REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-00336

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

8/7/2024
DATE

[redacted]
SIGNATURE

In the matter between:

RAYMOND ANTHONY PARKES	First Applicant
JOHANNES PHILIPPUS ENGELBRECHT	Second Applicant
ATVANCE FUNDING (PTY) LTD	Third Applicant

and

ATVANCE PROPERTY HOLDINGS (PTY) LTD (IN LIQUIDATION)	First Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent
FIRST NATIONAL BANK – A DIVISION OF FIRSTRAND BANK LIMITED	Intervenor

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 12h00 on 8 July 2024.

Order: Para [28] of this judgment.

JUDGMENT

TODD, AJ:

[1] The Applicants brought this application seeking an order that the First Respondent be placed under supervision and for business rescue proceedings to commence in terms of the provisions of section 131(1) read with section 131(4)(a) of the Companies Act, for the appointment of a business rescue practitioner and ancillary relief.

[2] First National Bank, a division of Firstrand Bank Limited (referred to further here as "**FNB**"), applied to intervene in the proceedings, and opposed the relief sought by the Applicants. Although the application to intervene was initially opposed by the Applicants, their opposition was withdrawn by notice dated 20 December 2023. I was satisfied that a proper case was made out for the intervention and joinder of FNB, and I include an order to that effect, below.

[3] The First Respondent is a property holding company whose major creditor is FNB in consequence of a written loan agreement under which FNB advanced to the First Respondent the sum of R20 million in loan funding.

[4] The First Respondent used the proceeds of the loan to acquire a commercial property, which is its only material asset.

[5] Between June and September 2022 the First Respondent defaulted on its monthly loan repayment instalments for a consecutive period of four months. This resulted in an indebtedness to FNB at that stage in an amount of just under R17 million.

[6] On 2 November 2022 the directors of the First Respondent placed the company into business rescue.

[7] In mid-December 2022 the business rescue practitioner concluded that there was no reasonable prospect that the company could be rescued and brought an application for the termination of the business rescue proceedings and to place the First Respondent into liquidation.

[8] Not satisfied with the pace at which that application was progressing, FNB launched an urgent application on 2 February 2023 seeking the liquidation of the First Respondent. This resulted in an order of this Court dated 21 February 2023 under which the First Respondent was finally liquidated in terms of section 130(5)(c)(i) of the Companies Act.

[9] The Applicants responded to this by bringing the present application, with the objective of placing the First Respondent back into business rescue.

[10] On 18 April 2023 FNB brought its application as an intervening creditor and simultaneously delivered an answering affidavit in which it opposed the main application.

[11] Mr d'Oliveira, who appeared for FNB, submitted that it is apparent from the sequence of events preceding the application, including in particular the fact that the Applicants had elected not to oppose the liquidation application argued on 21 February 2023, and from the manner in which the Applicants subsequently prosecuted the application or, more accurately, failed to prosecute it timeously, that the application had been brought for an ulterior motive as part of a stratagem to delay the liquidation process or to delay the process under which one or more of the Applicants may ultimately be held to account for the affairs of the First Respondent.

[12] The Applicants had failed to deliver a replying affidavit when it was initially due, on 4 May 2023, and thereafter took no further steps to pursue the matter by preparing an index, delivering heads of argument and taking the other steps required under this Court's Practice Directives to get the matter heard.

[13] In consequence FNB took those steps, as intervenor, delivering a consolidated index, its heads of argument, practice note, chronology and list of authorities on 30 May 2023. The Applicants were required to deliver their heads of argument, practice note, chronology and list of authorities by 13 June 2023. After giving an extension of time within which they should do so, FNB delivered an application to compel the delivery of the Applicants' heads of argument. This was on 28 June 2023.

[14] When a notice of set down for the application for compel was served on 11 August 2023, the Applicants filed answering affidavits dealing with the application to intervene and the application to compel. This required FNB to prepare for opposed interlocutory applications dealing with its application to intervene and to compel the Applicants to deliver their heads of argument in the main application.

[15] During December 2023 the parties' attorneys concluded an agreement in terms of which the Applicants withdrew their opposition to the joinder of FNB as an intervenor, and tendered the wasted costs of their opposition; and the Applicants undertook to deliver a replying affidavit in the main application by 15 December 2023 and heads of argument in the main application by 16 January 2024.

[16] Ultimately the Applicants delivered a replying affidavit by 16 January 2024, but failed to deliver heads of argument in the main application. Their attorneys of record filed a notice of withdrawal on 21 May 2024, a week before the hearing of the application, and there was no appearance on their behalf when the matter was argued on 28 May 2024.

[17] Mr d'Oliveira submitted that the evidence in the proceedings supported none of the five pillars on which the Applicants founded their contention that there was a reasonable prospect that the First Respondent's business could be rescued. He referred to *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*[1] where, at paragraphs [29] and [30] of the judgment, the Supreme Court of Appeal made the point that a finding that

[1] [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA)

there is a reasonable prospect for rescuing a company must be based on reasonable grounds established by evidence.

[18] In the first instance, Mr d'Oliveira submitted, there was no reasonable prospect of rescuing the First Respondent without its major creditor, FNB, agreeing to some form of leniency or restructuring of the debt due to it. It is clear, on the evidence as reflected in the answering affidavit, that the bank as a matter of fact has no appetite for revisiting the terms of the debt due to it. There is no case made out in the papers that this stance is unreasonable or *male fide* (cf *Oakdene supra* at paragraph [38]). I agree that this, by itself, indicates that there is no reasonable prospect of rescuing the company.

[19] Second, in the founding papers the Applicants suggested the potential of significantly increased rental income from the property, citing various enquiries which they stated were attached to the replying affidavit, but were in fact not so attached. Despite the Applicants making a general assertion that in the post-covid era commercial property rentals were improving, there is no evidence to suggest that this was so in the case of the First Respondent's property which, the evidence in fact shows, requires large scale renovation before being fit to lease. On this ground too, Mr d'Oliveira submitted that there was no factual basis for the contention that there were reasonable prospects of rescuing the company. I agree.

[20] Next, as the third pillar of their case, the Applicants rely on the possibility of outdoor advertising in respect of which a specified contractor was said to have expressed interest. The expression of interest attached to the founding papers, however, dated back to 2019. No evidence was put forward of any ongoing interest or opportunity other than the deponent's assertion in the replying affidavit that to suggest otherwise "defies logic".

[21] In any event, as Mr d'Oliveira pointed out, the revenue which the Applicants contended might possibly be generated by outdoor advertising would not have covered the original repayments due to FNB, even assuming the bank had been interested in restructuring the company's debt.

[22] Next, under the fourth pillar of their case, the Applicants contend that the intended business rescue practitioner had already introduced an investor who might be willing to invest in the property. In support of this, however, a letter was put up which, only in the vaguest terms, expressed an interest in a 50% investment in the First Respondent, whatever that might mean. In response to this concern being pertinently raised in the answering affidavit, the Applicants made no reply.

[23] Finally, the Applicants contend that in a liquidation scenario there is a significantly reduced possibility of realising an appropriate commercial value for the immovable property, which is the sole asset of the First Respondent, as compared to what might be achieved in a business rescue scenario. But, as Mr d'Oliveira pointed out, the Supreme Court of Appeal (in *Oakdene, supra, at paragraph [34]*) rejected this argument, raised in that case too, as resting on no more than speculation.

[24] In the circumstances I am satisfied that no case is made out in the papers for the relief sought by the Applicants, and that the application should be dismissed.

[25] Mr d'Oliveira submitted that this was an appropriate case in which punitive costs should be awarded. In support of this submission, he pointed to the manifest lack of merit in the application coupled with the Applicants' failure to proceed with the matter as and when required. The failure to proceed with the application with reasonable expedition applying the rules of this Court suggested, Mr d'Oliveira submitted, that the Applicants knew there was no merit in the application in the first place or had no confidence in it, and he submitted that I could draw the inference from this, and from their conduct in prosecuting the application, or in not doing so, that the application had been brought for an ulterior motive.

[26] It follows, Mr D'Oliveira submitted, that the application was part of a stratagem reflected in a pattern of conduct that brought the matter within the ambit of the situation described in *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd*[2], and in particular paragraphs [21] and [22] of that judgment.

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[2] [2019] ZASCA 7; 2019 (4) SA 532 (SCA)

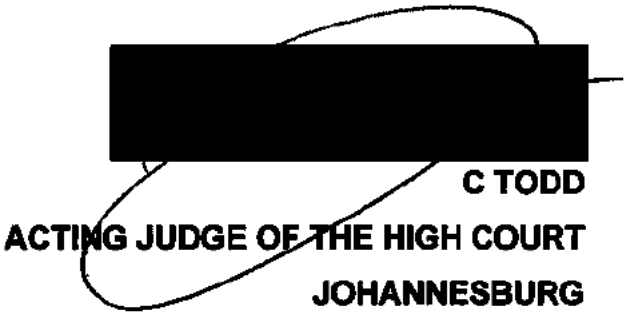
[27] Although there is no suggestion in the present matter, as there was in *Van Staden*, that the ulterior motive pursued by the Applicants involves "squirreling away of assets" – the immoveable property is the only material asset of the First Respondent - I am satisfied that the application both in its timing and in the Applicants' conduct of it constitutes an abuse of the process of this court and an abuse of the business rescue procedure of a kind that is intended to delay winding up or to delay the process under which those behind the First Respondent's business operations may be held to account for their stewardship. That being so, I am satisfied that a punitive costs order is appropriate.

[28] In the circumstances I make the following order:

1. The intervening creditor (FNB) is granted leave to intervene in the application.

2. The application (for business rescue proceedings to commence in terms of the provisions of section 131(1) read with section 131(4)(a) of the Companies Act) is dismissed.

3. The costs of the application, including those arising from the application to intervene, are to be paid by the Applicants jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.



C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing:	28 May 2024
Date of Judgment:	8 July 2024

APPEARANCES

Counsel for the Applicants:	no appearance
Counsel for the Intervenor:	Advocate AJ d'Oliveira
Instructed by:	Cox Yeats