

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

Case No.: 20261/2024

Before the Hon Madam Justice Slingers

Hearing: **12 March 2025**

Judgment Delivered: **16 May 2025**

In the matter between:

BLUE HOUSE INVESTMENTS (PTY) LTD

Applicant

(Registration no: 2022/383492/07)

and

BAREND DANIEL UYS

First Respondent

VILLAVIEW DEVELOPERS CC (in business rescue)

Second Respondent

(Registration no: 2006/132097/23)

HERMAN BESTER N.O

Third Respondent

JACOLIEN FRIEDA BARNARD N.O

Fourth Respondent

COMPANIES AND INTELLECTUAL PROPERTY

Fifth Respondent

COMMISSION

This judgment is handed down electronically by circulation to the parties' legal representatives' email addresses. The date of hand-down is deemed to be 16 May 2025.

JUDGMENT

SLINGERS J

Introduction

[1] The applicant, Blue House Investments (Pty) Ltd (**'BHI'**) is a private company with limited liability which sources funding and provides finance. The first respondent is a property-developer businessman (**'Uys'**) who uses the second

respondent, Villaview Developers CC ('Villaview') for sectional title property developments in Mossel Bay.

- [2] This matter arises from the contractual relationship between BHI, Uys and Villaview and the various agreements they concluded.
- [3] When the application was instituted and heard, BHI sought two categories of relief. The first category pertained to Uys' member's interest in Villaview and the second category pertained to the business rescues proceedings instituted by Uys in respect of Villaview.
- [4] Subsequent to the hearing of BHI, the applicant filed an application for leave to abandon the relief pertaining to the business rescue proceedings instituted in respect of Villaview. Furthermore, the court was advised that BHI no longer sought a costs order against Villaview and the third and fourth respondents. The third and fourth respondents were cited as the business rescue practitioners appointed to supervise the business rescue proceedings of Villaview.¹
- [5] In the explanatory affidavit filed in support of the application to abandon the business rescues related relief, BHI informed the court that:
 - (i) it attended a meeting convened by the business rescue practitioners on 12 March 2025;
 - (ii) Villaview's creditors which included BHI voted in favour of accepting the business rescue plan;

¹ No substantive relief was sought against the fifth respondent who did not participate in the proceedings.

- (iii) in BHI's estimation, the adoption of the business rescue plan would yield a better outcome for Villaview's creditors compared to any other scenario, including the setting aside of the business rescue plan; and
- (iv) it was of the view that the setting aside of the business rescue proceedings would be counterproductive and would be contrary to interests of Villaview's creditors, including the interests of BHI.

[6] The third respondent filed an affidavit in support of BHI's application to abandon the relief pertaining to the business rescue proceedings.

[7] As the relief pertaining to business rescue has been abandoned, the court need only determine the relief pertaining to Uys' members interest in Villaview. In this regard, BHI seeks an order declaring that:

1. BHI owns, holds and has executive title to all of the members' interest in Villaview;
2. BHI is entitled to forthwith to:
 - 2.1 procure the registration of all or any of Uys members' interest in Villaview into BHI's name or that of its nominee;
 - 2.2 realize Uys' member's interest in and/or claims against Villaview either by public auction or by private treaty, as BHI may in its sole and absolute discretion deem fit, or to take over the member's interests and/or claims at fair value as agreed or as determined by the auditors of the applicant (who shall act as an expert and not as an arbitrator);

2.3 apply the net proceeds of the sale, after all expenses of realization, to or set off the purchase price payable by it for the member's interest against Villaview's indebtedness to BHI, with the shortfall to remain as a debt due by Villaview to BHI; and

2.4 act as Uys' attorney and agent his name, place and stead, irrevocably and in *rem suam*, to sign and execute any of its abovementioned rights.

[8] BHI furthermore sought an order directing Uys and Villaview to take any and all steps that may be required in order to give effect to paragraph 7.2.1 on demand.

The agreements

[9] BHI and Villaview concluded two loan agreements, two addenda to one of the loan agreements, two suretyships, a number of mortgage bonds and a pledge and cession agreement. The details of these agreements are set out below.

[10] On 26 January 2022, Uys executed a written suretyship in favour of BHI, in terms whereof, Uys bound himself as surety *in solidum* for and co-principal debtor jointly and severally together with Villaview for the due payment of all or any monies which Villaview may at any time owe to BHI in relation to the first loan agreement that would be concluded on 27 January 2022. However, this was subject to the limit of R50 000 000.

[11] The first loan agreement was concluded on 27 January 2022 in terms whereof BHI agreed to loan and advance R40 000 000 to Villaview for purposes of a property development. The term of this loan was thirty six months with interest to accrue at a rate of four point five percent (4.5%) per month calculated daily. The

monthly instalments payable amounted to R70 000 which was due on the fifteenth of every month. The first installment was due on 15 March 2022.

- [12] As security for the first loan of R40 000 000 Villaview, duly represented by Uys, agreed to register a covering mortgage bond to the same value of the loan over erf 21106 and Villaview would ensure that erf 21106 and its development would be ensured for a reasonable replacement value through Success Brokers.
- [13] Uys was also required to pledge and cede his members' interest in Villaview to BHI as well as to execute a suretyship. A minimum amount of R30 000 000 would be paid to BHI on completion of the Mossel Bay development undertaken by Villaview.
- [14] Uys and Villaview represented to BHI that the intended development was feasible and that it would remain in its current form without any alterations to the applicable plans that could potentially delay the development or impact negatively on its feasibility.
- [15] It was further agreed that should Villaview or its related parties dispose of any property over which BHI had security in the form of a first mortgage bond, that the proceeds thereof were to be paid to BHI to reduce the outstanding balance of the loan. In the event of Villaview failing to make timeous payment of the minimum monthly instalment, the interest rate would increase to six percent (6%) per month until such time that the outstanding capital amount was settled.
- [16] Clause 8.1 of the loan agreement provided that:

'Should the Borrower fail to comply with or carry out any of the terms or conditions to this agreement, or to meet any obligation or liability to the Lender on the due date thereof, or to pay on demand any amount which may be lawfully

claimed by the Lender from the Borrower in terms of this agreement for more than 7 (SEVEN) DAYS after written notification by the Lender, addressed to the Borrower calling upon the Borrower to rectify the breach, then and in any such event the Lender is entitled to in its entire discretion to regard the total amount of the Borrower's liability in terms of this agreement to be immediately lawfully due and payable and the Lender is entitled to recover the same immediately together with all interest and other amounts which may be owing by virtue and in terms hereof. This may involve calling-up; enforcing and/or proceeding with transactions; sales and bonds including but not limited to those provided in Section K of the Schedule. The Lender's remedies in terms of this paragraph are without prejudice to any other remedies to which the Lender may be entitled in law.'

- [17] In terms of the first loan agreement, Villaview would be in breach and default if it *inter alia* committed an act of insolvency.
- [18] On 28 January 2022 BHI and Uys concluded an agreement in terms whereof Uys pledged and ceded to BHI one hundred percent (100%) of his member's interest and loan account in and to Villaview. The terms of the pledge and cession agreement included:
 - (i) as security for Villaview's present and future obligations to BHI from whatsoever cause, Uys ceded, transferred assigned and/or pledged, as the case might have been, his right, title and interest in his members' interests in and claims against Villaview;
 - (ii) Uys undertook to deliver to BHI the original CK form in relation to Villaview together with any certificate of interest, and a duly signed and completed CK2 form wherein the name of the transferee has been left blank;

- (iii) Uys undertook to immediately inform BHI if there was a material deterioration in the financial condition of Villaview or if Villaview became financially distressed- as defined in the Companies Act, Act 71 of 2008- or if it was reasonably likely to become financially distressed within any immediately ensuing we month period;
- (iv) undertook not to petition or apply or vote in favour of or convene or permit Villaview to convene a meeting of its members for the purpose of considering any resolution for, of the taking of any other steps necessary for the bringing of an application or the filing of any documents with the court or any registrar for its winding up, judicial management, dissolution or commencement of business rescue proceedings, or the seeking of relief under any applicable bankruptcy, insolvency, company or similar law whilst any amount is owing to BHI by any debtor, unless BHI has specifically approved in writing to any such meeting being held or steps being taken and any conditions to which such approval in subject have been fulfilled to the BHI's satisfaction; and
- (v) the parties to the pledge and cession agreement agreed that if, at any time during the pledge and cession, BHI became entitled to exercise its rights under the pledge and cession, Uys *vis a vis* Villaview waived any and all rights which he many have had as a member of Villaview and undertook that he would not himself, nor would any third party on his behalf attend any general meeting of Villaview or exercise any voting rights attaching to the pledged shares.

[19] On 1 June 2022, BHI and Villaview concluded a written addendum to the first loan. In terms of this written addendum:

- (i) BHI loaned and advanced a further R30 000 000 to Villaview. This monies were loaned and advanced for the development of *Die Punt Development* ('DP1'); and
 - (ii) the increased capital amount plus interest was repayable in monthly instalments of R100 000 which was due on the 15th of every month, with the first increased instalment being payable on 15 June 2022.
- [20] A first cover mortgage bond to the value of R30 000 000 would be registered over DPI. Villaview would be obliged to cause DP1 properties and its development to be insured for a reasonable replacement value through Success Brokers.
- [21] Uys and Villaview represented that the intended developments of View a Bay and DP1 were feasible and they would remain in their current form without any alternations to the applicable plans which might potentially delay the developments or negatively impact on their feasibility.
- [22] Furthermore, a minimum amount of R15 000 000 would be paid to BHI on completion of the development.
- [23] As at 31 March 2022 the amount outstanding in respect of the first loan was R21 050 317.34 and at 30 April the amount outstanding was R25 230 393.00.
- [24] On 22 February 2023, BHI and Villaview concluded a second written loan agreement in terms of which BHI advanced and loaned R30 000 000 to Villaview for purposes of a property development known as *Die Punt 2* ('DP2').

- [25] Save that a different capital amount and a different monthly instalment was due, the terms of the second loan were substantially similar to the terms of the first loan.
- [26] The second loan was accompanied by a second suretyship in terms whereof Uys' exposure to BHI for Villaview's liabilities to BHI increased to a capital sum of R100 000 000 on terms substantially similar to those of the first suretyship.
- [27] On 1 November 2023 BHI and Villaview concluded a further written addendum to the first loan. In terms hereof:
- (i) it was recorded that the total outstanding balance owing by Villaview to BHI at 31 October 2023 was R111 641 031.87; and
 - (ii) the interest rate payable in terms of the first loan was reduced to 2.75 percent per month, calculated daily and compounded monthly with effect from 1 March 2023.

The Breaches

- [28] It is undisputed that since 18 September 2023, Villaview failed to honour its obligations to pay its monthly instalments of R150 000.00 to BHI. By 31 March 2024 Villaview was indebted to BHI in relation to the View a Bay Development in the amount of R169 783 339.81.
- [29] Thereafter, Uys purportedly passed a resolution to commence business rescue proceedings of Villaview without BHI's consent.
- [30] On 23 April 2024 BHI's attorneys addressed correspondence (**'the correspondence'**) to Uys and copied in Villaview in respect of Villaview'

breaches of the loan agreements and put it on terms to remedy same.² One of the breaches identified by BHI was the repeated failure to pay the minimum monthly instalments. This correspondence recorded that Uys stood surety for the obligations of Villaview to BHI to a maximum extent of R100 million and consequently that Uys was indebted to BHI in the amount of R100 million.

[31] The correspondence went on to remind Uys that he provided a pledge and cession of his member's interest and loan accounts in Villaview to BHI and that he was in breach of his undertaking that Villaview would not breach the provisions of any agreement to which it was a party. Consequently, in accordance with clause 5(4) of the pledge and cession agreement, and as a result of Uys' breach, BHI was entitled, without obtaining a court order to procure the registration of his member's interest into BHI's name or the name of its nominee.

[32] Clause 5(4) of the pledge and cession agreement provides that:

'The parties acknowledge that the obligations of the pledgor secured by this pledge and cession are obligations of a commercial nature and that the security afforded in terms hereof are fair, reasonable and necessary to ensure that the creditor does not suffer unfair commercial prejudice. Accordingly if at any time during this pledge and cession the pledgor commits a breach of any of its obligations set out herein, or if the creditor becomes entitled to claim payment from the pledgor in respect of any of the obligations for which this pledge and cession has been given, the creditor shall be entitled, and the pledgor hereby authorizes the creditor irrevocably and in rem suam in its sole and absolute

² Annexure FA5 on page 77

discretion without reference to the pledgor and without first obtaining an order of court:

5.1

5.2

5.3

5.4 *to procure the registration of all or any of the pledged shares into its name or the name of its nominee, or any other person, and to exercise any voting rights attached thereto in such manner as it may in its sole and absolute discretion deem fit;...*⁹

[33] Uys was informed of BHI's intention to implement the pledge seven days after he received the correspondence. Uys was also informed that he may seek the protection of a court if, upon any just ground, he could show that the implementation of the pledge was prejudicial to him and his rights.

[34] At this stage Villaview was indebted to BHI in the amount of R215 165 719.55 and by 3 May 2024 it was indebted to BHI in the full amount outstanding in terms of the first and second loans and Uys was indebted to BHI in the amount of R100 million.

[35] As Uys failed to remedy his breach, as called upon to do by the correspondence, BHI perfected the pledge and cession thereby taking over Uys' member's interest in Villaview. However, when BHI sought to have Uys' member's interest in Villaview registered in its name, Uys was uncooperative and the fifth respondent would not transfer ownership of Uys' member's interest without a transfer form signed by Uys or a court order.

- [36] BHI instituted these proceedings to give legal effect to the pledge, more particularly to obtain declaratory relief pertaining to Uys' member's interest in Villaview.
- [37] The application is actively opposed by Uys who raised various *in limine* points which was not pursued during argument. Furthermore, the *in limine* points primarily pertained to the relief sought in respect of the business rescue proceedings which no longer need to be determined as a result of the applicant abandoning this relief.
- [38] In opposing the application Uys contended that there was a material factual dispute to which the applicant was alive when the application was instituted. While Uys admitted that he pledged and ceded one hundred percent (100%) of his member's interest in Villaview to BHI as security for Villaview's obligations. He denied that BHI validly implemented and/or enforced the pledge as he alleges that Villaview did not breach its obligations to BHI. On the contrary, Uys alleges that BHI ceased funding it as a result of its inability to provide funding.
- [39] Uys deposed that:
- 'The reason why I signed the surety documents, cession and pledge was to afford the Applicant with peace of mind that I will complete the development and that I am personally committed. I submit that it is indeed the Applicant who breached the agreement by not releasing funds from the transferring attorneys thereby strangling the Second Respondent, the development and other creditors, for its own benefit.'*
- [40] Upon receipt of the application to abandon the business rescue related proceedings, Uys filed an answering explanatory affidavit wherein he alleged that

BHI's acceptance of the business rescue plan rendered the application moot. Uys argues that the adoption of the plan has the effect that BHI is precluded from advancing any further claim of whatsoever nature against Villaview and against him. The remaining relief which BHI seeks in the amended draft order amounts to a call up for security from Uys which is precluded by the business rescue plan which was voted for and accepted by BHI.

Discussion

[41] It is common cause that Villaview failed to pay the minimum monthly loan instalments to BHI since September 2023 and persisted with its nonpayment thereof notwithstanding demand in April 2024. Uys alleged that he was exempted from making these monthly instalment payments as he paid R14 492 930.38 to BHI following the sale of a farm he owned through a different entity, 15AE Properties (Pty) Ltd. However, at the time BHI was the mortgagee in respect of the first bond over this farm.

[42] Clause 15 contained in the first loan agreement provides:

*'Should the Borrower or its related parties dispose of the property over which the Lender has Security in the form of a first mortgage bond, the proceeds of this disposal shall be paid to the Lender and reduce the outstanding balance of the loan.'*³

[43] Therefore, the payment of R14 492 930.38 was in terms of the loan agreements and did not indemnify Uys against the payment of the monthly minimum instalments.

³The equivalent clause in the second loan agreement is clause M(vii).

[44] Uys implies that a variation of the loan agreements occurred which would excuse the payment of the minimum monthly installment. This argument holds no water as the loan agreements provide that *'This document records the entire agreement between the parties and no amendment or cancellation or substitution of the whole or any portion thereof shall be of any force or effect unless such amendment, cancellation or substitution is reduced to writing and signed by the parties thereto.'*

[45] In his answering affidavit, Uys also appears to contend that Villaview's obligations to pay the minimum monthly instalments were reciprocal to BHI discharging its obligations to provide Villaview with further funding. This argument relies on clauses 7 and 8 of the addendum to the loans which provide that:

'7. It is agreed that a maximum of R8 000 000 (Eight Million Rand) is being held by the Lender for future draws by the Borrower prior to transfer.

8. It is agreed that the Lender shall re-advance funds to the Borrower, to complete the developments, as and when sale proceeds are received from the transferring attorney – provided a fair and reasonable amount of securities remain in place and that the developments remain financially feasible.

This creates a revolving facility limited to amount as disclosed in item of this addendum.'

[46] As seen from clause 8, the further financing by BHI was subject to it receiving sales proceeds from the transferring attorneys; that a fair and reasonable amount

of security remained in place and that the development remained financially feasible.

[47] By April 2024, there were no proceeds of sales which BHI could have advanced to Villaview. Furthermore, it cannot be said that the development remained financially feasible.

[48] Therefore, Uys failed to show that the suspensive conditions under which further financing would be made available were fulfilled. Further, the addendum's written provisions do not support the argument that the payment of the minimum monthly instalments were reciprocal and dependent upon further financing being made available to Villaview. On the contrary, it undermines the argument for reciprocal obligations on BHI to provide further financing as it would amount to a variation of agreements without complying with the agreed upon formalities for such variation.

[49] As there is no express written term in the addendum providing for the reciprocal obligations which would have permitted the suspension of the minimum monthly instalments, Uys has to make out a case for the incorporation of a tacit term to this effect. Therefore, Uys would have to show that the parties would necessarily have agreed to such a term if it had been suggested at the time.⁴ He failed to do so.

[50] BHI has also shown on an analysis of the figures that View a Bay Development is not feasible.⁵ This also constituted a breach of the loans extended to Villaview by BHI.

⁴ *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another* 2006 (3) SA 488 (SCA) at para [19]

⁵ Paragraph 14 of the replying affidavit, pg. 235

- [51] In terms of the pledge and cession agreement, BHI was entitled to realize Uys' members interest in Villaview if Uys breached his obligations imposed under the pledge and cession agreement or if BHI became entitled to claim payment from Uys in respect of any obligation for which the pledge and cession was given as security.⁶
- [52] Furthermore, in terms of the pledge and cession agreement, BHI did not require a court order or the fulfillment of any formality to take over Uys' pledged members' interest. The right to do so accrued with the occurrence of one of the stipulated trigger events.
- [53] Uys breached his obligations in terms of clause 4.3, 4.4 and 4.7 of the pledge and cession when he placed Villaview into business rescue without BHI's written approval.⁷
- [54] Villaview also breached the loan agreements and failed to remedy same after receiving written notice requesting it to do so. Consequently, BHI was entitled to demand the full outstanding amount due to it. As Uys stood surety for Villaview's indebtedness, BHI was entitled to look to him for payment.
- [55] The occurrence of the trigger events entitled BHI to perfect Uys' one hundred percent member's interest in Villaview and to treat it as its own, subject to BHI crediting Uys with the fair value thereof.

⁶ Paragraph 21 of the founding affidavit read with paragraph 143 of the answering affidavit.

⁷ Clause 4.3 provides that: 'no special resolution of the shareholder of the company will be proposed or passed without the written consent of the creditor (BHI) which shall not be unreasonably withheld.' Clause 4.4 provides that: 'the company /corporation will carry on business in the normal and regular way'; Clause 4.7 provides that: 'it will immediately notify the creditor if there is a material deterioration in the financial condition of the company /corporation or if the company becomes "financially distressed" as defined in the Company Act, 71 of 2008 or is reasonably likely to become "financially distressed" within any immediate ensuing 12 (twelve) month period.'

[56] There is no legal impediment to this relief.⁸ Furthermore, there is no factual impediment to the granting of the relief as BHI has shown that Uys breached the terms of the pledge and cession agreement and that Villaview breached the terms of the loan agreements, rendering Uys answerable to BHI for the amount of R100 million, factually entitling BHI to perfect Uys member's interest in Villaview.

[57] This right to perfect the members interest in Villaview is not affected by BHI's adoption of the business rescue plan as it had accrued upon the occurrence of the trigger events. Thus, at the time the business rescue plan was adopted, BHI had already accrued Uys member's interest in Villaview. The adoption of the business rescue plan did not undo this position nor could it result in the factual position being revisited or reversed.

[58] In the circumstances, I am satisfied that BHI has made out a case for the pledge related relief it seeks.

Condonation

[59] Uys sought condonation for the late filing of his answering affidavit. Although BHI did not oppose the condonation sought, it did point out the knock on effect it had on the filing of it replying papers which consequently were also delivered out of time and for which it in turn sought condonation.

Conclusion


[60] In the circumstances, I make an order in the following terms:

- (i) the first respondent's late filing of the answering affidavit is condoned;

⁸ *Bock v Buburoro Investments (Pty) Ltd* 204 (2) SA (SCA)

- (ii) the applicant's late filing of the replying affidavit is condoned;
- (iii) the applicant is entitled to forthwith to
 - (a) procure the registration of all or any of the first respondent's member's interest in the second respondent into the applicant's name or that of its nominee;
 - (b) realize the first respondent's member's interest in and/or claims against the second respondent either by public auction or by private treaty, as the applicant may in its sole and absolute discretion deem fit, or to take over the member's interests and/or claims at fair value as agreed or as determined by the auditors of the applicant (who shall act as an expert and not as an arbitrator);
 - (c) apply the net proceeds of the sale, after all expenses of realization, to or set off the purchase price payable by it for the member's interest against the second respondent's indebtedness to the applicant, with the shortfall to remain as a debt due by the second respondent to the applicant; and
 - (d) act as the first respondent's attorney and agent in the first respondent's name, place and stead, irrevocably and in *rem suam*, to sign and execute all documents necessary to enable the applicant to exercise any of its abovementioned rights.
- (iv) the first and second respondents are directed to take any and all steps that may be required in order to give effect to (iii)(a) above on demand, including by providing the applicant with:

- (a) the original CK form in relation to the second respondent together with any certificate of interest, and a duly signed and completed CK2 form wherein the name of the transferee has been left blank; and
- (b) any and all information required to value the first respondent's members' interest in the second respondent.
- (v) The fifth respondent is directed to take any and all steps that may be required in order to give effect to paragraph (iii)(a) above on demand but subject to the applicant's compliance with the fifth respondent's requirements.
- (vi) The costs of the application shall be borne by the first respondent, including the costs of two counsel where so employed on scale C.


SLINGERS, J
16 May 2025