

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
<u>17/5/2023</u>	
DATE	SIGNATURE

CASE NO: 3708/2021

In the matter between:

ORION REAL ESTATE LIMITED

Applicant

and

ERF 195 ELMA PARK LIMITED

(In liquidation)

First Respondent

DONOVAN THEODORE MAJIEDT N.O.

Second Respondent

HARRY KAPLAN N.O.

Third Respondent

FUSI PATRICK RAMPOPORO N.O.

Fourth Respondent

*(in their capacities as the joint provisional liquidators
of ERF 195 ELMA PARK LIMITED)*

THE MASTER OF HIGH COURT – JOHANNESBURG

Fifth Respondent

THE BODY CORPORATE ELMA PARK

Sixth Respondent

SBD INVESTMENTS (PTY) LIMITED

Seventh Respondent

Neutral citation: *Orion Real Estate Limited v ERF 195 Elma Park Limited and 5 Others* (Case No: 3708/2021) [2023] ZAGPJHC 501 (17 May 2023)

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicant applied under this case number to convert the liquidation proceedings in respect of the first respondent to business rescue proceedings in terms of section 131 of the Companies Act, 2008, together with ancillary relief.
2. The applicant cited the liquidators of the first respondent as further respondents.
3. The sixth respondent, who is a body corporate and a creditor of the first respondent, as an affected party applied for and was granted leave to intervene in these proceedings. The sixth respondent opposed the conversion of the liquidation proceedings to business rescue proceedings, raising various objections as to why it contended that business rescue proceedings would not be appropriate.

4. During the course of Mr Bezuidenhout's argument on behalf of the applicant motivating for business rescue, one of the benefits put forward by the applicant should the first respondent be placed into business rescue was that the applicant would procure the transfer of a property, being Erf 257 Elma Park Extension 2 Township ("Erf 257") to the first respondent and so facilitate the business rescue proceedings. The applicant had previously in a letter from its attorneys made a tender that it was *inter alia* "*willing to consider throwing Erf 257 into the proverbial pot of the business rescue*" for purposes of advancing the business rescue.
5. This tender was made consequent upon the sixth respondent in its answering affidavit raising as an objection that a major obstacle to any business rescue, and for purposes of unlocking value in respect of the first respondent's assets, was that this property needed to be "*returned*" to the first respondent.
6. What had transpired is that after the winding-up application for the first respondent had been launched, but before a provisional order was granted, the applicant, who was then still in control of the first respondent, had transferred Erf 257 from the first respondent to one of its subsidiary companies, SBD Investments (Pty) Limited ("SBD Investments"). The provisional liquidators once they were appointed initiated proceedings in terms of section 341(2) of the Companies Act, 1973 seeking that this property be returned to the insolvent estate of the first respondent. As far as I can gather from the papers, no opposing papers have been filed in relation to those section 341(2) proceedings. Upon the launch of these

business rescue proceedings, those section 341(2) proceedings in any event would have been suspended.

7. The importance of Erf 257 to any successful business rescue, as would appear to be common cause between the parties, is that this property would constitute the necessary parking lot for purposes of making parking available to in particular the commercial retail sectional title units that make up potentially, in value, a large part of the first respondent's assets.
8. The first respondent's main assets are sectional title units in the Elma Park sectional title scheme, consisting of two retail commercial units as well as seventeen residential units. The balance of the units in the sectional title scheme are residential units which are owned by various other parties. As stated, in order to unlock value in respect of the commercial retail units, it is necessary for Erf 257 to be transferred to the first respondent so that the first respondent, as the developer of the scheme, would then have that available for the necessary parking for the operation of the commercial retail units. Precisely what the fate would be of this property once transferred to the first respondent (such as must it be transferred to the sixth respondent as the body corporate and/or notarially tied to the erf on which the sectional title scheme is situated) is something that would have to be taken up by a business rescue practitioner, alternatively should the first respondent revert to liquidation, by the liquidators, or otherwise.

9. I during the course of Mr Bezuidenhout's argument raised with him various difficulties in converting the liquidation to business rescue proceedings, one of which was that it was not clear from the applicant's attorneys' letter that the applicant was actually making Erf 257 available to a potential business rescue, or was only expressing a possibility that it may do so.
10. Mr Bezuidenhout, after standing the matter down to take instructions, clarified that Erf 257 would be made available on condition that the first respondent was placed into business rescue, thereby enabling the business rescue practitioner to have the property at his disposal in advancing the business rescue. To the extent necessary, SBD Investments as the transferee and present registered owner of Erf 257 was agreeable to being joined to these proceedings so that it would be party to an order requiring it to transfer the property to the first respondent.
11. This tender removed one of the major obstacles standing in the way of a potentially successful business rescue. This tender, once repeated and clarified during the course of the hearing before me by the applicant and its subsidiary, SBD Investments, opened a pathway for engagement between the applicant's and sixth respondent's respective counsel as to whether in these evolving circumstances consensus could be reached as to whether the first respondent should now be placed in business rescue.
12. Having stood the matter down to enable the applicant and sixth respondent to engage with each other, they were able to agree upon a consent order, which I granted. The order that I granted, by consent

between the applicant, the sixth respondent and the seventh respondent, was as follows:

- 12.1. SBD Investments is joined to the proceedings as the seventh respondent.
- 12.2. The liquidation proceedings of the first respondent under Master's reference number T935/16 is hereby converted to business rescue proceedings as contemplated in Chapter VI of the Companies Act, 71 of 2008.
- 12.3. Mr Jacobus Michiel van Tonder is appointed as the interim senior business rescue practitioner of the first respondent;
- 12.4. The seventh respondent is ordered and directed to transfer the property ERF 257, ELMA PARK EXTENTION 2 TOWNSHIP, REGISTRATION DIVISION I.R., PROVINCE OF GAUTENG, held under title deed number T036416/2015 ("the property"), to the first respondent.
- 12.5. Should the seventh respondent fail to do so, the sheriff for the area within which the property is located is authorised to sign all documents and to do all things necessary to give effect to the transfer of the property.
- 12.6. The costs of the transfer of the property shall be costs in the business rescue.

13. I was informed that attorneys for the applicant did contact the attorneys for the liquidators, who had previously filed a notice to abide, to ascertain whether the liquidators had any objection to the proposed consent order, and no objection was forthcoming.
14. What the parties were unable to reach agreement on was the incidence of costs of these proceedings, and so required me to decide the issue of costs. I reserved judgment in that regard.
15. The applicant submitted that it had been substantially successful in that, after all, it had been seeking a conversion to business rescue and that this had been achieved. It accordingly submitted that it would be appropriate that its costs be costs in the business rescue of the first respondent.
16. Mr Campbell for the sixth respondent countered that the applicant should not be permitted to recover any costs from the business rescue proceedings and that rather the applicant should pay the sixth respondent's costs. Amongst his submissions were that until Mr Bezuidenhout's engagement with the court and which elicited the clarified tender by the applicant and its subsidiary, SBD Investments, to "*return*" Erf 257 to the first respondent, it was unlikely that there would have been any success in the application given the difficulties that the court had raised with Mr Bezuidenhout during the course of his argument.
17. Various other submissions were made by each of the counsel in support of their respective positions in relation to costs.

18. What I did find persuasive was Mr Bezuidenhout's submission that once there was to be a conversion to business rescue, whatever the route taken to reach that consensus, to order one or other of the parties to pay the other's costs rather than that the parties' costs be costs in the business rescue would continue to fuel the friction between the parties and would serve as an obstacle to a successful business rescue.
19. In my view, the applicant now, having through its subsidiary the seventh respondent tendered the return of Erf 257, has a real vested interest in advancing the business rescue proceedings, rather than making use of those proceedings as a dilatory tactic.
20. An order that the sixth respondent's costs also be costs in the business rescue would also give impetus to the sixth respondent cooperating in respect of a successful business rescue as the likelihood of it recovering its costs would be heightened by a successful business rescue. A successful business rescue is unlikely to entail anything less than the costs of this application being paid in due course.
21. Should the business rescue proceedings fail and be superseded by a liquidation order, then the parties' costs as costs of business rescue should have the appropriate preference in the insolvency ranking as provided for in Chapter 6 of the Companies Act.
22. In my discretion, it is appropriate that both the costs of the applicant as well as the costs of the sixth respondent be costs in the business rescue of the first respondent.

23. In giving my reasons for this order, I have avoided dealing with the various objections that the sixth respondent has raised as to the conduct of the applicant to date, both in leading up to the winding-up and during the course of the winding-up of the first respondent. Given the consent order that has been reached, I deliberately refrain from doing so but this is not to say that the sixth respondent's concerns were without merit.
24. It is hoped that in light of the consent order which now obliges the applicant through its subsidiary, the seventh respondent, to transfer Erf 257 to the first respondent that this is a first, and hopefully landmark, step taken in the right direction to resolving the disputes that have arisen between the parties and which now that the liquidation proceedings have been converted to business rescue proceedings, will result in a successful rescue of the first respondent.
25. I express my gratitude to the counsel and attorneys for the applicant and the sixth respondent for their constructive engagement during the course of the hearing before me to enable the consent order to be agreed and made.
26. In the circumstances, and in respect of the costs of the application, I order that:
- 26.1. the applicant's costs are to be costs in the business rescue of the first respondent;

26.2. the sixth respondent's costs are to be costs in the business rescue
of the first respondent.



Gilbert AJ

Date of hearing: 11 May 2023

Date of judgment (on costs): 17 May 2023

Counsel for the Applicant and

Seventh Respondent:

W J Bezuidenhout

Instructed by:

Van Deventer Dlamini Inc.

Counsel for the Sixth Respondent:

A G Campbell

Instructed by:

Karnavos Attorneys