REPORTABLE

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

Case No: 8825/2021

In the matter between:

JOHAN DU TOIT **FIRST APPLICANT**

(in his capacity as the duly appointed business rescue practitioner of Tsoma Trading CC (in business rescue)

IAN FLEMING N.O **SECOND APPLICANT**

in his capacity as the duly appointed business rescue practitioner of Tsoma Trading CC (in business rescue)

TSOMA TRADING CC (IN BUSINESS RESCUE) TRADING AS CC CRANES **THIRD APPLICANT**

(Registration Number: 2009/178451/23)

and

AZARI WIND PROPRIETARY LIMITED **FIRST RESPONDENT**

(Registration Number: 2011/002624/07)

NORDEX ENERGY SOUTH AFRICA PROPRIETARY LIMITED **SECOND RESPONDENT**

(Registration Number: 2011/148529/07)

VESTAS SOUTHERN AFRICA PROPRIETARY LIMITED **THIRD RESPONDENT**

(Registration Number: 2010/008330/07)

ALL THE KNOWN AFFECTED PERSONS OF THE SECOND APPLICANT **FOURTH RESPONDENT**

(As more fully described in Annexure "X" to the notice of motion)

Coram: **The Honourable Mr Justice M Francis**

Date of Hearing: **28 July 2021**

Date of Judgment: **4 August 2021 (Handed Down Electronically)**

JUDGMENT

INTRODUCTION

[1] This is an application brought on an urgent basis for relief within the context of a business rescue process. I have already provided an *ex tempore* judgment together with brief reasons. I now provide the full judgment.

[2] The first and second applicants are the joint business rescue practitioners of the third applicant, Tsoma Trading CC (In Business Rescue) t/a CC Cranes ("Tsoma"). Depending on the context, the business rescue practitioners will be referred to as the "BRPs" or as "the applicants" when referred together with Tsoma.

[3] The first respondent is Azari Wind Proprietary Limited ("Azari"), a creditor of Tsoma. Azari engaged Tsoma to provide sub-contracting services on two

windfarm projects in which Azari, in turn, was engaged as contractor by the second respondent ("Nordex") and the third respondent ("Vestas").

[4] The fourth respondent refers to all the known affected persons of Tsoma, namely the creditors, employees, trade unions representing the employees, and the members of Tsoma.

[5] The application was two-fold. In Part A, the applicant sought directions from the court on the service of the application on all the affected persons. Directions for service were duly authorised and the papers were served on the affected persons. In Part B, the applicants brought an application in terms of section 136(2)(b) of the Companies Act 71 of 2008 ("the Companies Act") for the cancellation of any and all of Tsoma's obligations in terms of the sub-contracts concluded between Tsoma and Azari in relation to the Oyster Bay project and the Copperton project. In addition, the applicants sought payment from Azari of the amount of R13 857 836 in respect of the Oyster Bay sub-contract and the amount of R2 392 862.50 in respect of the Copperton sub-contract.

[6] The Copperton and Oyster Bay sub-contracts arise out of windfarm projects in the Northern Cape and the Eastern Cape. Azari was employed as a contractor by Nordex on the Copperton project and by Vestas on the Oyster Bay project.

[7] As contractor, Azari was involved in various windfarms projects forming part of the government's Renewable Energy Independent Power Producer Programme. The projects included both the mechanical and electrical assembly of wind turbine generators. These generators were supplied by Nordex and Vestas in terms of an engineering and procurement contract or a turbine supply contract with the project companies controlling the projects. Nordex and Vestas, in turn, contracted Azari to erect and install the wind turbine generators.

[8] Azari sub-contracted Tsoma as a specialist sub-contractor to provide cranage services on both the Oyster Bay and Copperton projects. The services rendered by Tsoma were limited to the erection of cranes operated by its employees which were used to hoist various portions of the towers and the turbine propellors. After the services were rendered, the cranes were dismantled and Tsoma left the site. Azari remained responsible for the overall installation and erection of the wind turbine generators.

[9] The contractual relationship between Azari and Tsoma commenced during 2020 and continued until the Copperton main agreement was cancelled between Nordex and Azari, and the sub-contract between Azari and Tsoma was subsequently cancelled on 14 May 2021. The Oyster Bay project was completed on 31 March 2021 and, as a consequence, the Oyster Bay sub-contract also came to an end.

[10] It is common cause that Tsoma performed the services it was contracted to perform and that no further services are required to be rendered by Tsoma in terms of either of the sub-contracts.

[11] Having performed the services in terms of its sub-contracts, Tsoma issued invoices to Azari. However, Azari has not paid certain of these invoices despite Azari having been paid by Nordex and Vestas.

[12] Tsoma is financially distressed and commenced the business rescue process by virtue of a Members Resolution on 24 February 2021, and the first and second applicants were appointed as BRPs on 25 February 2021.

DISCUSSION OF LEGAL PRINCIPLES AND SUBMISSIONS

[13] As noted, the BRPs seek orders for the urgent cancellation of Tsoma's business rescue obligations in relation to the Oyster Bay and Copperton projects as

contemplated by section 136(2)(b) of the Companies Act, and for the immediate payment by Azari of Tsoma's unpaid invoices relating to the crane services provided on the projects.

[14] In terms of section 136(2) of the Companies Act, business rescue practitioners may apply to court on an urgent basis for the cancellation of pre-business rescue obligations. The opportunity to cancel contractual obligations allows the practitioner to extricate the company, whether temporarily or permanently, from onerous contractual provisions that may prevent the company from becoming a successful concern (see, Delport *et al* **Henochsberg on the Companies Act 71 of 2008 478 (14) – 478 (15)**.

[15] Section 136(2) of the Companies Act provides that despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may:

> "*(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –*
>
> *(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and*
> *(ii) would otherwise become due during those proceedings; or*
>
> *(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a)*" (my underlining).

[16] It seems to me that in order to succeed, a business rescue practitioner who approaches a court in terms of section 136(2)(b) of the Companies Act will have to provide a legal and/or factual basis that:

[16.1] the application is indeed urgent;

[16.2] the contract giving rise to the obligation that is sought to be cancelled was in existence at the commencement of the business rescue proceedings;

[16.3] the obligations sought to be cancelled would become due during the business rescue proceedings; and

[16.4] it would be just and reasonable in the circumstances that the obligation be cancelled, whether entirely, partially or conditionally.

[17] I now turn to deal with each issue in turn having regard to the pleadings and evidence (as set out in the affidavits) and the arguments proffered during the hearing.

Urgency

[18] Section 136(2)(b) of the Companies Act creates a statutory right on the part of the business rescue practitioner to approach the court on an urgent basis to cancel an agreement. However, in my view, the business rescue practitioner is not precluded, or exempted, from following the normal procedure for getting applications into court. The normal court rules apply. In respect of an urgent application, this means that regard must be had to rule 6(12) of the Uniform Rules of Court (the “Rules”).

[19] The effect of rule 6(12) of the Rules is that applicants are, in a certain sense and taking into the account the exigencies of the circumstances of the case,

permitted to make their own rules but must do so "as far as practicable" in accordance with the existing rules of court (see, ***Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms)*** **1972 (1) SA 773 (A)**). If an applicant informs the respondent that the application is regarded as urgent, the respondent is obliged to provisionally accept the rules which the applicant has adopted. When the matter comes to court, the respondent could object but, in the meantime, cannot ignore the rules which the applicant has made for the further conduct of the application proceedings.

[20] Having regard to the nature of the business rescue process and the requirement that the process be completed expeditiously (within three months unless extended with the leave of the court[1]), a court would be loathe to insist on a strict adherence to even the more relaxed procedural requirements in terms of rule 6(12) of the Rules. Thus, for example, whether the applicant could achieve the same result in the ordinary course would not necessarily apply. On the other hand, the interests of justice dictates that respondents be afforded an opportunity to oppose any relief or to make their views known on the application. The degree of relaxation of the rules would depend on the particular facts of the matter (cf. ***Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers)*** **1977 (4) SA 135 (W) 136C-137G**).

[21] In the matter at hand, the applicants set this matter down on an urgent basis to be heard on 8 June 2021. In summary, the applicants submitted that the matter was urgent because of the dire financial position of Tsoma and averred that if

[1] Section 132(3) of the Companies Act deals with the duration of business rescue proceedings and provides as follows:

> "*If a company's business rescue proceedings have not ended within three months after the star 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, and to the –*
> *(i) court, if the proceedings have been subject of a court order; or*
> *(ii) [Companies and Intellectual Property Commission], in any other case."*

appropriate relief was not granted, the business rescue process would be doomed to failure. The respondents, on the other hand, disputed the urgency of the matter, especially the claim for payment which, it was submitted, could be obtained in the ordinary course given the contested nature of the relief sought.

[22] Azari filed its answering affidavit and the parties thereafter agreed to approach the Judge President to allocate a preferential hearing date on the semi-urgent roll, with Azari reserving its right to challenge the urgency of the application. The matter was, accordingly, postponed to 28 July 2021 for hearing. After the matter was adjourned, the applicants filed a replying affidavit on 28 June 2021. Azari did not deem it necessary to file a supplementary affidavit.

[23] It is indeed so that the application was brought on highly truncated time periods which must have placed Azari under considerable pressure to perform. Given the practice in this division, in light of the complexity of this matter, the issues to be traversed, and the extent of the record, the matter ought to have initially been placed on the semi-urgent roll after a request to the Judge President for an expedited date. As it turns out, this is what in fact subsequently transpired. The matter was placed on the semi-urgent roll and a time-table was agreed by the parties on the further conduct of this matter.

[24] The parties have now canvassed the issues and ventilated their views fairly extensively in the papers, prepared comprehensive heads of argument, and the court has had an opportunity to peruse the papers. Thus, while not ideal, there cannot be said to be prejudice to any of the parties of the sort that would vitiate the fairness of the litigation process (cf. ***IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and another 1981 (4) SA 108 (C)*** at 112H-113A). I am, accordingly, of the view that, in the context of business rescue proceedings, there is no merit in the contention that the matter was not urgent.

Was the agreement in existence at the commencement of the business rescue proceeedings

[25] It is common cause that both the Oyster Bay contracts and the Copperton contracts were in existence when business rescue proceedings commenced.

Did the obligations sought to be cancelled otherwise become due during the business rescue proceedings

[26] In Part B of the Notice of Motion, the applicants seek an order *inter alia*:

> "*4. That any and all of (Tsoma's) obligations to (Azari) in terms of the Oysterbay Subcontract dated 11 June 2020 (the "Oysterbay Subcontract), as read together with the Oysterbay Main Agreement dated 12 December 2019 (the "Oysterbay Main Agreement") concluded between (Tsoma) and (Azari) and all other obligations emanating therefrom, be cancelled as contemplated by the provisions of section 136(2)(b) of the Companies Act 71 of 2008, with immediate effect, including but not limited to:*
>
> *4.1 (Tsoma's) obligations in relation to claims for stoppages, delay, disruption, and cost of additional main build teams ("stoppages claims") in as much as Azari has and may have and/or may assert such claims in relation to the Oysterbay Project.*
>
> *4.2 (Tsoma's) indemnification obligations as contemplated by the provisions of clause 18.4 of the Oysterbay Main Agreement read together with clause 7 of Oysterbay Subcontract.*

4.3 (Tsoma's) defects obligations as contemplated by the provisions of clause 9 of the Oysterbay Main Agreement read together with clause 7 of the Oysterbay Subcontract.

4.4 (Tsoma's) performance bond obligations as contemplated by the provisions of clause 15 of the Oysterbay Main Agreement read together with clause 7.7 of Oysterbay Subcontract.

4.5 (Tsoma's) insurance obligations as contemplated by the provisions of clause 19 of the Oysterbay Main Agreement read together with clause 7 of Oysterbay Subcontract.

4.6 That any and all of the (Tsoma's) obligations to (Azari) in terms of the Copperton Subcontract Agreement concluded between the (Tsoma) and (Azari) on 16 July 2020 "(the Copperton Subcontract") and all other obligations emanating therefrom, be cancelled, in terms of section 136(2)(b) of the Companies Act 71 of 2008, with immediate effect including but not limited to:

4.6.1 (Tsoma's) obligations in relation to claims for stoppages, delay, disruption, and cost of additional main build teams ("stoppages claims") inasmuch as Azari has and may have and/or may assert such claims in relation to the Copperton Project.

4.6.2 (Tsoma's) indemnification obligations as contemplated by clause 17 of the Copperton Main Agreement read together with clause 7 of the Copperton Sub-contract.

4.6.3 (Tsoma's) warranty obligations, performance bond obligations and warranty bond obligations as contemplated by the provisions of clause 5 of the Copperton Main Agreement read together with clause 7 of Copperton Subcontract.

4.6.4 (Tsoma's) insurance obligations as contemplated by the provisions of clause 7.4 of the Copperton Subcontract."

[27] The overarching purpose of section 136(2)(b) of the Companies Act is to empower a business rescue practitioner, through the court, to cancel onerous contractual obligations which could provide some breathing space for the company so as to allow a business rescue practitioner to attempt to rescue the company's affairs without the overbearing operational financial obligations emanating from such a contract. The cancellation of a contract is very drastic remedy that is placed at the disposal of business rescue practitioners and considerably waters down the principle of the sanctity of contracts. Also, the cancellation of an obligation in terms of section 136(2)(b) of the Companies Act is a court sanctioned cancellation and this obligation cannot be revived in the ordinary course if the business rescue process does not succeed. It is, thus, incumbent on an applicant to identify precisely which obligations ought to be cancelled and provide a proper explanation why such a drastic measure is necessary.

[28] It was submitted by the applicants that it is important for Tsoma's obligations to Azari to be cancelled so that the limited cash available to Tsoma can be applied to critical expenses of Tsoma for the benefit of all the affected parties, rather than exposing these funds for the benefit of Azari only. In addition, it was necessary that the remaining obligations under the Copperton sub-contract (read with the main contract) be cancelled since it would be too onerous for Tsoma to be bound

by two contracts in relation to the same project if it wished to conclude an agreement directly with Nordex.

[29] In so far as the cancellation of obligations are concerned, it was imperative for the BRPs to show that all the obligations to be cancelled would otherwise become due during the business rescue process. Therefore, the BRPs would have had to sift through all the contracts, ascertain any extant obligations, and determine whether any of these obligations would become due during the course of the business rescue proceedings. Because business rescue proceedings are intended to be of short duration - not more than three months in the first instance - the BRPs would have had a definite time period as a frame of reference when deciding which obligations would become due and ought to be cancelled in order to assist the financial rescue of the business.

[30] In their founding affidavit, the applicants outlined in some detail the provisions of the respective contracts and sub-contracts which were deemed to be relevant to these proceedings. The applicants also referred this court to the balance of the terms of the sub-contract which they requested to be read as specifically incorporated in their papers[2]. The obligations sought to be cancelled in respect of both the Oyster Bay and Copperton contracts include obligations relating to stoppages, delay, disruption, the cost of additional main build teams, indemnification obligations, warranty obligations, performance bond obligations, warranty bond obligations, and insurance obligations.

[31] The principal difficulty which this court has with the applicants' case is that they have failed to demonstrate that the obligations sought to be cancelled would fall due during the business rescue proceedings. For example, the claims for

[2] In this regard, it should be noted that affidavits must identify the issues and contain the factual averments relevant to those issues. After all, affidavits constitute both the pleadings and the evidence in motion proceedings (see, ***Minister of Land Affairs and Agriculture v D & F Wevell Trust*** **2008 (2) SA 184 (SCA)** at para [43]). Where a party relies on a document, the passages in the document must be identified and the conclusions based on the passages must be set out. It is not the duty of the court to search through documents to establish the facts required to support the averments made by parties in their affidavits.

stoppages, delays, disruptions, and the cost of additional main build teams ("stoppages claims"), would all have arisen during the course of the contract period when Tsoma was still providing services to Azari. In this regard, Azari submitted that these obligations do not fall within section 136(2)(b) of the Companies Act because those claims arose prior to the business rescue process even though all the claims had not necessarily been quantified.

[32] It was the applicants' contention, on the other hand, that even though the claims may have arisen during the period when both the main and sub-contracts were still in existence, these obligations were not due because any amounts to be paid in respect of the stoppages claims have yet to be determined. The applicants submitted that an "obligation" for the purposes of section 136(2)(b) of the Companies Act should be construed as the same as a "debt". If so interpreted, a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. In other words, the debt must be one in respect of which the debtor is under an obligation to pay immediately (see, ***Umgeni Water & Others v Mshengu*** **[2010] 2 All SA 505 (SCA)** at 505). It was argued by the applicants that the debt or obligation becomes due when a creditor acquires a complete cause of action for the recovery of the debt or when the entire set of facts upon which the creditor relies to prove its claim was in place (see, ***Truter & Another Deysel*** **2006 (4) SA168 (SCA)** paras 11 and 16).

[33] On the applicants' version, then, the stoppages claims are yet to be determined. The applicants, however, have not indicated if these obligations would become *due* during the business rescue proceedings. Indeed, these claims are unresolved and, according to the applicants, "*remain the subject of the complex construction adjudication processes and are incapable of speedy resolution*". The applicants go further on to state *that "there is no way that the court could determine the quantum of the unliquidated claims even if it was asked (to which it is not*)". In any event, the applicants submit that all the stoppages claims are

invalid because Azari has failed to comply with the 90-day time period for the notification of claims as stipulated in the contract. This was disputed by Azari.

[34] Azari did assert a stoppages claim in the sum of R4 833 685 but the applicants submit that this amount is disputed and is merely a claim that still has to be properly assessed and quantified The fact of the matter, though, is that the stoppages claims are disputed and, on the applicants' version, are not due. If Tsoma is not liable for the stoppages claims and/or the stoppages claims are not yet due and/or there is no indication that these claims will become due during the business rescue proceedings, it begs the question: is there then a legal basis for this court to cancel these obligations? The answer, with respect, is self-evident.

[35] The failure by the applicants to demonstrate that the obligations in respect of the stoppages claims become otherwise due during the business rescue proceedings applies equally in respect of the other obligations sought to be cancelled, namely the indemnification obligations, warranty obligations, performance bond obligations, warranty bond obligations, and insurance obligations. No indication was provided whatsoever by the applicants that any of the aforementioned obligations would become due during the business rescue process. The nature of the events that might give rise to the performance of these obligations is such that they may have already occurred, may not occur at all, or may occur at some future date. This, together with the limited time-frame which the BRPs had to work with, meant that the obligations that would fall due during the business rescue proceedings were reasonably ascertainable.

[36] In summary, the obligations to be cancelled must be discreet and identified in order to provide the court with some certainty on what is to be cancelled. However, apart from identifying in general terms the obligations to be cancelled, the applicants have failed to discharge the onus of demonstrating that the obligations sought to be cancelled would otherwise become due during the business rescue proceedings.

PAYMENT FOR WORK DONE

[37] It is not disputed that Tsoma has completed the work in respect of the Oyster Bay and Copperton projects. It is also not disputed that payment in the amount of R13 857 636 (and interest) is outstanding in respect of the Oyster Bay invoices and that the sum of R2 392 862.50 (and interest) is outstanding on the Copperton invoices.

[38] According to Azari, as with many construction-related agreements, a mechanism is built into the agreements in terms of which claims may be submitted by either party (and against Azari's employer) for liquidated damages caused by, amongst other things, stoppages on the project which are attributable to any particular party. These take the form both of direct costs associated with stoppages (for example, workmen being unable to work on the site for several hours for whatever reason) and a knock-on effect of further delays caused by the stoppages and claims for an extension of time, which operate to extend the time permitted to a party to complete the works against an agreed time schedule.

[39] The effect of these liquidated damages claims is that amounts claimed, and accepted by the party against whom they had claimed, are expressly permitted in terms of the contract to be set-off against other amounts which may be due by the claiming party. Azari has submitted several hundred stoppages claims against Tsoma which are in the process of being resolved by a committee of representatives appointed by each party. Both the Oyster Bay sub-contract and the Copperton sub-contract provide agreed dispute resolution mechanisms which are to be followed. These entail that the parties first amicably try to resolve the dispute and thereafter if that fails, to refer the dispute to arbitration. According to Azari, many of these claims have in fact been informally admitted and resolved by that committee.

[40] Payment is being withheld by Azari who asserts that although the services were rendered in respect of which the invoices were issued, by virtue of its claims for liquidated damages, no amount is due in terms of the invoices. Azari submits that its entitlement to withhold payment is a contractual right in terms of which payment would be made only once there is a reconciliation of the amounts due to and by the respective parties. This process has not been completed and, therefore, according to Azari, it is not obliged to pay over the amounts claimed by the applicants in respect of the outstanding invoices.

[41] According to Azari, what the applicants seek, under the guise of a cancellation of obligations, is to have the dispute around the stoppages claims – which operate as a form of pre-estimated damages - determined on an urgent basis by wiping out these claims in their entirety, without any reference to the merits of such claims. In other words, the applicants are attempting to extinguish claims that have already accrued, rather than obligations that are still to be fulfilled in terms of the relevant agreements. It is only upon that basis that the applicants are able to claim payment of the amounts invoiced by Tsoma.

[42] Tsoma has disputed that any stoppages claims have been validly lodged (because they are time-barred) and/or are due. Accordingly, Tsoma submits that Azari cannot apply set-off against its (Tsoma's) undisputed debt. The applicants submit further that claims for payment of the aforementioned invoices or balances thereof are not the only claims Tsoma has against Azari. They aver that Tsoma has, by way of example, delay and disruption claims against Azari on the Oyster Bay project exceeding R30 million, as well as claims against Azari for payments for work done on the Roggeveld project. In this regard, Azari's response is that the bulk of any claims on the Oyster Bay project would in any event be for the account of the main contractor, Vestas, by virtue of the "pass-through" provisions in the sub-contract agreement. These claims, which

were for wind and weather claims, have, according to Azari, been rejected by Vestas as the relevant agreement does not allow for such claims.

[43] Whatever the respective merits of the parties' cases are, one thing is clear: there is a dispute on whether monies are owed by Azari to Tsoma and vice versa. In this regard, the applicants state as follows in their replying affidavit: "A*s Azari correctly says, the completing claims are complex and not easily resoluble. The parties have asserted hundreds of claims against each other. They are so complex that Azari utilises a special computer programme and a third party moderation mechanism to quantify its claims. The complexity warranted the establishment of a by-partisan committee to attempt to resolve them. To date, it has not succeeded*".

[44] If the issue of the payment of the invoices is uncoupled from the request for the order to cancel the stoppages claims in terms of section 136(2)(b) of the Companies Act, then the claim for payment is simply a request for final relief for a money judgment on an urgent basis in motion proceedings and in circumstances where the respondent contends that it has a contractual defence to the order sought for payment of a disputed amount.

[45] In ***Wrightman t/a JW Construction v Headfour (Pty) Ltd & Another*** **2008 (3) SA 371 (SCA)** at para [12], the Supreme Court of Appeal confirmed the well-established rule in dealing with factual disputes in applications where the applicants seek final relief:

> "*[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona*

fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers…

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact, said to be disputed."

In its answering affidavit, Azari has put up a robust and spirited defence against Tsoma's claim for payment. Certainly, it cannot be said that the claims by Azari are so untenable as to be rejected merely on the papers.

[46] It is indeed so that the business rescue proceedings may well have been assisted if payment was ordered as sought by the applicants However, in the circumstances, the dispute over payment is purely a commercial issue between the parties and does not fall to be resolved within the business rescue process on the case presented by the applicants.

[47] In the circumstances, the applicants have failed to make out a case for the grant of an order for payment.

ORDER

[1] The application is dismissed.

[2] The applicants are directed to pay the costs of the application, including the costs consequent upon the employment of two counsel.

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FRANCIS J

APPEARANCES:

Applicant's Counsel:	**Adv. G Wickins (SC) (JHB)** **Adv. D Watson**
Applicant's Attorney:	**Mr Alex Eliott**
Respondent's Counsel:	**Adv. G Woodland (SC)** **Adv. S Fergus**
Respondent's Attorney:	**Mr Nico Walters**