IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. D841/2019

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA LTD	Applicant
and	
HARRY SPAIN N.O.	First Respondent
MASIPHUZE TRADING (PTY) LTD	Second Respondent
(in business rescue)	
JOHN RUSSELL GOLDREICH	Third Respondent
WILLIAM PATRICK O'DRISCOLL	Fourth Respondent
ECOLAB (PTY) LTD	Fifth Respondent
H WASSINK	Sixth Respondent
HYCHEM KWAZULU-NATAL (PTY) LTD	Seventh Respondent
METRO FILE	Eighth Respondent
MICHAEL SMITH AND ASSOCIATES	Ninth Respondent
SOUTH AFRICAN REVENUE SERVICES	Tenth Respondent
SIR JUICE	Eleventh Respondent
SPRINGBOK FOODS	Twelfth Respondent
THE EMPLOYEES	Thirteenth Respondent

ORDER

The application is dismissed with costs.

JUDGMENT

Chetty J:

1. This is an application by the Airports Company of South Africa Ltd which is a state owned entity in terms of the Public Finance Management Act 1 of 1999 ('the PFMA') and the owner of the premises known as King Shaka International Airport in KwaZulu-Natal ('the airport'). The second respondent, Masiphuze Trading (Pty) Ltd, which carries on business as a Wimpy restaurant ('the restaurant') in the departures section of the airport. It was placed under business rescue following a resolution taken on 4 September 2017 in terms of s 129 of the Companies Act 71 of 2008 ('the Act'). The first respondent was appointed as the business rescue practitioner ('the practitioner') to the restaurant.

2. This application is brought in terms of s 133(*a*) and (*b*) of the Act, requiring leave of the court to institute proceedings against the second respondent, despite a moratorium in place pursuant to the second respondent being placed under business rescue. Relief is only sought against the first respondent, while the remaining respondents are the directors of the second respondent, the creditors of the restaurant as well as its employees. It is now trite that the purpose of business rescue proceedings is to provide an ailing business with sufficient 'breathing space' in order to appoint a practitioner, one of whose main tasks it is to implement a business rescue plan in order to usher the entity out of the financial predicament it currently faces, guiding it to financial viability. See *Chetty t/a Nationwide Electrical v Hart & another NNO* 2015 (6) SA 424 (SCA) para 29.

3. The applicant seeks an order compelling the practitioner to comply with his obligations pursuant to sections 141(2)(*b*)(ii) and 152(8) of the Act. In so doing, the

applicant effectively seeks to compel the practitioner to either file a notice of the termination of the business rescue proceedings, alternatively a notice that there has been substantial implementation of the business rescue plan ('the plan'). It is clear from the aforegoing that the onus rests with the applicant to persuade this court on the probabilities, that it is entitled to such relief, notwithstanding the second respondent still being under business rescue. The main contention of the applicant is that the second respondent has been able to generate a sufficient cash income to settle those debts which have been admitted, and that it is now trading profitably. A lease agreement has been concluded as part of the plan, allowing the second respondent to remain at the premises at the airport until a tender process for the lease of the premises has concluded. That apart, the applicant contends that the protection which the second respondent was afforded under the plan, should now come to an end.

4. This application largely hinges on an interpretation of sections 133(1), 141(2) and 158 of the Act. The 'breathing space' referred to above is provided for in s 133(1) which reads 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.' (my emphasis)

5. In attempting to persuade the court to grant 'leave' to institute proceedings not against the second respondent, which is the subject matter of the rescue proceedings, but against the practitioner, it was submitted that no adverse impact would be visited on the second respondent if the application is granted as the restaurant is on its way to financial recovery, and is no longer financially distressed. On the contrary, if no relief were granted to take the second respondent out of business rescue, the second respondent's creditors, including the applicant, would suffer severe prejudice. In this regard the applicant contends that the second respondent has remained under the cloak of business rescue since September 2017 and wishes to continue, without any end in sight, in a similar vein. In this regard s 132(3) provides the following:

'If a company's business rescue proceedings have not ended *within three months* after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must- (a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and (b) deliver the report and each update in the prescribed manner to each affected person. . .' (my emphasis)

6. In light of the first respondent continuing to remain ensconced since September 2017, the applicant considers that the only manner in which the practitioner may be removed from office would be pursuant to an order directing him to file a notice contemplated either in terms of s 141(2)(*b*)(ii) or s 152(8). The former provides the following:

'If, at any time during business rescue proceedings, the practitioner concludes that (a*) there is no reasonable prospect for the company to be rescued,* the practitioner must-

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;'

'If, at any time during business rescue proceedings, the practitioner concludes that—

(b) there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and—

(i) . . .

(ii) . . . file a notice of termination of the business rescue proceedings;

The latter section reads as follows:

'When the business rescue plan *has been substantially implemented*, the practitioner *must* file a notice of the substantial implementation of the business rescue plan.' (my emphasis)

7. The onus therefore rests on the applicant to prove that either there are no longer reasonable grounds to believe that the second respondent remains financially distressed, alternatively, that the plan has been substantially implemented. The process to terminate the business rescue proceedings, properly interpreted in terms of the Act, would require a two-stage approach. First, the court would, in its discretion, have to grant leave to an applicant to bring the application, and thereafter, it must convince the court that an order in terms of s 141(2)(*b*)(ii) or 152(8) is

justified. I am in agreement with the applicant that sound economic sense would dictate that the two-stage approach should be collapsed into one, particularly where the enquiry in both phases is based on the same set of facts. In any event, in order to assess the first part of the application (whether to grant leave in terms of s 133(1)(*b*)) this would entail a consideration of the prospects of the main application, pursuant to s 141 and 152. I am satisfied that the relief sought in prayer 1 of the notice of motion is competent and may be considered at the same time in respect of the further relief sought.

8. Turning to the merits and background leading to this application, the applicant and the second respondent entered into a lease agreement in August 2009 in respect of the premises at the airport, from which the restaurant carries on business. The agreement was to commence in May 2010, with the termination date being 30 April 2015. During the course of the lease, the second respondent fell into arrears with its rental, resulting in the applicant instituting action against the second respondent in August 2015. That action has still not been finalised, despite the business rescue only coming into operation three years' later. I am not aware of reasons why this claim for arrear rental has not reached finality.

9. At the end of April 2015 when the lease agreement would have run its course, the second respondent continued to remain in occupation of the premises, resulting in the applicant instituting an application for its eviction. This application was instituted in July 2015 and this too has not been finalised. Again, I am not aware of the reasons why it has taken such an inordinate period of time for the matter to reach finality. As such, the applicant claims a cause of action in respect of outstanding rent as well as a claim for eviction from commercial premises.

10. In September 2017 the directors of the second respondent took a resolution placing the second respondent under voluntary business rescue. Pursuant thereto, the first respondent was appointed as the business rescue practitioner. In light of its claims based on arrear rental and eviction, the applicant contends that it is an 'affected person' for the purposes of s 128 of the Act.

11. In accordance with his obligations under the Act, the first respondent called meetings of all affected parties, including creditors. The applicant was represented by two attorneys from Garlicke and Bousfield. Meetings were held on 15 May 2018, 8 June 2018 and 25 June 2018. A further meeting was held on 23 July 2018 at the offices of the applicant's attorney for the purpose of adopting a plan. According to the minutes of the meeting, the first respondent was informed that the applicant's attorney was not available (despite the meeting being held at the applicant's attorneys' offices). The meeting went ahead and the plan was duly voted on and approved by those present. After the conclusion of the meeting, a representative of the applicant's attorneys arrived and contended that there had been a mis-communication as to the availability of the applicant's attorney. The first respondent took the view that as the plan had been voted on and adopted, he was *functus officio* and did not have the power to set aside that decision. One of the issues that concerned the applicant is that as a result of its non-attendance at the meeting, the claims of other creditors were admitted, and its claim was not. A consequence of the applicant's claim not being admitted upon the adoption of the plan is that the applicant's claim, as contended for by the second respondent, becomes extinguished in terms of s 154(2) of the Act. The question, which admittedly is not before me, is whether the applicant continues to have a claim for arrear rental even if the second respondent comes out of business rescue, having regard to the provisions of s 154(2). As to the applicant's second claim for the eviction of the second respondent, s 152(4) refers to a 'debt'. I would assume a 'debt' excludes a claim for eviction.

12. Whatever the applicant's concerns are in relation to the validity of the plan adopted on 23 July 2018 or the procedure which preceded its adoption, the plan was never challenged nor set aside by a court. On that basis, I must assume that the plan adopted was in accordance with the Act and is therefore binding on all parties until set aside. However, it would be overly simplistic to attribute the applicant's claim not being recognised only as a result of its non-attendance. A perusal of the minutes of the earlier meetings called by the first respondent reflect that there was no agreement on the actual amount of the applicant's claim, although the latter indicated to the first respondent that its claim was for the amount of R5 384 071.

13. The applicant contends in its founding papers that a perusal of the plan reflects that, of the total owed to concurrent creditors at the time of the plan's adoption, being the amount of R5 749 538, an overwhelming portion comprised the applicant's claim (the sum of R5 603 563), which had been rejected. As stated above, the minutes of the meeting reflect that there was no unanimity as to the computation of the applicant's claim. The claim of the South African Revenue Service which had been admitted, was paid, ostensibly to enable a tax clearance certificate to be issued to allow the restaurant to trade whilst under business rescue. The plan also catered for the payment of the salaries of 61 employees, with the meeting on 15 May 2018 recording that certain retrenchments had taken place and a director removed, thereby resulting in a reduction of the salary bill. On a broad reflection of the minutes, the plan set out by the practitioner charters a course for rent to be promptly paid, and makes provision for payment of arrear rentals on a monthly basis, with the aim to restore the second respondent to a financially viable position.

14. Mr *Topping* SC, who appeared for the applicant, submitted that if one has careful regard to the plan, based on the projections of the first respondent, by the end of February 2019, almost seven months from the date of adoption, the first respondent projected a cash surplus of R 1 603 113. The applicant also complains that the first respondent failed to deliver monthly reports following his appointment. The requirement to provide reports is specifically provided for in s 132(3) of the Act. This has not been advanced as a ground for the relief sought. The applicant submits that the rescue proceedings are open-ended and it (the applicant) is left 'in the dark' as to when these proceedings would come to an end. The main ground of complaint is that the cash flow position of the second respondent, as reflected in the accounts attached to the plan, which are not disputed by the second respondent, are inconsistent with an entity remaining under business rescue. The second respondent would have, by the time the application was launched, generated sufficient income to be able to settle its admitted debts. Consequently, the first respondent ought to have filed a notice in terms of s 141(2)(*b*) that, in his view, there 'no longer are reasonable grounds to believe that the [second respondent] is financially distressed'.

15. There is however a twist in the plan, in that it provides for the continued operation of the business premises by the second respondent at the airport, despite the applicant having already instituted proceedings seeking the second respondent's eviction from the site. Mr *Topping* further submitted that the first respondent was not entitled to restructure the second respondent's affairs in a way which seeks to appropriate or utilise assets over which the second respondent has no lawful claim. To the extent that the second respondent alleges the existence of an agreement with the applicant that allows it to remain in occupation until a tender process, which was initiated by the applicant, has run its course, counsel submitted that such an agreement would be invalid and unlawful having regard to the absence of a fair and transparent tender process in terms of the PFMA. In any event, it was pointed out that the tender was subsequently cancelled in December 2018. It is unclear on what basis the cancellation is being challenged by the second respondent.

16. The upshot of this all is that as far as the applicant is concerned, the second respondent occupies the business premises at the airport unlawfully and without a valid lease. The second respondent disputes that its occupation is unlawful. I deal with this issue below, as it appears to me to be pivotal to the outcome of this application.

17. In light of the lease agreement being the subject of proceedings which have already been instituted in this court prior to the second respondent going into business rescue, it is submitted by the applicant that the moratorium which the second respondent enjoyed against the institution of legal proceedings, should now come to an end. On the basis of the projections by the practitioner, the applicant submits that there is a 'substantial indication' that the second respondent is no longer in financial distress. Accordingly the first respondent should be directed to issue a notice pursuant to s 141(2)(*b*)(ii), alternatively a notice in terms of section 152(8).

18. Insofar as second respondent's reliance on an agreement to occupy the business premises, the best evidence of this, generally, is a lease agreement. In the absence thereof, it would be contended that the second respondent has no lawful basis to occupy the premises. I am aware that the eviction is the matter of a dispute

pending before this court. It is not an issue which is before me for determination. However, one of the main grounds advanced for the continuation of the plan rests on whether or not a lease agreement is in place which enables the second respondent to operate its restaurant at the airport. The point advanced by the applicant is that the second respondent relies on an extension of the previous lease, based on correspondence exchanged between the parties. The applicant contends that the lease agreement was breached during its term, but in any event, it endured only until 30 April 2015. Accordingly, the lease agreement between the applicant and the second respondent came to an end on 30 April 2015. No exchange of correspondence thereafter could serve to resuscitate that agreement. As stated earlier, the second respondent does not contend that a new written agreement of lease was concluded, but relies on a letter from the applicant's attorney dated 4 April 2016 indicating that:

'. . .[the applicant] will allow [second respondent] to remain on the premises until such time that [the applicant] appoints a new tenant for the premises alternatively [second respondent] vacates the premises prior to the appointment of a new tenant by [the applicant]. Either party must give the other a month's notice to vacate the premises.'[1]

This offer was conditional upon the second respondent signing a consent to eviction as part of the settlement, and that any eviction application would be held in abeyance pending the appointment of a new tenant. The offer was accepted by the second respondent two days after it was made. The invitation put out by the applicant for a tender was cancelled in December 2018, and the papers provided no insight as to how far this process has gone. As such, the second respondent remains in occupation of the business premises, and I am advised my Mr *Wallis* who appeared for the first and second respondents, that the second respondent continues to pay its rental as it falls due.

19. In the course of the meeting on 15 May 2018 the practitioner mentioned that 'security of tenure was necessary for the continuation of the business'.[2] This causes me to return to the point advanced by Mr *Topping* that the practitioner was not entitled to utilise or appropriate the assets of the applicant (who was not even

[1] First and second respondents' answering affidavit, para 35, at 77-78 of the indexed papers.
[2] Annexure 'AA1' to first and second respondents' answering affidavit at 94 of the indexed papers.

admitted as a creditor) as part of the plan. Again, I must point out that as attractive as it may be to venture into this enquiry, this is not an issue that I am required to determine.

20. At the time when the meeting was held in May 2018, the original lease agreement had expired three years prior. The attorney representing the applicant pointed out that the applicant, being a State Owned Entity (SOE), was obliged to follow fair tender procedures before concluding any contract for goods or services. I assume that he was referring to various statutorily prescribed procedures relating to procurements, such as the PFMA. The applicant stood firm, contending that it was not prepared to enter into any lease agreement but would allow the second respondent to occupy the premises until July 2018. This however is inconsistent with the unanimous decision of parties at the meeting on 15 May 2018 which resolved that the second respondent would be allowed to remain in occupation of the premises 'until an award [is] made in terms of the tender which had been advertised'.[3] The tender has been cancelled and I am advised that this cancellation is itself the subject of litigation. Mr *Topping* submitted that the decision for the restaurant to remain in the premises (in accordance with the decision at the business rescue meeting) is incorrect in law and relied on *Municipal Manager: Qaukeni & another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23, where the court said the following :

'This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act: see *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) ([2003] 3 All SA 21)] at para 10. . . .in *Premier, Free State and Others v Firechem Free State (Pty) Ltd*, supra, Schutz JA, concluded in giving the unanimous judgment of this court, concluded that "the province [the appellant] was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist [the respondent's] attempts at enforcement".'

21. On the issue of the invalidity of the agreement relied on by the second respondent, Mr *Wallis* submitted that even if the agreement did not comply with the

[3] Ibid.

relevant statutory prescripts, it remains valid and binding until set aside. He relied on *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] 3 All SA 1 (SCA).

22. I agree with Mr Topping that the applicant has a duty in terms of s 217 of the Constitution to follow a fair process in concluding a lease extension – see *Airports Company South Africa Soc Ltd v Imperial Group Ltd And Others* 2020 (4) SA 17 (SCA). However, I do not agree that the apparent position of the (unlawful) extension of the lease agreement can simply be ignored. My understanding is that it must be set aside by a court after a direct or indirect review (collateral challenge). The difference in *Qaukeni* is that a counter-application was brought to indirectly review, by way of a collateral challenge, the attempted enforcement of an unlawfully concluded contract. In the present matter, no such counter-application or collateral challenge has been raised, which is why Mr Wallis contends that *Oudekraal* applies, and the agreement to extend the lease (if concluded) remains valid until set aside. In *MEC: Police, Roads and Transport (Free State Provincial Government) v SMEC South Africa (Pty) Ltd* (A46/2018) [2019] ZAFSHC 59 (30 May 2019) reliance had been placed on the *Firechem* judgment. The court in *MEC Police* found that:

'The facts in *Firechem* differ completely from the present case and Mr Georgiades is not correct to submit that *Firechem* is authority that an organ of State can merely plead unlawfulness in situations like the matter before us without resorting to either a counter-claim or a review application.'

23. Although the present matter concerns the effect of a lease agreement purportedly concluded with an SOE, *Oudekraal* is possibly relevant because even if the decision is not labelled an 'administrative action' in terms of PAJA – the principle of legality still applies if the applicant was peforming a statutory or public function in leasing out the premises. If the decision to extend the lease was done contrary to s 217 of the Constitution, then it is vulnerable to be set aside. See *Airports Company South Africa Soc Ltd v Imperial Group Ltd And Others* (supra). Applying the principle of *Oudekraal* until the decision to extend the lease is set aside, it stands.

24. Mr *Topping* submitted that the view in *Qaukeni* at para [26] supported the applicant's case. Here the court held that:

'While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard.'

25. However, my interpretation of *Qaukeni* is that it is not necessary for a municipality or organ of state to bring a direct review to challenge an unlawfully concluded contract. It is sufficient for a collateral challenge or an indirect challenge to be mounted by way of a counter-application. Thus, the court found that a review was necessary, but that it need not have been a direct review, and that an indirect review would suffice. It was established in *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 140 that state organs are entitled to raise collateral challenges to their own unlawful decisions. The applicant in the present matter has not sought to review the allegedly unlawful decision, thus the applicant cannot complain that it is being held to an unlawful agreement.

26. The position in *Qaukeni* is different from the facts before me as the lease relied on by the second respondent has been either concluded with the applicant (albeit contrary to statute) alternatively, imposed by the practitioner pursuant to a decision taken in the context of business rescue proceedings. As stated earlier, no explanation is tendered why the applicant has not sought to set side either the plan or decisions stemming therefrom. The second respondent submits that the reason for this is because the applicant *agreed* with the decisions taken by the practitioner, particularly for the second respondent to remain in occupation pending the outcome of the tender process.

27. The issue to be determined, on the papers before me, is whether the applicant has made out a case that the second respondent is no longer in financial distress. If so, the practitioner is obliged to issue the notice contemplated in paragraph 2 of the notice of motion. It is trite that an applicant must make out a case for relief in its founding papers. The only part of the applicant's papers which seek to grapple with this issue is at paragraphs 45(f) to (i); 46; 46 and 48. The applicant's contention that the second respondent is no longer financially distressed is based on assumptions drawn from the plan and the financial indications therein. The high-

water mark of the applicant's case seems to be the conclusion in its founding affidavit that:

'. . . having regard to the projected cash flow surplus reflected in the business plan, it must be concluded that the Second Respondent must have, by now, generated sufficient cash income to settle admitted debts due by it as recorded in the business rescue plan.'[4]

28. This is hardly a sufficient basis for the court to conclude that the second respondent is no longer in financial distress. Mr *Wallis* submitted that the issue of whether or not the second respondent is in financial distress must be ascertained by having regard to the actual financial statements of the company as opposed to what is predicted in terms of cash flow projections. The contention advanced by counsel, as I understood it, is that the viability of a business operating under a plan must be determined not by strict interpretation of the plan, but rather by a sensible interpretation of the actual performance of the business. It would be safe to assume that where a practitioner believes that there is a 'reasonable prospect' of a company being rescued this would, as stated in *Henochsberg*, be an expression of an 'opinion as to whether there is a reasonable prospect of rescuing the company'.[5] The true test of the liquidity or otherwise of a business can only be assessed by having regard to the 'actuals' in terms of cash flow statements and the ability of the business to meet its day to day expenses.

29. As to whether there has been substantial compliance with the plan in terms of s 132(8) of the Act, this is an enquiry which must be answered having regard to whether the business is able to achieve a commercially viable outcome. The practitioner must have 'taken all necessary steps to satisfy the conditions on which the business rescue plan is contingent.'[6] In *Meatworld Factory CC v ET Trading House Pty Ltd & another* 2019 JOL 45224 (GJ) the requirement of 'substantial implementation' was interpreted to mean that the business rescue plan as approved must have been finally executed.[7] It is stated in *Henochsberg* that this:

'. . . wide interpretation may not be correct because after compliance with conditions and compliance by the business rescue practitioner with his/her obligations in terms of the

[4] Founding affidavit, para 54, at 26 of the indexed papers.
[5] Delport *Henochsberg on the Companies 71 of 2008* (May 2020) SI 22 at 525.
[6] Ibid at 529.
[7] Ibid.

business rescue plan, he/she is *functus officio* and has no role to play in the execution and/or enforcement of the plan.'[8]

30. Once the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the plan. In *Arqomanzi Proprietary Limited v Vantage Goldfields (Pty) Limited* 2019 JDR 2506 (MN), para 106, the court stated:

'This does not mean that everything that was set out to be implemented was indeed implemented. The threshold the Act provides is substantial implementation. It therefore presupposes that although substantially implemented, some steps may still need to be implemented.'

31. In determining whether the plan has been substantially implemented, the court should adopt a sensible interpretation of the documents placed before it, without attempting to analyse the plan in such detail that the scrutiny under which it is placed results in the plan having no practical effect. See *Panamo Properties (Pty) Ltd & another v Nel & others NNO* 2015 (5) SA 63 (SCA). It is also useful to bear in mind that in terms of s 5 of the Act, the provisions of the Act must be interpreted and applied in a manner that gives effect to the provisions of s 7 of the Act, which sets out the purposes of the Act. Amongst those are sections 7(*b*)(i) and (*k*) which provide that the purposes of the Act are to 'promote the development of the South African economy by . . . encouraging entrepreneurship and enterprise efficiency' as well as to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'. These aims are best achieved by affording a practitioner the necessary time and breathing space to return a distressed business to an even keel. This is certainly not suggestive of an open-ended opportunity to turn affairs around. On the other hand, a premature end to business rescue, more often than not, could plunge a business into insolvency rather than achieving an efficient rescue.

32. Mr *Wallis* submitted that inasmuch as the plan provides for the restaurant to operate from the applicant's premises, until the tender is finalised, there can therefore be no substantial implementation of the plan until there is a finalisation of the tender process. As stated above, there is nothing before me to indicate how far

[8] Ibid.

this process has gone. There is also nothing before me in terms of the negotiations towards the conclusion of a lease between the applicant and the second respondent, as directed in terms of the plan.

33. In the result I am satisfied that the applicant has not discharged the onus of establishing that the first respondent has achieved substantial implementation of the business rescue plan. The applicant's complaint against the practitioner, in my view, seems to be less about there being 'substantial implementation' with the plan and more about the fact that it is unfair for the second respondent to essentially 'hijack' the applicant's property until the tender process is concluded despite it (apparently) no longer being in financial distress. If this was the case, the applicant should have brought an application to set aside the plan.

34. In the result I make the following order :

The application is dismissed with costs.

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M R CHETTY

Appearances

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Date reserved	18 May 2020
Date of judgment	1 September 2020