 as claimed by the Applicant, but R215 107.98

19.7 The Applicant was not paid in full because there were insufficient funds available to meet all business rescue costs and expenses, including the Applicant's remuneration. The situation was explained to the Applicant in correspondence and verbally.

19.8 In accordance with section 134 (3) of the Act, the Respondents could not use rental income subjected to security interest in the form of a cession.

FNB or Chrysalis consented to the use of certain rental income for specific purposes.

19.9 According to the Respondents, there is no need for the Applicant to be granted leave to commence proceedings as the Plans provide an adequate mechanism to deal with the claims of the Applicant.

19.10 The Applicant has a claim for the balance of the remuneration due to him during the business rescue proceedings by virtue of section 135 (1) of the Act.

19.11 The Applicant is a preferrent creditor in terms of section 135 of the Act, and he will be paid in full, as contemplated in the business plans; before any concurrent creditors.

19.12 If the Court fails to grant leave there would be no substantive impact on the Applicant; as he will receive his salary that was not paid in full through the business rescue process.

19.13 If the Applicant believes that he is entitled to the full balance for the unexpired portion, he may assert his claim by submitting a claim against the companies.

19.4 According to the Respondents, this application is unnecessary and ill conceived, they further contend that this application is a waste of time and resources and impedes the Respondents in their efforts to ensure a successful, rapid recovery to the benefit of all stakeholders. The Respondents hold the view that protracted litigation will involve an unnecessary waste of resources and potentially delay the business

rescue proceedings. Whereas there is an alternative, speedy and cost effective dispute resolution process contained in the plans.

19.15 The order sought breaching the moratorium and ordering the companies to pay R10 561 500, would prejudice the business rescue process.

19.16 If the Respondents were to be ordered to pay the Applicant in excess R10 million, this would prejudice the creditors by diluting the funds available to them.

19.7 It is the view of the Respondents that the companies must be given breathing room for a plan to be adopted and implemented.

[20] During the hearing of this application, the following were common cause between the parties:

20.1 That the outstanding net monthly salary arrears due to the Applicant were paid in full.

20.2 That the claim by the Applicant for the accelerated net salary income of the applicant in terms of clause 11.3 has been reduced.

20.3 That Bestinver [one of the two companies], is currently under liquidation.

20.4 The Applicant has abandoned the claim against Bestinver.

20.4 That the Applicant is still in the employment of Joburg Skyscraper.

20.5 That several new developments have taken place since the filing of the initial notice of motion.

20.6 The various new developments necessitated the filing of additional and supplementary affidavits and an amendment of the notice of motion.

The legislation

[21] Chapter 6 of the Act deals with business rescue. For present purposes, I consider it convenient to quote fully the relevant provisions of the Act.

[22] Section 136 of the Act stipulates:

> ***"Effect of business rescue on employees and contracts***
>
> *136. (1) Despite any provision of an agreement to the contrary—*
>
> *(a) during a company's business rescue proceedings employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—*
>
> *(i) changes occur in the ordinary course of attrition; or*
>
> *(ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and*
>
> *(b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act No. 66 of 1995), and other applicable employment related legislation.*
>
> *(2) Subject to sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may cancel or suspend entirely, partially or conditionally any provision of an agreement to which the company is a party at the commencement of the business rescue period, other than an agreement of employment.*
>
> *(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.*

(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began."

[23] Section 137 of the Act provides:

'Effect on shareholders and directors'

"137. (1) . . .

(2) During a company's business rescue proceedings, each director of the company—

(a) must continue to exercise the functions of director, subject to the authority of the practitioner; (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

(c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and

(d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).

(3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.

(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that

requires the approval of the practitioner, that action is void unless approved by the practitioner."

[24] Section 140 of the Act' stipulates:

'General powers and duties of practitioners

"140. (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—

(a) has full management control of the company in substitution for its board and pre-existing management;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

(c) may—

(i) remove from office any person who forms part of the pre-existing management of the company; or

(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and

(d) is responsible to—

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.

(2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the

company, or an advisor to the company or to the practitioner, if that person—

(a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or

(b) is related to a person who has a relationship contemplated in paragraph (a).

(3) During a company's business rescue proceedings, the practitioner—

(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;

(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and

(c) other than as contemplated in paragraph (b)— (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but (ii) 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.

(4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company."

[25] Section 144 deals with the rights of employees as follows:

"Rights of employees"

(1) During a company's business rescue proceedings any employees of the company who are—

(a) represented by a registered trade union may exercise any rights set out in this Chapter—

(i) collectively through their trade union; and

in accordance with applicable labour law; or

(b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.

(2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

(3) During a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to—

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings and such notice must be given to

employees at their workplace and served at the head office of the relevant trade union;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) form a committee of employees' representatives;

(d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152(1)(c);

(e) be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152(1)(c);

(f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection (1); and

(g) if the proposed business rescue plan is rejected, to—

(i) propose the development of an alternative plan, in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of one or more affected persons, in the manner contemplated in section 153."

Is the Applicant entitled to an accelerated remuneration?

Termination of the Agreement

[26] Under the heading 'Termination', clause 11 of the executive employment agreement between the Applicant and Joburg Skyscraper provides as follows:

> *"11.1 The Company will be entitled to terminate the Agreement subject to clause 11.2 below for any sufficient reason recognised by law which would, without limitation, includes a reason relating to misconduct, capacity or the Employer's operational requirements that relates to liquidation, insolvency, or business rescue. The Company and the Employee will also be entitled to terminate this agreement in the circumstances in which an irretrievable breakdown in the continued employment relationship has occurred between any of the directors or shareholders of the Company and the Employee, which breakdown is not capable of being resolved on an amicable basis.*
>
> *11.2 In the event that the Company or the Employee elects to terminate this agreement on any of the grounds listed in clause 11.1 above before the expiry of the 7-year period, the Employee will be contractually entitled in terms of this agreement to be paid his full outstanding remuneration including bonuses and increases (if applicable) for the remainder of the 7-year period, from the date of the occurrence of any of the mentioned events within 30 calendar days.*
>
> *11.3 Should any director or shareholder of the Company act unlawfully by breaching any of the term of this agreement, the Employee will be paid out his full remuneration, including bonuses and increases (if applicable), for the remainder of the 7-year period from the date of the occurrence of any of the mentioned events within 30 calendar days".*

[27] In terms of clause 11.3, the full acceleration of the agreement is based on the occurrence of a single event, which is when a director or shareholder of the Company, act unlawfully by breaching any term of the agreement. The Applicant wants to invoke the accelerated clause as contemplated in clause 11.3, to claim the remainder of the agreement.

[28] I pause to mention that it is quite clear that clause 11.3 is subject to certain conditions. Put differently, there are certain requirements or events that may cause clause 11.3 to be triggered. The relevant question then is, whether the event, which is contemplated by clause 11.3, has occurred.

[29] Gleaning from the above-cited extracts of the Act, particularly, the provisions of section 140 (1), it is quite clear that the control of the company shifts to the practitioners when the company is under business rescue. However, before we get to whether the Respondents have stepped into the shoes of the company directors, the Applicant needs to overcome the hurdle of termination of the agreement, in order to put into effect the acceleration clause.

[30] First and foremost, it is needless to say that in this matter, it is not in dispute that the company is in financial distress and that the unpaid salaries were paid. Before the payment of the outstanding monies, the Applicant was recognised as a preferent creditor, in the business rescue plan.

[31] I wish to emphasize at the outset that the Act, in my view, ensures that the employees are not left in the cold and that they are afforded greater protection during business rescue. Section 144 of the Act affords the protection to employees, by mitigating the consequences of business rescue. However, the possibility is always there, that a company under business rescue might be incapable of satisfying due and payable remuneration obligations to its employees.

[32] Plainly, the Respondents can only pay the employees salaries if there are sufficient funds. Clearly, when a company is under financial distress it is difficult to guarantee the employees their full pay, which is promised by the terms of their agreements; particularly on time. This is because the financial circumstances of the company have changed. Hence, the Act, has devised protection means to ensure that employees can claim. It is also significant to note that the Act does not specifically protect the employees' salaries, particularly if regard is had to section 144 (2) - (3), of the Act, but deals with claims, which an employee might have.

Leave to institute legal proceedings against the Respondents, in their representative capacities

[33] Section 133 of the Act stipulates the following:

> **'General moratorium on legal proceedings against company.** – (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except–

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) . . .

(d) . . ."

[34] In *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43 (13 April 2021), the following was stated at paragraph 25:

> *"[25] Section 133 must be read as a whole: the different subsections of a provision dealing with the same subject matter must not be considered in isolation but read together so as to ascertain the meaning of the provision. 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. 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. This Court 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." (foot note omitted)

[35] When a company is under business rescue, the business rescue practitioners cannot be sued for the payment of salaries due and payable, provided they did not act within the purview and the requirements of the Act.

[36] When a party seeks leave to institute legal proceedings against business rescue practitioners in their representative capacities, he or she has a very high hurdle to overcome.

[37] In my mind, it should be proven that they acted unlawfully, unfairly, and that the practitioners did not act in the interest of the creditors. It should also not be forgotten that business rescue is also subject to the court's supervision, and the practitioners have a duty to act fairly and honest as well as lawfully.

Has clause 11.3 of the employment agreement been triggered?

[38] I am quite aware of the sanctity of contract, however, in a situation involving business rescue, an acceleration clause cannot be used to mitigate the risk of retrenchment or the risk of not being paid the full remuneration. The fact of the matter is that an acceleration clause cannot be used or relied on by a contracting party as a protection against the harsh and unpredictable effect of business rescue, on a pretext of enforcing the terms of the agreement.

[39] I hasten to add that, in the instant case, the Respondents assert that the Applicant could not be paid because there were insufficient funds to do so; therefore, it is untenable that it can be suggested that the business rescue practitioners can be said to have acted unlawfully when the situation of the company did not allow them to.

[40] The Applicant asserted in his papers that he is aware that the company was in a position to pay his full salaries when it failed to do so. The Respondents vehemently denied this assertion by the Applicant. The assertion by the Applicant in this regard was his mere say so. There was no evidential material to back this up. Therefore, the denial of the Respondents should prevail.

[41] Evidently, in this case, there is no scintilla of evidence to demonstrate that the Respondents acted unlawfully when they failed to pay the Applicant his full remuneration. In a business rescue situation, the fact that an employee is not paid his salary in full does not necessarily imply that the business rescue practitioners have acted unlawfully. Particularly, if there is no evidence to show that they acted unlawful or wilfully.

[42] Additionally, in the context of this case, the Respondents' contention that special circumstances warranted that the Applicant not be paid his full salary makes absolute sense. Failure to honour salary obligations on time, when a company is under business rescue, is unfortunately an inherent part of business rescue. Hence,

when a company is in distress, employees might be retrenched before the expiration of their contract term. Of course, specific channels and procedures must be followed when retrenchment and failure to honour terms of contracts are going to be done.

[43] It is needless to say that in this matter, it is not in dispute that the Applicant is still an employee of the Joburg Skyscraper. The necessary implication, which is raised by this, is that it imports that the agreement between the Applicant and Joburg Skyscraper was not terminated. The gravamen of the Applicant's complainant is that he did not get his full monthly payments, hence he is of the view that the Respondents acted unlawfully.

[44] Why should this court make a declaratory order that the company is indebted to the Applicant, yet the Applicant is continuing with his employment? It does not at all follow that clause 11.3, has been triggered, whereas, the Applicant is currently in the employ of the company.

[45] Of course, this begs the question as to whether under the circumstances of this case, whether it would be fair and equitable to declare that the Joburg Skyscraper, under business rescue, is indebted to the Applicant in the amount of R2 516 458 71 as at 26 October 2021. The answer to this question is no. There is absolutely no justification in this matter to do so. To do so will be a glaring leap of logic.

[46] In my view, in the circumstances of this case, termination of the agreement is a necessary ingredient required to trigger the provisions of clause 11.3, even if this court was inclined to find that the Respondents unlawfully breached the terms of contract. Clearly, if there is termination of the agreement there will be an ending date. If there is no termination of the contract, it will not be possible to claim the remainder of the contract, as the employee would still be enforcing the contract.

[47] Contrary to the Applicant's attempts to give a generous broad meaning to clause 11; on the face of clause 11, and looking at the language used in clause 11, it is quite apparent that an employee cannot claim that the terms of clause 11.3, have taken effect, whilst he or she is still in the continuous employ of the company. Clause 11.3 presupposes termination of a fixed term prematurely. That being so, contrary to the Applicant's belief, an employee cannot claim remainder of a term of service yet he/or she is still in service. It is not logical that the Applicant seeks a declaratory order to the effect that the company is indebted to him yet he has remained in continuous service with the company, through the business rescue, and did not terminate the agreement.

[48] In the context of this case, the acceleration clause has not been triggered. For that matter the Applicant felt that the actions of the Respondents fell within the ambit of clause 11.3, nothing prevented him from terminating the agreement even though the company was under business rescue. See in this regard *Murray N.O. and Another v Firstrand Bank Ltd t/a Wesbank* (20104/2014) [2015] ZASCA 39; 2015 (3) SA 438 (SCA) (26 March 2015), at 34-35, whet the following is stated:

"[34] . . . [B]ut for the sake of completeness I will succinctly deal with the remainder of the reasons for my conclusion. I have in paragraph 14 above, alluded to the purpose of the moratorium in s 133(1) of the Act, namely to provide a company in distress with the crucial breathing space to enable it to restructure its affairs. I accept, as stated in Henochsberg at 478(6), that the intention of the moratorium is to cast the net as wide as possible in order to include any conceivable type of action against the company. The liquidators submit that, having regard to this purpose, it would result in the inevitable demise of business rescue proceedings if any creditor is allowed to cancel any contract with a company under business rescue. Therefore, they contend that the net is cast so wide by means of s 133(1) of the Act as to include a moratorium against a creditor cancelling an agreement with a financially distressed company under business rescue.

[35] I do not agree with this submission."

[49] In this case, there are no basis whatsoever why the relief sought by the Applicant, should be granted.

[50] In the result, the following order is made:

Application is dismissed with costs.

CN NZIWENI
Acting Judge of the High Court

Appearances

Counsel for the Applicant:	Adv M Seale SC
	Adv A Walters
Instructed by	Kemp Nabel Attorneys
	CR Nelson
Counsel for the Respondents:	Adv R Goodman SC
Instructed by	
For First Respondent	Jacques Du Toit N.O.
	C/O Mazars
Instructed by	Bowman Gilfillan Inc
For Second Respondent	J De Hutton