



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

REPORTABLE

CASE NO: D5093/2020

In the matter between:

VENJANDRAN SHUNMUGUM PILLAY

Applicant

and

PERSONIFY INVESTMENTS (PTY) LTD

First Respondent

THE COMPANIES AND INTELLECTUAL
PROPERTIES COMMISSION

Second Respondent

AFFECTED PARTIES

Third Respondent

CASE NO: D5094/2020

In the matter between:

VENJANDRAN SHUNMUGUM PILLAY

First Applicant

JENNY PILLAY

Second Applicant

and

HUNTREX 302 (PTY) LTD

First Respondent

THE COMPANIES AND INTELLECTUAL
PROPERTIES COMMISSION

Second Respondent

AFFECTED PARTIES

Third Respondent

CASE NO: D5095/2020

In the matter between:

VENJANDRAN SHUNMUGUM PILLAY

Applicant

and

MISTY BLUE INVESTMENTS (PTY) LTD

First Respondent

THE COMPANIES AND INTELLECTUAL
PROPERTIES COMMISSION

Second Respondent

AFFECTED PARTIES

Third Respondent

CASE NO: D5622/2020

In the matter between:

INVESTEC BANK LTD

Applicant

and

PERSONIFY INVESTMENTS (PTY)LTD

Respondent

CASE NO: D5623/2020

In the matter between:

INVESTEC BANK LTD

Applicant

and

MISTY BLUE INVESTMENTS (PTY) LTD

Respondent

CASE NO: D5624/2020

In the matter between:

INVESTEC BANK LTD

Applicant

and

HUNTREX 302 (PTY) LTD

Respondent

CASE NO: D3036/2021

In the matter between:

HUNTREX 302 (PTY) LTD

First Applicant

PERSONIFY INVESTMENTS (PTY) LTD

Second Applicant

MISTY BLUE INVESTMENTS (PTY) LTD

Third Applicant

and

INVESTEC BANK LTD

First Respondent

THE SHERIFF OF THE HIGH COURT
INANDA AREA 2

Second Respondent

THE SHERIFF OF THE HIGH COURT
DURBAN COASTAL

Third Respondent

IAN WYLES AUCTIONEERS

Fourth Respondent

ORDER

(a) The application for recusal is dismissed with costs.

(b) The applications in case numbers 5093/2020, 5094/2020 and 5095/2020 are dismissed with costs.

(c) In each of cases 5622/2020, 5623/2020 and 5624/2020 there will be the following order:

- (i) the respondent is placed under a provisional winding-up order in the hands of the Master of the High Court, Pietermaritzburg;
 - (ii) a rule nisi is issued, calling on the respondent and all interested parties to show cause, if any, to this court on 24 August 2021 at 9.30 am why the provisional order should not be made final.
 - (iii) This order is to be published in the Government Gazette and in the Natal Mercury on or before 21 July 2021.
- (d) The applicants in case 3036/2021 are ordered to pay the costs of that application.
- (e) The application for leave to intervene on 14 June 2021 is dismissed with costs.
- (f) The affected parties who delivered affidavits in support of the business rescue applications will pay their own costs.
- (g) The applicants in the business rescue applications are ordered to pay the costs of those affected parties who delivered affidavits in opposition to the business rescue applications, including the costs of the appearance.
- (h) The application by Absa Bank Ltd to intervene is dismissed with costs.
- (i) The applications by the second to the thirteenth intervening creditors in the winding-up applications are dismissed with costs.
- (j) All the costs orders will include those occasioned by the employment of senior counsel, or two counsel, where so employed.

JUDGMENT

Delivered on: 29 June 2021

Ploos van Amstel J

[1] There are seven matters before me, which were heard together. Investec Bank Ltd seeks winding-up orders against three companies; their shareholders seek business rescue orders, rather than winding-up orders; and the three companies themselves sought an interdict against Investec, pending the outcome of the other applications. In addition there are several applications by affected persons to participate in the hearing of the business rescue applications, and by creditors to intervene in the winding-up applications.

[2] The three companies are part of one group. They are Misty Blue Investments (Pty) Ltd, Personify Investments (Pty) Ltd and Huntrex 302 (Pty) Ltd. I refer to them in this judgment, respectively, as Misty, Personify and Huntrex, and collectively as 'the companies'.

[3] It is undisputed that the companies are indebted to Investec in an amount of some R200 million, to Nedbank in an amount of some R3 million, and to Absa in an amount of just over R2 million. The liabilities are joint and several as there are suretyships and cross-suretyships. In addition there are concurrent creditors for a further approximately R100 million.

[4] Investec launched winding-up applications against all three companies on 10 and 12 July 2019. These applications have been adjourned from time to time, first because of a resolution by the directors to commence business rescue proceedings (which was later withdrawn) and on other occasions because of moratoriums or agreements for the rescheduling of the debts. They are the winding-up applications which are before me.

[5] On 7 August 2020 the applicant and his wife, as shareholders, launched applications to place the three companies in business rescue. The result was that the winding-up applications were suspended in terms of s 133 of the Companies Act 71 of 2008 (the Act). These are the business rescue applications which are before me.

[6] The application for an interdict was launched on 14 April 2021. The companies sought to restrain Investec, pending the outcome of the other applications, from furnishing notice to the companies' debtors to make payment directly to Investec in terms of certain cession agreements. They also sought to restrain the removal of certain assets which had been attached pursuant to a notarial bond. On 15 April 2021 Olsen J adjourned the application for an interdict, to be heard together with the other applications. He recorded that Investec had given an undertaking pending the outcome, which was acceptable to the companies.

[7] I need to consider the business rescue applications first. If they succeed the winding-up applications will remain suspended. If the business rescue applications fail, I will need to consider the winding-up applications on their merits.

Business Rescue

[8] The shareholders of the companies are Mr Vejandran Pillay and his wife. Misty and Personify are property owning companies. Their income consists mainly of rentals. Huntrex is the trading company and occupies, in the main, properties owned by the other two. It operates hotels, guest houses, conference facilities and so on. It is accepted on the papers that the companies are so interdependent that the outcome of the applications should be the same in respect of all three.

[9] The immovable properties owned by the companies are as follows. Misty owns the Urban Park Apartments and Hotel; the Auberge Hollandaise Guest House; the Imperial Hotel; the Central Park sectional title units and parking bays, together with the adjacent vacant land; Aldrovanda Palace; and Section 208, Millenium Towers. Personify owns The Square Shopping Centre and Boutique Hotel; and the Waterfront Hotel and Spa. Huntrex owns no immovable property. It owns moveable property in the form of furniture and equipment, which has been attached by Investec in terms of a notarial bond.

[10] It is undisputed that the companies are financially distressed and that they have been unable to service their debts for a number of years, resulting in several restructuring agreements.

[11] The purpose of business rescue proceedings is stated in s 128(b)(iii) of the Act to be to facilitate the rehabilitation of a company that is financially distressed by providing for the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis, or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. One of the requirements for the making of such an order by a court is, in terms of s 131(4)(a), that there must be a reasonable prospect for rescuing the company. This was the real issue before me.

[12] The applicants bought Misty and Personify in about 2003 and 2004 respectively. They were both shelf companies. Misty and Personify bought a number of immovable properties during the period 2012 to 2015. Some were bought as

existing buildings. Others were bought as land, and buildings were constructed on them. These acquisitions and developments were funded by Investec and Nedbank against the security of the properties and suretyships.

[13] A development in Umhlanga Rocks did not go according to plan and there were substantial delays. The companies ran into financial difficulties and were not able to service their debts. A number of moratorium agreements were concluded from time to time, but the companies continued to default on their payments. In July 2019 Investec applied for the companies to be liquidated. Those applications were later put on hold, and further attempts were made to enable the companies to rectify the situation. The last moratorium agreement was concluded on 5 February 2020. It provided for the sale of various immovable properties and the payment of the proceeds to Investec. It also provided for the payment of the balance in instalments, and the settlement of the entire indebtedness by 30 June 2020.

[14] Clause one of the agreement provided for a guarantee to be furnished to Investec by 14 February 2020, in an amount of R15 million, and payment of that amount by 28 February 2020. Clause two provided for a second guarantee to be furnished, also by 14 February, and payment of R15 million by 28 February 2020. These amounts related to Central Park Phases One and Two. The first guarantee was furnished, but expired without payment being made. The second guarantee was not furnished, nor was payment made. I mention these two breaches because they occurred before the national lockdown that was caused by the Covid pandemic. The companies were in other words already financially distressed.

[15] The other guarantees referred to in the agreement were also not furnished, as the sales contemplated in the agreement did not take place. Nor were the payments made when they fell due. These included amounts of R10 million and R50 million that were payable on 31 May 2020.

[16] The national lockdown as a result of the Covid pandemic took effect on 26 March 2020. The applicants say the hospitality industry was hit particularly hard by the lockdown, and potential purchasers of the properties which had been earmarked for sale became hesitant and would not commit.

[17] It appears from Investec's answering affidavit that Misty and Personify had a history of defaulting in their loan obligations, from 2017 through to the present. The applications for their liquidation were launched well before the Covid pandemic resulted in a national lockdown. Investec points out that the restructuring agreements of 17 July 2019 and 5 February 2020 both contemplated the selling of properties owned by the companies so as to enable them to discharge their debts. There was never a suggestion that the income from the trading company, Huntrex, would ever be sufficient to pay the debts. The agreements contemplated the disposal of assets so that creditors could be paid.

[18] The applicants contend that the companies should not be liquidated as there is a reasonable prospect that they can be rescued. In an attempt to establish this they put up a proposed business strategy, prepared by a business rescue practitioner, Mr K Maharaj. The proposal was heavily criticised by Investec, who contended that no case for a reasonable prospect was made.

[19] The test for a reasonable prospect was considered in *Prospec Investments*¹. Van der Merwe J said: 'I agree that vague statements and mere speculative suggestions will not suffice. There can be no doubt that in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.' And in *Oakdene*² Brand JA said it must be a prospect based on reasonable grounds.

[20] The proposal by Mr Maharaj contemplates the sale of a number of the properties, the conversion of two hotels into old age care facilities, and the continued operation of a guesthouse. Investec raised a number of criticisms of the proposal, such as the fact that the companies themselves have not been able to sell the properties at the prices mentioned in the proposal; it reflects Investec as a secured creditor for R95 million instead of R195 million; it does not mention Misty's liability to Absa Bank in a sum of R2 322 014; the information with regard to the sale of The Square is incorrect; the information with regard to the Imperial Hotel, Central Park Phase Two, Aldrovanda Palace and Millenium Towers is unsubstantiated; there is no factual basis for the claim that the dividend in the case of business rescue will

¹ *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB) para 11.

² *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 (SCA)

exceed the dividend on liquidation; the proposal is superficial and lacking in essential information; it refers to annexures which are not there; none of the companies has any experience in the running of old age care facilities; there is no information as to the cost of equipping and running the facilities, or where the money will come from; the expected income will not be sufficient to service the debts to the banks; and there is no reason to think the debts will be restructured in such a way that the banks will get paid in the foreseeable future. Investec also points out that in the moratorium agreement of 5 February 2020 the applicants acknowledged that business rescue would not have a reasonable prospect and would be inappropriate.

[21] Counsel for the applicants based his argument for a reasonable prospect on what he called a mix of selling properties, trading as old age care facilities, and the continued trading in the hospitality industry. He submitted that as matters improve the companies will be able to trade out of their difficulties. The facts show that this is unlikely. They have been unable since 2017 to service their debts, and the last moratorium of 5 February 2020 was designed to give them time to sell a number of the properties so that they can pay their debts. It did not envisage that they would be able to trade out of their difficulties. Their poor prospects have been exacerbated by the Covid pandemic. There are no facts before me that demonstrate a reasonable prospect that the companies can be returned to a position where they exist on a solvent basis. It is not the purpose of business rescue to give a debtor unlimited time to trade out of its financial difficulties. The creditors are entitled to be paid within a reasonable time and the applicants have to show that business rescue will have a reasonable prospect of achieving this. The report by Mr Maharaj seems to me to be based on vague statements and speculative suggestions. It does not reveal a factual foundation for the existence of a reasonable prospect, based on reasonable grounds, as required in *Prospec Investments* and *Oakdene*.

[22] With regard to the suggestion of converting the hotels into old age care facilities Investec pointed out that none of the companies has any experience in this field and the report says nothing about the equipment or trained staff for such a venture. Counsel for the applicants sought to counter this by submitting that what was contemplated was not a care facility, but rather accommodation for the aged, where they can be seen by their own doctors. This was not the case made in the papers. The report refers to a 'care facility', and the supplementary report that the

applicants sought to introduce refers to the 'provision of meals, medical and other necessary services'.

[23] A number of affected persons delivered affidavits in support of the business rescue applications, and some in opposition. They were entitled to do so in terms of s 131(3). Those in support did not take the matter any further, and it is perhaps fair to say that they were merely expressing their support. Those in opposition contended that the applicants have not discharged the onus of showing a reasonable prospect for rescuing the companies. They contended that the applicants have not demonstrated that there will be a better return for creditors under business rescue as opposed to liquidation; they pointed to the lack of particulars in the proposed strategy; and they contended that a liquidator will be in a better position to deal with the assets of the companies and investigate their affairs.

[24] Four persons brought an urgent application on 14 June 2021, seeking leave to intervene. I pointed out to counsel that they did not have to be joined as respondents because in terms of section 131(3) they were entitled to participate in the hearing. Counsel for Investec agreed and said Investec would file an answering affidavit and the affidavits would be dealt with in argument.

[25] The main affidavit in the application of 14 June was deposed to by Mr MY Khan. The other 'intervening parties' deposed to confirmatory affidavits. The four of them had bought apartments in Central Park and paid the purchase price in full. None of them has received transfer.

[26] Khan says on 10 June 2021 he was told by one Des Govindasamy, a creditor of Misty's, that there were prospects that the liquidation and business rescue proceedings could be settled in the light of 'certain lucrative offers' that had been made by third parties. He asked his attorney to make enquiries, who wrote to the applicants' attorney and requested certain information. Then follows a number of pages that contain financial and contractual information which was supplied to Khan's attorney by the applicants' attorney. Annexed to the affidavit are copies of a number of agreements and guarantees. It seems plain to me that Khan's affidavit is a disguised supplementary affidavit by the first applicant. Most of the affidavit consists of inadmissible hearsay evidence. I therefore ruled that these affidavits would not be allowed in. The right of an affected person to participate in the hearing

does not extend to the introduction of hearsay evidence at the last minute through the back door.

[27] I was informed from the bar that in the affidavit delivered by Investec in opposition to the introduction of these affidavits, it took the point that Khan's affidavit consisted of inadmissible hearsay. This is confirmed by the first applicant in his affidavit. This no doubt explains the application by the applicants, during the hearing before me, for leave to deliver a supplementary affidavit and a supplementary report by Mr Maharaj. When counsel for the applicants commenced his argument he informed me that such an application was being prepared and would be available in the course of the morning. The notice of motion was dated 17 June 2020, as were the affidavits of the first applicant and Mr Maharaj, and his supplementary report. The first applicant says in his affidavit that he provided Mr Maharaj with the information and documents referred to in his affidavit. Neither he nor Mr Maharaj says when this occurred.

[28] The supplementary report mentions sale agreements which have been concluded in respect of some of the properties. These include: the sale to one Charles Thompson of land in Central Park for R15 million and the Auberge Hollandaise Guest House for R10 million. The agreements were concluded on 7 May 2021; offers totalling R41 million for units in Urban Park. The dates are not provided, nor are the offers. The report does not say why the offers have not been accepted; the sale of a number of floors in Urban Park for R60 million; the sale of three ground floor units for R3 million; and the sale of The Square for R75 million, on 1 June 2021.

[29] There are oddities in some of the agreements. Clause 3.3 of the agreement for the sale of the land and the guest house refers to the transfer of a three bed unit for 'NIL consideration and pay the seller an amount of R2 000 000... in settlement'. This appears to be in 'payment' of the purchase price. The agreement for the sale of a number of floors in Urban Park is conditional on Investec consenting to the sale, or the winding-up application being dismissed, or the seller being placed under business rescue and the agreement being accepted by the practitioner. There is no explanation as to why the agreement is conditional on the liquidation application being dismissed. This suggests manipulation on the part of the first applicant.

[30] It seems plain that the applicants could have placed the additional information before the court much earlier than the date of the hearing. Some of the agreements were concluded as long ago as 7 May and 1 June. There is no explanation in the papers as to why this was not done. Further, as counsel for Investec submitted, the new information hardly changes the picture. It concerns the sale of properties and adds very little to the prospect to rescue the companies. Counsel for the applicants referred me to a number of authorities mentioned in Erasmus³, to the effect that a court should lean towards allowing additional information by way of supplementary affidavits. That may be correct as a general proposition. But the rules and practice relating to motion proceedings are there for good reason. In this matter the first applicant tried to introduce the new information by providing it to Khan so that he could introduce it as an affected person. When this did not work he resorted to an application to deliver a supplementary affidavit during the hearing. I do not regard the new information as sufficiently weighty to persuade me to allow this abuse of the process.

[31] The remarks by Brand JA in *Oakdene* should be borne in mind. He said:⁴'My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act... I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. *A fortiori*, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings...'

[32] The application to supplement the papers is disallowed.

[33] I do not consider that the applicants have shown a reasonable prospect to rescue the companies, and all three those applications will be dismissed with costs.

³ Erasmus Superior Court Practice.

⁴ At para 33.

[34] This brings me to the applications for liquidation. At the commencement of the proceedings before me I directed that the business rescue and winding-up applications be heard together, for practical reasons. They had all been set down together.

The Liquidation Applications

[35] The companies are liable jointly and severally for debts of approximately R300 million. The submission that they are not commercially insolvent is based on the notion of intervening impossibility, or *vis major*. The contention is that the Covid pandemic and the national lockdown had the result that they could not perform in terms of the moratorium agreement of 5 February 2020; this was out of their control and they are consequently not in breach as their obligations have been suspended, albeit temporarily. Counsel submitted that this continues to be the case.

[36] The moratorium agreement of 5 February 2020 contemplated the sale of a number of properties, including The Square, The Waterfront Hotel and Spa, the Auberge Hollandaise Guest House, and units in Urban Park Apartments and Hotel. It obliged the companies to make the following payments to Investec: two amounts of R15 million each by 28 February 2020, in respect of Central Park Phases One and Two, and the furnishing of guarantees by 14 February; R10 million by 31 May 2020 in respect of Auberge Hollandaise Guest House; R50 million by 31 May 2020 in respect of Urban Park; R500 000 by 7 February 2020; R500 000 by 14 February 2020; R1 500 000 by 28 February 2020; and R1 500 000 by 31 March 2020. The balance of the total liability had to be paid by 30 June 2020.

[37] The companies furnished one of the guarantees for R15 million, and it was apparently extended to 10 April 2020. The second guarantee was not furnished. Neither of the payments of R15 million was paid. Counsel for Investec submitted that the companies were in *mora* when the second R15 million payment was not made on 28 February, and was still in *mora* when the national lockdown was announced on 20 March 2020.

[38] It was held in *Tweedie*⁵ that when a debtor is in *mora* any subsequent supervening impossibility does not relieve him from his duty to perform. Counsel for

⁵ *Tweedie and Another v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (WLD) 805F-I.

the companies did not contest this, but submitted that they were not in *mora* as Investec had agreed to an extension of the time to pay.

[39] The request for an extension was made by the first applicant on 2 April 2020. He asked Investec ‘to defer any payments due for a period of 90 days’. The reply from Investec’s attorney, on 9 April, was that Investec had agreed to defer payment in respect of clauses 15.2 and 15.3 of the settlement agreement for a period of 90 days, and that an addendum to the settlement agreement would be sent to him for signature. Those clauses referred to two payments of R1,5 million each, which were payable on 28 February and 31 March respectively. There was no extension of the time for payment of the second sum of R15 million that was due on 28 February 2020. In any event, the extension was granted on 9 April 2020, when the national lockdown was already in place. If the *mora* on 20 March prevented the lockdown from qualifying as an intervening impossibility then a subsequent extension would not have changed that.

[40] Further, an inability to pay seems to me to be a subjective impossibility. It was held in *Unibank*⁶ that impossibility is not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.

[41] The event must render performance absolutely or objectively impossible. Mere personal incapacity to perform does not render performance impossible, unless performance is of a personal nature, so that, for example the death of a contracting party does not render performance by that party impossible unless the performance was personal in the sense that only the deceased could have performed it.⁷ The death of an opera singer is a good example.

[42] The companies were therefore not excused by the national lockdown or the pandemic from paying their debts. It seems plain that they are not able to pay their debts and are commercially insolvent. In *Murray NO*⁸ Wallis JA referred with approval to the following passage in LAWSA: ‘A company is unable to pay its debts

⁶ *Unibank Savings and Loans (formerly Community Bank) v Absa Bank* 2000 (4) SA 191 (WLD) 198.

⁷ Christie’s *Law of Contract in South Africa*, 7th ed, 550; *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) para 22.

⁸ *Murray NO v African Global Holdings (Pty) Ltd* 2020 (2) SA 93 (SCA) para 28.

when it is unable to meet current demands on it, or its day-to-day liabilities in the ordinary course of business, in other words, when it is “commercially insolvent”. The test is therefore not whether the company’s liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant’.

[43] On the evidence before me the companies are plainly unable to pay their debts. I see no basis for exercising my discretion against the granting of a provisional liquidation order. Counsel for the intervening creditors submitted that there are matters that need to be investigated by a liquidator, such as what happened to the deposits that were paid in respect of the sale agreements that were cancelled. This is a valid point as a liquidator has powers to investigate wrongdoing and contraventions of the Companies Act, which a business rescue practitioner does not have.

The Interdict.

[44] The interdict was sought pending the determination of the business rescue and winding-up applications. Investec gave an undertaking that applies until the outcome of the applications. An interdict is therefore no longer required. The relief that was sought was to restrain Investec from furnishing notice to the companies’ debtors to pay it in terms of cession agreements, and to restrain it from removing goods that had been attached under a notarial bond.

[45] The basis on which the interdict was sought was that the companies had not defaulted in terms of the settlement agreement and that consequently Investec was not entitled to exercise its rights in terms of the cession. The contention was based on the alleged intervening impossibility of performance, which excused them from performance. I have already dealt with this contention, and concluded that it is without merit.

[46] The application for an interdict would have failed. Firstly, the companies were in breach of their obligations and Investec was entitled to exercise its rights under

the cessions. Secondly, the debts did not belong to the companies as they had been ceded in *securitatem debiti* and were not affected by the business rescue application. Thirdly, collecting the debts as cessionary did not amount to *paratie executie*. See *De Beer*⁹, where it was held that micro lenders were entitled to use their clients' cash cards and PIN numbers to draw their money in order to pay their debt, and this was not against public policy.¹⁰ The order of 10 July 2019 authorised Investec to attach and take possession of the goods. In those circumstances an interdict restraining the removal of the goods would not have been granted.

[47] The application for an interdict was misconceived and the applicants will be ordered to pay the costs.

The Intervening parties

[48] A number of affected persons and creditors applied for leave to intervene. I deal with them briefly.

[49] The persons who sought leave to intervene on 14 June 2021 claimed to be affected persons in the business rescue applications. These were the affidavits which I refused to accept as they consisted of inadmissible hearsay, which the first applicant sought to introduce through them. They will be ordered to pay the costs occasioned by their abortive application, which necessitated an urgent hearing on 14 June.

[50] The other affected parties were entitled to participate in the business rescue applications as they had delivered affidavits and some were represented by counsel. Those who supported the applications for business rescue will be ordered to pay their own costs. Those who successfully opposed the applications for business rescue are entitled to have their costs paid by the applicants.

[51] Absa sought leave to intervene as a creditor, but was not represented at the hearing. It in any event relied on actual insolvency, which was not established. Its application to intervene will be dismissed with costs.

⁹ *De Beer v Keyser* 2002 (1) SA 827 (SCA) at 838.

¹⁰ This practice was later prohibited by legislation.

[52] The second to the thirteenth intervening creditors in the winding-up applications did not file security bonds as was required by section 346(3) of the 1973 Companies Act. Their applications are defective and will be dismissed with costs.

Recusal application

[53] There is one further matter that I need to deal with. After these applications were allocated to me and while I was in the process of reading the papers it occurred to me that I should probably inform the parties that I was a client of Investec Bank. Whether or not that was necessary is now academic. It appears from *Bernert*¹¹ that it was in fact not necessary. Nevertheless, on 1 June 2021 my secretary informed the parties that I was a long-standing private bank client of Investec and if any of the parties wished to object to me hearing the matter such party should notify me and the other parties as soon as possible. This resulted in a substantive application by the applicants for me to recuse myself. I heard argument on this application on 10 June 2021, and dismissed it with costs.

[54] The reasons for my doing so were as follows. Although I bank with Investec I own no shares in it, nor do I know any of the Investec employees involved in the transactions between the parties, or in the applications themselves. I had never heard of the matter until it was allocated to me. The liabilities of the group of companies to Investec are not in issue on the papers. The real issue is whether those companies should be placed in liquidation or in business rescue.

[55] The basis on which the application for my recusal is based is, if I understood it correctly, an alleged apprehension that I made the disclosure because I had doubts about my own impartiality. I told counsel during argument that I made the disclosure not because I had any reservation about my impartiality in the matter, but because I did not want my relationship with Investec to be raised at the hearing of the main applications and result in the matter being delayed. Nor did I want the issue to be raised after the matter had been heard. I was also conscious of the fact that the relationship between judges and their banks had been raised before in other proceedings, and in the questioning of a judge in the Judicial Service Commission.

¹¹ *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) para 79.

[56] Counsel for the applicants submitted that they were not able to assess properly whether they should be concerned as no information has been provided as to my dealings with Investec. This submission is misplaced. The test for recusal is objective and the onus of establishing it rests on the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. See *Bernert*¹² and the cases referred to there. Ngcobo J referred to the presumption of impartiality, the effect of which is that a judicial officer will not lightly be presumed to be biased. He said this is a consideration a reasonable litigant would take into account.¹³

[57] My relationship with Investec is the usual, professional relationship that millions of other people have with their banks. It has nothing to do with the transactions in the papers, or the applications themselves. The outcome of the main applications is entirely irrelevant to my own interests and to my relationship with Investec.

[58] I concluded that the application for my recusal was devoid of merit.

[59] The orders that I make are as follows:

- (a) The application for recusal is dismissed with costs.
- (b) The applications in case numbers 5093/2020, 5094/2020 and 5095/2020 are dismissed with costs.
- (c) In each of cases 5622/2020, 5623/2020 and 5624/2020 there will be the following order:
 - (i) the respondent is placed under a provisional winding-up order in the hands of the Master of the High Court, Pietermaritzburg;
 - (ii) a rule nisi is issued, calling on the respondent and all interested parties to show cause, if any, to this court on 24 August 2021 at 9.30 am why the provisional order should not be made final.
 - (iii) This order is to be published in the Government Gazette and in the Natal Mercury on or before 21 July 2021.

¹² At para 29 and further.

¹³ Para 33

- (d) The applicants in case 3036/2021 are ordered to pay the costs of that application.
- (e) The application for leave to intervene on 14 June 2021 is dismissed with costs.
- (f) The affected parties who delivered affidavits in support of the business rescue applications will pay their own costs.
- (g) The applicants in the business rescue applications are ordered to pay the costs of those affected parties who delivered affidavits in opposition to the business rescue applications, including the costs of the appearance.
- (h) The application by Absa Bank Ltd to intervene is dismissed with costs.
- (i) The applications by the second to the thirteenth intervening creditors in the winding-up applications are dismissed with costs.
- (j) All the costs orders will include those occasioned by the employment of senior counsel, or two counsel, where so employed.

Ploos van Amstel J

Appearances:

(Case No: 5093/2020, 5094/2020, 5095/2020, 5622/2020, 5623/2020,5624/2020, D3036/2020)

For the Applicants	:	G D Harpur SC (with D Dheoduth)
Instructed by	:	T. Giyapersad Incorporated
	:	Durban

(Case No: 5093/2020, 5094/2020, 5095/2020, 5622/2020, 5623/2020,5624/2020, D3036/2020)

For the 2nd to 13th

Intervening Applicants	:	M Manikam
Instructed by	:	Anand Nepaul
	:	Durban

(Case No: 5093/2020,5094/2020,5095/2020)

For the Intervening Applicants	:	G Harrison
Instructed by	:	Nair Attorneys Incorporated
	:	Durban

(Case No: 5093/2020,5095/2020 5622/2020,5624/2020, D3036/2020)

For the 1 st and 2 nd Respondents	:	A Stokes SC (with R M Van Rooyen)
Instructed by	:	Johnston & Partners
	:	Durban

Date Judgment Reserved	:	17 June 2021
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Date of Judgment	:	29 June 2021
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