REPUBLIC OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURTS

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

CASE NO: 15185/22P

In the matter between:-

GLEN VIVIAN USHER N.O. APPLICANT

and

ABRINA 284 (PTY) LIMITED (IN BUSINESS RESCUE)
(Registration No. 2004/034518/07) RESPONDENT

LESLIE JOHN BOTHA INTERVENING CREDITOR

JUDGMENT

A. M. ANNANDALE, AJ:

[1] The respondent was placed in business rescue in March 2020 pursuant to an application brought by the intervening creditor, who is its sole director and one of the

trustees of the trust which owns its shares. The applicant is the company's duly appointed business rescue practitioner.

[2] This is an application in terms of section 141(2)(a)(ii) of the Companies Act 71 of 2008 for orders discontinuing business rescue and winding up the respondent brought by the business rescue practitioner. He has concluded that there is no reasonable prospect for the respondent to be rescued because the amended business rescue plan is incapable of implementation. It was dependent on one of the respondent's associated companies providing a capital injection of R 1,5 million. Despite the respondent's creditors having granted an extension of over a year to raise these funds, they have not been forthcoming.

[3] The intervening creditor opposes the application on the basis that the applicant's conclusion regarding the respondent's prospects is neither reasonable nor justifiable. The gist of the intervening creditor's case is that the applicant has misread the company's financial situation and should in any event have explored options short of liquidation even if the respondent cannot be rescued.

[4] Section 141 of the Act reads in relevant part as follows:-

> **'141. Investigation of affairs of company.**—
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> …
>
> (2) 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
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> (ii)apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;…..
>
> (3) A court to which an application has been made in terms of subsection (2)(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances.'

[5] The primary issue in this application is whether the threshold required by section 141(2) of the Act for an order winding up the respondent has been met. An

ancillary issue which arises if the threshold has been met, is whether the respondent should be placed in provisional or final liquidation.

[6] Two matters of principle need to be dealt with before considering the facts and then evaluating the opposing parties' contentions in the light thereof. The first relates to the onus and second to whether it is necessary for a business rescue practitioner to consider options short of liquidation after an approved business rescue plan has failed.

The nature and incidence of onus

[7] There was a dispute as to the incidence and the nature of the onus and how it stood to be discharged.

[8] The intervening creditor submitted that a business rescue practitioner bears the onus to prove that their conclusion that a company could not be rescued was based on justifiable and reasonable grounds and that he was accordingly entitled to the relief sought. The applicant on the other hand contended that the intervening creditor bore the onus to prove that the relief sought should be refused. This onus was said to emanate from the obligation imposed on a business rescue practitioner by section 141(2)(a) to apply for liquidation when they have concluded that there is no reasonable prospect of rescue and, as articulated in the heads of argument filed on behalf of the applicant, because 'the intervening creditor has not taken any steps to set aside the applicant's decision which in any event is unassailable.'

[9] Despite his initial position on this issue, during the hearing of the application counsel for the applicant disavowed reliance on the notion that the applicant's decision needed to have been set aside by the intervening creditor. He also moved from his stance that the applicant bore no onus. Ultimately, he submitted that it was for the applicant to prove *prima facie* that there was no reasonable prospect for the company to be rescued, and if this threshold was met, the intervening creditor would need to rebut that *prima facie* case.

[10] Such an approach is, in my view, contrary to the language of section 141(2)(ii) and runs counter to the judgment of the Supreme Court of Appeal in *Oakdene Square*

Properties v Farm Bothasfontein (Kyalami) 2013 (4) SA 539 (SCA) (*Oakdene*) on the meaning of "*reasonable prospect*" of rescue.

[11] Although *Oakdene* was concerned with the use of that phrase in section 131 and not 142, both sections form part of Chapter 6 of the Act which deals with business rescue and compromise with creditors and both employ the phrase "*reasonable prospect"* in relation to the rescue of a company. The identical phrase ought to be interpreted consistently, unless the context in which it is used warrants a different meaning being accorded to the same phrase in different sections of the Act. Even more so, when the phrase appears throughout the chapter, including, for example, in sections 128 and 129.

[12] Section 131 deals with the circumstances in which a court may order the commencement of business rescue proceedings. Section 131(4) empowers a court to grant an application placing a company under supervision and commencing business rescue proceedings if it is satisfied that at least one of three jurisdictional facts exist and 'there is a reasonable prospect for rescuing the company' In that context *Oakdene* held that demonstrating a reasonable prospect that a company can be rescued requires 'more than a mere *prima facie* case or an arguable possibility' but less than proof on a balance of probabilities.[1] What is required is-

> 'a reasonable prospect – with the emphasis on "reasonable" – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough.'[2]

[13] There is nothing about the context in which the concept of a reasonable prospect of rescue is used in section 141 which, in my view, warrants attaching a different meaning to that phrase than it was accorded in *Oakdene*. Consequently, a business rescue practitioner bringing an application in terms of section 141(2)(a)(ii) is required to place before the court a factual foundation to demonstrate that there are grounds for his conclusion that there is no reasonable prospect for the company to be rescued, in the sense described above.

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1 *Oakdene* paras 29 to 31.
2 *Oakdene* para 29.

[14] Where an opposing party disputes the facts upon which the business rescue practitioner relies and/or contends that the business rescue practitioner should have taken other steps or explored other possibilities, they would need to do more than simply raise bare denials or engage in vague averments and speculative suggestions given the application of the *Plascon-Evans* rule.

[15] Turning to how the burden might be discharged, *Oakdene* cautioned that it was neither practical nor prudent to be prescriptive about the way in which an applicant must show a reasonable prospect in every case.[3] The Supreme Court of Appeal did however endorse the comments of Van Der Merwe J in *Propspec Investments (Pty) Ltd v Specific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) that demonstrating a factual foundation for the existence of a reasonable prospect that the desired objects of business rescue could be achieved did not 'require, as a minimum, concrete and objectively ascertainable details of matters including the likely availability of the necessary cash resources in order to enable the company to meet its day to day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company'. The same is true *mutatis mutandis* when considering whether there is no reasonable prospect that those objectives can be achieved.

[16] By virtue of the intrinsic nature of business rescue and the impact it has on affected parties, whether a prospect of recovery is reasonable entails considerations of the timelines involved and the effect of continued business rescue on all stakeholders.

[17] As to the first of these matters, *Koen and Another v Wedgewood Golf and Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10 stressed that:-

> 'It is axiomatic that business rescue proceedings, by their very nature, must be conducted with maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a

[3] *Oakdene* para 30.

> company is in financial distress will lessen or negate the prospect of effective rescue'.

[18] Counsel for the intervening creditor submitted that the Act must be interpreted through the prism of the Constitution and stressed that the regime of business rescue does not accord exclusive primacy to the interest of creditors and instead places special value on the preservation of companies in financial distress.[4] Both submissions are correct, but they do not mean that the interests of the company override those of its creditors.

[19] The 'legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction' revealed by the business rescue provisions in the Act[5] does not elevate the interests of companies above those of all other stakeholders. Indeed, the imperative that under our democratic order all legislation must be interpreted through the prism of the Constitution,[6] requires the balancing of all competing rights and interests.

[20] Section 7 of the Act which provides for the efficient rescue and recovery of financially distressed companies, does so in a manner which balances the rights and interests of all relevant stakeholders, for the benefit of all of whom business rescue practitioners are consequently obliged to execute their duties.[7] Although the term stakeholder is not defined in the Act, creditors fall within its ambit. As Gorven J explained in *DH Brothers Industries (Pty) Ltd v Gribnitz NO & Others* 2014 (1) SA 103 (KZP) (*Gribnitz*) para 54,:

> 'Although "stakeholders" is nowhere defined in the Act, creditors must surely fall within its ambit. The business rescue mechanism recognises throughout that they, too, contribute to the lifeblood of the economy. It is important that business rescue must be done in a manner which balances the rights and interests of stakeholders,

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[4] *Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and another* 2017(4) SA 51 (WCC) paras 16 -17.

[5] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) para 6.

[6] *Investigating Directorate*: *Serious Economic Offences and others v Hyundai Motor Distributors* (*Pty*) *Ltd and others*: *In re*: *Hyundai Motor Distributors* (*Pty*) *Ltd and others v Smit NO and others* [2000] ZACC 12; 2001 (1) SA 545 (CC) paras 21 -22.

[7] *Commissioner for the South African Revenue Service v Louis Pasteur Investments (Pty) Ltd and Others* [2021] JOL 49964 GP paras 46 and 51.

> including creditors. If the rights of creditors were to be ridden over roughshod, this would undoubtedly detract from other overarching purposes of the Act, such as promoting the development of the South African economy, promoting investment in the South African markets, creating optimum conditions for the investment of capital in enterprises and providing a predictable and effective environment for the efficient regulation of companies, to mention only a few.' (footnotes omitted)

[21] Whilst the interests of companies are important, where a company has no employees and conducts an enterprise that is not dependent on special skills, so the contribution it might make to the economy is not dependent on its continued existence, the interest of the company, may weigh less heavily in the scale. More so when considered against the impact its continued existence in business rescue has on the ability of its creditors to contribute to the economy.

Obligation to explore options short of liquidation

[22] It is necessary to deal with the question of whether a business rescue practitioner is required to consider options short of liquidation where a business rescue plan has failed before he can reasonably conclude that there is no prospect of rescuing the company. That issue arises from the intervening creditor's submission that such an investigation is required, whilst the applicant's stance is that once the approved business rescue plan has failed, he has no option but to bring the present proceedings.

[23] The intervening creditor's submission accords with the concept of rescue as articulated in the Act, which encompasses not only a return to solvency but, if that primary goal is unattainable, facilitating a better return for creditors or shareholders than would result from liquidation.[8] Evaluating whether there are prospects of rescue in this sense, must perforce entail consideration of both these facets of the concept of rescue. Such an obligation is also consistent with business rescue practitioners'

[8] *Oakdene* paras 22 to 28

obligations in terms of section 140 and 141 which include the duty to undertake a proper investigation into the company's affairs and its prospects of being rescued[9]

[24] It is however unnecessary to decide the question as a matter of legal principle due to the facts of this matter because the revised business plan obliged the applicant to consider whether the continuation of business rescue would be more advantageous for creditors than liquidation. It provides that if the business rescue practitioner concluded at any time after the adoption of the plan that it was no longer capable of implementation, but continued to believe that business rescue would yield a better return for creditors than liquidation, he would be obliged to call a meeting of all affected persons for the purpose of considering whether or not a revised plan should be formulated and published. It is apparent from this provision, that the applicant was obliged to consider whether business rescue would yield a better return for creditors than liquidation if the revised business rescue plan could not be implemented. The applicant could not therefore simply regard the failure of the plan as automatically requiring an application for winding-up to be brought.

[25] Although the applicant formed the view that liquidation was inevitable due to the failure of the amended business rescue plan, in his replying affidavit, he dealt with the alternatives to liquidation suggested by the intervening creditor and explained why none of them was such as to alter the conclusion to which he had originally come. The adequacy of those responses can therefore be considered in determining whether the applicant has demonstrated a reasonable basis for his conclusion that there is no reasonable prospect of rescuing the respondent, in the dual-faceted sense in which that term is employed in the Act.

[26] I propose to consider the parties' competing contentions on that basis, against the facts regarding the company, its operations and the events leading up to business rescue and the present application, which are not in dispute.

The facts

[9] *Ragavan and others v Optimum Coal Terminal* (Pty) Ltd 2023 (4) SA 78 (SCA) para 24

[27] The respondent is one of four associated companies, all wholly owned by the BND Family Trust. The other companies in the group are Gentle Wind Investments (Pty) Ltd (Gentle Wind), Moneyline 327 (Pty) Ltd (Moneyline) and Orion Properties 115 (Pty) Ltd (Orion). The intervening creditor is the sole director of all the associated companies and one of the three trustees of the BND Family Trust.

[28] The respondent is a property holding company which owns four units in a sectional title scheme called Torino Court. The sections comprise commercial premises in Hillcrest, KwaZulu-Natal which are let to various enterprises. The rental so derived is the respondent's sole source of regular income, which has been supplemented in the past by loans from the intervening creditor and Gentle Wind. The respondent has no employees and owns no assets other than the sectional title units.

[29] The respondent became financially distressed when some of the units fell vacant in 2018 and 2019. The Standard Bank of South Africa Limited (Standard Bank) extended three facilities to the respondent in terms of which they loaned it various amounts all of which were repayable by 28 February 2019. The amounts due on the facilities were not repaid. In October 2019, Standard Bank brough an application to wind up the respondent on the basis that it was unable to pay its debts as contemplated by section 344(f) read with section 345(1)(c) of the Companies Act, 61 of1973 which still applies to the winding up of insolvent companies by virtue of item 9(1) of Schedule 5 of the Act.

[30] In February 2020, whilst that liquidation application was still pending, the intervening creditor brought an application to place the respondent under business rescue, to which Standard Bank consented in March 2020, thus suspending that liquidation by virtue of section 131(6) of the Act.

[31] When it entered business rescue, the respondent was receiving rental income of approximately R144 000 per month inclusive of VAT which was insufficient to meet its routine expenditure. The instalment due to Standard Bank was R70 000 per month and could not be paid consistently and in full.

[32] At that stage, creditors' claims amounted to some R10.2 million, whilst the four sectional title units had been valued at R12.7 million on the open market, and R8.9

million on a forced sale basis by a professional valuer introduced to the applicant by the intervening creditor.

[33] Standard Bank was the major creditor with a claim of nearly R5.4 million giving it a little over 80% of the voting interest. The intervening creditor's claim on loan account was around R 560 000 and subordinated to the claims of independent creditors. By virtue of the subordination of his claim, the intervening creditor would not receive a dividend if the company were liquidated, and consequently, no voting interest attaches to his claim. The same is true of Gentle Wind's claim of R 3 million, which is second in magnitude to that of Standard Bank and exceeds the quantum of the other creditors' claims by a considerable margin.

[34] The first business rescue plan apparently required the sale of Unit 4 Torino Court by no later than 31 December 2020 either by private treaty or, failing that, by public auction. No sale by private treaty was secured, and no offers were received in an auction of the property on 9 December 2020. The first business rescue plan could therefore not be implemented.

[35] On 12 April 2021 a revised business rescue plan was adopted which contemplated the respondent continuing in business under the control of the intervening creditor after the termination of business rescue. The revised business rescue plan no longer envisaged the sale of any of the units in Torino Court. It was instead predicated on R1.5 million being introduced into the respondent as loan funds by one of its associated companies, Gentle Wind, which was already owed some R 3 million. The envisaged source of the funds was sales of units in a sectional title development called Morningside which Gentle Wind was undertaking.

[36] The R 1.5 million capital injection was to be used to reduce the respondent's indebtedness to Standard Bank and allow part payments to other creditors *pro-rata*. From the start of business rescue, the plan required payments to Standard Bank of R45 000 per month, which were only sufficient to service the interest on the facilities. The revised business plan envisaged R500 000 of the loan funds being paid to Standard Bank and the remaining bank debt being refinanced over a fixed term.

[37] The due date for Gentle Wind's introduction of the R1.5 million was originally September 2021. No funds were however forthcoming by that date, apparently due to certain delays and difficulties in the development of Morningside apartments. The payment deadline was extended to 31 May 2022 and then, finally, to 30 September 2022, but still no funds were forthcoming. Standard Bank conveyed to the applicant that it was not prepared to accord Gentle Wind any further extensions of time.

[38] The applicant formed the view that the amended business rescue plan was accordingly incapable of implementation. He therefore concluded that there was no longer any reasonable prospect for the respondent to be rescued and that he was obliged to make application for an order discontinuing business rescue and placing the respondent into liquidation. He conveyed this conclusion in a letter to all affected persons dated 21 October 2022 and cancelled the next meeting of creditors scheduled for 28 October 2022.

[39] The intervening creditor contended in his opposing affidavit that the applicant had failed to give notice to all interested and affected parties in the proper form. Counsel who appeared for him correctly did not persist with this objection at the hearing as it was based on the notice requirements for proceedings under section 141(2)(b) where the business practice practitioner concludes that there are no reasonable grounds to believe that the company is financially distressed, not proceedings under section 141(2)(a) such as the present. It consequently became common cause that all the notice requirements in terms of section 141(2)(a) as well as the notice and security formalities for winding-up had been met.

[40] On 27 October 2022, the intervening creditor, still writing as director of respondent and on its company stationery despite the control and management of the respondent vesting in the hands of the business rescue practitioner, wrote to the applicant and took issue with his conclusion that there was no reasonable prospect of rescuing the respondent on two bases. The first was that the construction of Morningside apartments was complete, Gentle Wind was in the process of collecting certificates to enable transfers to occur and sales which had fallen through were being replaced at higher values. At that stage the intervening creditor anticipated that the delay which would be occasioned by having to secure replacement sales would be about two or three months. The second basis on which the intervening creditor took

issues with the applicant was a contention that the applicant ought to have made application for finance to the ‘various tiers of funders available to the marketplace to bridge the gap’.

[41] Unmoved, on 3 November 2022, the applicant instituted the present proceedings. The intervening creditor applied for and was granted leave to intervene.

[42] At some point between 8 and 28 November 2022, the intervening creditor forwarded the applicant two agreements of sale relating to sections 1 and 2 of Torino Court which he had purported to accept on behalf of the respondent on 8 November 2022. Notwithstanding his lack of authority to act on behalf of the respondent, the intervening creditor treated the purported agreements as binding contracts and engaged with the named purchaser on that basis. I refer to them as agreements because of the how they were treated by the intervening creditor, not to denote that they were enforceable contracts.

[43] The purchaser in terms of both agreements was a company registered in 2022 called Isciko (Pty) Ltd, although the details of the purchaser recorded on the information for the conveyancer sheet of the agreements in one instance records the details of a natural person. Both agreements were conditional on the purchasers obtaining mortgage bonds and ‘fulfilling the conditions of the purchaser’s bond’.

[44] The applicant was not persuaded that either the letter of 28 October 2022 or the agreements were any reason for him to reconsider his stance. Insofar as the agreements were concerned, the applicant viewed them as not worth the paper they were written on. He advanced several reasons for this view including the conditional nature of the sales, the curious wording of the suspensive condition regarding compliance with the purchaser’s bond conditions and the fact that the agreements were not valid because the intervening creditor had no authority to conclude them on the respondent’s behalf as he purported to have done.

[45] Both agreements provided for the payment of cash deposits in the sum of R1.75 million (being half of the purchase price for each unit) within 30 (thirty) days of acceptance of the offer to purchase, and for a bond to be secured for the balance of the price by 8 December 2022. As the agreements were purportedly accepted by the

intervening creditor on 8 November 2022, payment of the deposit was due on the same date as bond confirmation.

[46] No deposits were paid, nor was any bond finance was secured by that date, nor indeed by 31 March 2023, to which date the intervening creditor purported to extend the deadline for approval of bond finance and payment of the deposits after both agreements had already lapsed due to failure of the conditions.

[47] Despite the intervening creditor's optimism in his letter of 27 October 2022 that replacement sales in Morningside would have been finalised within 2 or 3 months, when he deposed to his opposing affidavit on 1 March 2023, there was no suggestion that funds could be forthcoming from this source. The intervening creditor nonetheless questioned why the applicant's initial stance that business rescue would yield a better return for creditors than liquidation had changed. He charged that the applicant had not provided sufficient reasons for his changed view regarding the respondent's prospects and opposed the application on several grounds. I deal with each of these in turn in assessing whether the applicant has demonstrated that his conclusion that the respondent cannot be rescued is based on reasonable grounds.

Whether the revised plan was capable of implementation

[48] First, the intervening creditor contended that Gentle Wind's failure to advance the capital did not result in a failure of the revised business plan. Whilst the intervening creditor accepts that a capital injection was essential for the implementation of the revised plan, counsel who appeared on his behalf submitted that the revised plan envisaged that if the funds was not forthcoming from Gentle Wind, a unit in Torino Court would be sold to raise the necessary capital.

[49] This submission does not accord with the revised plan. It was advanced based on a document with which counsel for the intervening creditor had been briefed which reflected that provision, but which was not part of the revised plan or the court papers. I must stress that counsel was entirely unaware of this discrepancy which arose solely due to the manner in which she had been briefed. It thus became common cause that the revised plan which had been approved was not capable of implementation.

The company's financial position

[50] The intervening creditor's second contention is that the applicant had misconstrued the respondent's financial position which was that the respondent was in fact profitable and not commercially insolvent as it could meet its day-to-day expenses.[10] That contention was advanced on the strength of an income and expenditure sheet prepared by the intervening creditor which was said to reveal a nett profit of almost R 200 000 as at January 2023.

[51] This contention cannot be upheld. The expenses on the sheet relied on by the intervening creditor are based on the reduced payments made by the respondent in terms of the amended business rescue plan including short-payments due to its cash flow constraints, not its actual obligations.

[52] By way of example, the reduced monthly payments to Standard Bank in terms of the revised plan solely to service interest were in arrears by R 135 000 as at January 2023 and SARS had not been paid VAT in the sum of around R 60 000. The respondent actually had a cash shortfall at the end of January of almost R 400 000. At that time applicant had outstanding fees due totally nearly R 390 000, and none of the respondent's pre-business rescue creditors had been paid anything.

[53] To make matters worse, the respondent's rental income has decreased since January 2023 because Orion, one of the companies associated with the respondent ,and of which the intervening creditor is the sole director, has failed to pay more than R 120 000 in rental for the unit in Torino Court it occupies and had also not paid its share of electricity.

[54] It is the intervening creditor, not the applicant who has misread the respondent's financial position.

Sale as a going concern

[55] The intervening creditor's third contention that the applicant should have considered the sale of the business of the respondent as a going concern is

[10] As described in *ACSA V Spain NO* 2021 (1) SA 97 (KZD).

untenable. It was not capable of being sold as a going concern because it could not meet its operational expenses to trade on that basis from its sole source of income.

[56] The respondent is therefore plainly commercially insolvent. It is precisely for that reason that the revised business rescue plan required the injection of a substantial amount of capital which would be used to restructure the company's finances and reduce its debt. It is therefore unsurprising that the other options the intervening creditor suggests the applicant should have pursued envisage an inflow of funds either through the sale of one or more of its units or the procurement of loan funding from sources unconnected to the respondent and its associated companies.

Sale of the units

[57] The intervening creditor contends that the valuation of the sectional title units relied upon by the applicant is outdated, and points to the two agreements with Isciko (Pty) Ltd as better indicators of market value. Whilst this does not detract from the respondent's commercial insolvency, the intervening creditor submits that the applicant should have pursued the agreements or, failing them, the sale of one or more of the respondent's units by private treaty to achieve a better return for creditors than would eventuate on liquidation.

[58] The intervening creditor was constrained to accept that he had no authority to conclude the agreements on the respondent's behalf as he had purported to do, and that they had in any event lapsed. He nonetheless suggested that the applicant should have looked to conclude agreements with the named purchaser on the same or similar terms with the concurrence of the affected parties.

[59] Neither of the agreements existed when the applicant instituted the present proceedings on 3 November 2022, but he did consider them and concluded that they were no reason for him to change his conclusion regarding the respondent's prospects of recovery as discussed above.

[60] Those reasons aside, the fact that neither payment of the deposits nor bond approvals were forthcoming despite extensions of time and the intervening creditor

engaging with the purchaser as if there were valid agreements in place, demonstrates that the agreements, or valid contracts concluded on similar terms, were not likely to materialise into real sales transactions. It also undermines the intervening creditor's submission that the offers are indicative of the true value of the properties and that the applicant has undervalued the sectional title units.

[61] The intervening creditor's submissions regarding what he contends is the true value of the sectional title units and the perceived viability of selling individual units also takes no account of the fact – stressed by the applicant – that the units are let and will therefore need to be sold subject to the existing leases, the revenue from which is insufficient to meet the respondent's operational expenses. This situation is exacerbated by the fact that demand for the units is dwindling. The rental previously agreed in respect of certain of the units has had to be reduced simply to procure some income.

[62] I therefore find that the applicant's view that selling one or more of the units would not create a reasonable prospect of rescuing the respondent, is based on reasonable grounds.

Other sources of capital

[63] The intervening creditor's final contention is that the applicant should have explored the introduction of capital through other sources including commercial lending institutions.

[64] That contention is again divorced from the commercial reality of the respondent. Standard Bank is the creditor with the largest claim, and the capital of the facilities it advanced the company have not been serviced for a period now exceeding two years. The revised business rescue plan envisaged that Standard Bank's claim would have been settled in full by November 2021, over eighteen months ago. Instead, not even the interest has been fully serviced in that period.

[65] In those circumstances, the applicant's stance that it would be futile to look for other sources of capital funding and his conclusion that only the intervening creditor or

one of the respondent's associated companies would be likely to provide a capital injection is based on reasonable factual grounds.

[66] I therefore find that all the various avenues the intervening creditor submits were worth exploring are speculative and, in some instances, have no factual foundation. They do not detract from the reasonableness of the applicant's conclusion that there is no reasonable prospect that the respondent can be rescued, and that liquidation is the only option.

[67] It follows that the application must succeed, and the respondent should be placed in liquidation. The question is whether I should grant a provisional or final winding up order.

Provisional or final winding up

[68] The 1973 Companies Act does not require a final order to be preceded by a provisional order and there is no reason why final orders should not be granted in appropriate cases.[11] This division usually follows the practice of granting a provisional order of winding up coupled with a rule *nisi* calling upon persons concerned to show cause why a final order should not be granted. That is not however an immutable practice, and the discretion accorded to the court in terms of section 141(3) to grant any order the court considers appropriate is broad.

[69] In this case, all the parties who would have an interest in showing cause why the respondent should not be finally wound up if a rule *nisi* and provisional order were granted are affected parties in the business rescue proceedings who have all been notified of this application to wind up the respondent. Only the intervening creditor opposes the grant of that relief. All the issues have been fully ventilated on the affidavits, and the intervening creditor has put nothing forward to persuade me that further relevant facts would be forthcoming if a rule *nisi* were issued.[12]

[70] Given the history of this matter it is likely that the intervening creditor would oppose a final order thereby further delaying the respondent's winding up. It was the

[11] *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) para 9.
[12] *Cf Johnson v Hirotec* note 11 above, para 9.

intervening creditor who forestalled liquidation in 2019 by applying to place the respondent in business rescue. In the intervening three and a half years, there have been various unsuccessful attempts to avert liquidation, the last of which was entirely dependent on the intervening creditor sourcing a capital injection via one of the associated companies which he controls It is now two years since those funds should have been paid.

[71] Delay occasions no prejudice to the intervening creditor. It favours him and the respondent at the expense of creditors who are entitled to a dividend on winding up and who have effectively been subsidising the respondent. In addition, the respondent's creditors have not been able to enforce their claims due to business rescue for a considerable period and the respondent is presently trading in insolvent circumstances. There is no reason why that should continue any longer.

[72] As Gorven J said in *Gribnitz* para 27:

> 'Business rescue proceedings are geared at providing a window of opportunity to restore an ailing company to financial health and functionality. The window of opportunity does not remain open indefinitely.' "

[73] For the respondent, that window of opportunity which has stood ajar for some considerable time must now close and I consider it appropriate to grant a final liquidation order.

Costs

[74] There remains the question of the costs. The applicant seeks an order that the costs of the application be costs in the liquidation, save for the costs occasioned by intervening creditor's intervention and unsuccessful opposition, which he submits should be paid by the intervening creditor on the scale as between attorney and client.

[75] The intervening creditor has been unsuccessful. He acted in his own interests in a manner which has prejudiced the general body of creditors who will obtain a dividend on liquidation by delaying the winding up of the respondent for a protracted period. If the intervening creditor is not ordered to pay the costs associated with his

opposition, the general body of the respondent's creditors will bear them. I can see no basis upon which that would be an appropriate exercise of my discretion in respect of costs. I do not however consider that the intervening creditor acted in a fashion which warrants costs on an attorney and client scale.

Order

[76] I therefore make the following order:-

1. In terms of section 141(2)(a)(ii) of the Companies Act, 2008 the business rescue proceedings in respect of Abrina 284 (Pty) Limited (registration number 2004/034518/07) (in business rescue) be and are hereby terminated.

2. In terms of section 141(2)(a)(ii) of the Companies Act, 2008, Abrina 284 (Pty) Limited (registration number 2004/03451807) (in business rescue) is hereby placed under final liquidation in the hands of the Master of the KwaZulu-Natal High Court, Pietermaritzburg.

3. The costs of the application are costs in the liquidation, save for those costs in respect of the intervention application and the costs incurred by the intervening creditor's opposition of this application which costs are to be paid by the intervening creditor.

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A.M. ANNANDALE, AJ

JUDGMENT RESERVED: 17 JULY 2023

JUDGMENT HANDED DOWN: 6 OCTOBER 2023

COUNSEL FOR APPLICANT: D. SCHAUP

Instructed by: **Stowell & Company**

Pietermaritzburg

Tel: 033 845 0500

Ref: PL FIRMAN/USH9/0036

E-mail: paul@stowell.co.za

COUNSEL FOR INTERVENING CREDITOR: C. S. A. SMART

Instructed by: **Colyn Townsend Attorneys**

Hillcrest

Tel: 031 765 7507

Ref: COLYN TOWNSEND / BO 02/0001/2023

E-mail: colyn@colyntownsenlaw.co.za

c/o **Randles Incorporated**

Pietermaritzburg

Tel: 033 392 8000

Ref: A VAN LINGEN/AMISHA

E-mail: amisha@randles.co.za