"0"

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 1410/2023

In the matter between:

ISLANDSITE INVESTMENTS 180 (PTY) LTD — First Applicant

RONICA RAGAVAN N.O. — Second Applicant

and

KURT ROBERT KNOOP N.O. — First Respondent

JOHAN LOUIS KLOPPER N.O. — Second Respondent

DINESH APPAVOO N.O. — Third Respondent

HUGH VINCENT COOKE — Fourth Respondent

CORAM: CRONJÉ, AJ

HEARD ON: 20 APRIL 2023

JUDGMENT BY: CRONJÉ, AJ

REASONS FOR JUDGMENT

The reasons for my amended order granted on 26 April 2023 are contained in my written judgment handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for handing down was deemed to be 12h00 on 2 May 2023.

[1] The matter was heard on 20 April 2023 and judgment was reserved. The Respondents gave an undertaking that no steps will be taken to transfer the property on condition that this Court makes an order whether to grant an interdict pending the finalisation of the application under Part B before 28 April 2023. I was not able to give reasons before 28 April 2023 and granted relief under Part A on 26 April 2023 with reasons to follow. These are my reasons.

I THE RELIEF UNDER PART A

[2] The Applicants brought an urgent application requesting leave, to the extent necessary, in terms of Section 133(1)(b) of the Companies Act, 71 of 2008 ("the Companies Act") to bring the application. They seek that pending determination of the relief in Part B, the Respondents be interdicted from, in any way, selling or alienating the property situated at Cape Town (the property"). I granted an interim interdict on 26 April 2023.

II BACKGROUND

121 of 1998 ("POCA") against a number of Defendants/Respondents. The First Applicant ("Islandsite") was the Third Defendant whilst the Second Applicant ("Ms Ragavan") was cited in the application before me in her capacity as director of Islandsite.[1] She was not cited in her personal capacity in the NDPP's application.

[4] Islandsite was placed in business rescue in terms of the Companies Act before the POCA order was granted. The First and Second Respondents are the appointed business rescue practitioners ("BRP's"). The Third Respondent was appointed as Curator in terms of the POCA order.

[5] On 21 April 2023, one day after I heard this application, Gusha AJ discharged the accused against whom the POCA order was granted in terms of section 174 of the Criminal Procedure Act, 51 of 1977 ("the CPA").[2]

[6] The Respondents raised various points *in limine* which I will address first.

III URGENCY

[7] The Second Applicant states that certain news articles were published on or about 11 January 2023 concerning the sale of the property wherein, according to her, a low-listing price as well as an allegation that the property was in a dilapidated state appeared. Upon learning of the articles, VDM Attorneys ("VDM") directed a letter to the BRPs stating that the property was to be sold below market value and it was proposed that a third party ("Newco") immediately take care of, and pay all expenses associated with the property.

---

[1] Reported as NDPP v Sharma and Others (2427/2021) [2021] ZAFSHC 172; 2022 (1) SACR 289 (FB) (11 August 2021) – not read for purposes of this application

[2] Reported as S v Thabethe and Others (08/2022) [2023] ZAFSHC 126 (21 April 2023)

[8] The Applicants allege that no reply was received from the BRPs and VDM followed up for a response on 23 January 2023 and 31 January 2023. Feedback was also sought whether the BRPs communicated the correspondence with the Curator.

[9] On 31 January 2023, the BRPs' replied and *inter alia* stated that the Curator, the NDPP and the BRPs have consented to the sale of the property and that a mandate was already signed in December 2022. The BRPs were of the view that the proposal to keep the property is not viable or in the best interest of business rescue and contrary to the adopted business rescue plan. I pause to state that the plan is not as clear as averred.

[10] On 3 February 2023, VDM addressed further correspondence to the BRPs and copied the Curator therein. It recorded that the BRPs would be remiss in their duty to Islandsite, its shareholders, directors and creditors, not to realize assets at their full value where possible. They stated that there can be no prejudice if the Board is allowed to arrange for immediate security and have the property maintained from a structural perspective (repairs and maintenance) and that the refusal of the request in the January correspondence was unreasonable. The pleadings do not indicate that there was further exchange of correspondence between 3 February 2023 and 21 February 2023 when the BRPs replied stating that an offer of R20 million has been received and the Curator and BRPs are of the firm view that this offer should be accepted. The sale was concluded on 22 February 2023.

[11] The Applicants state that on 10 March 2023, in an attempt to avoid issuing this urgent application, VDM again addressed a letter to the Curator and BRPs to which a draft urgent application was appended. The Curator was requested to reconsider alienating the property, having regard to the grounds set out in the draft application. It was stated that everything should at least be held in abeyance until judgment has been handed down by

Gusha AJ in the criminal matter as, if the State fails in the prosecution, it will vitiate the POCA order and the appointment of the Curator. The Heads of Argument of the Accused in the criminal matter was appended to the correspondence.

[12] VDM also requested that the sale be pended to allow the intended application to be heard in normal course. On 16 March 2023, the Curator stated that a cash offer was received and accepted by him and the BRPs on 22 February 2023. It is recorded that the Curator and the BRPs knew of the stance of Islandsite's Board. From the papers it is clear that the Curator and BRPs delayed responding from 3 February 2023 until 21 February 2023. The advertisement for sale stated that the offers will be accepted until 17 February 2023. The Curator and the BRPs accepted an offer for a price predetermined by one agent in January 2023 without disclosing on 21 February 2023 that they will sign an agreement.

[13] A copy of the sale agreement was provided to VDM on 17 March 2023 and on the same date, VDM dispatched an e-mail to the Curator wherein critical information was sought.[3]

[14] The Curator was informed that, should it be his view that Mrs Ragavan is not entitled to the information and that he only has a duty to report to the BRPs, he should confirm it in writing. The Curator was requested to confirm whether he provided the BRPs with a statement of account and if so when it was done. A copy was requested. On 16 March, the Curator dispatched an e-mail to VDM.

[15] The Applicant states that they have no means to achieve similar redress and for this reason the urgent procedure was adopted.

[16] They allege that they tried in good faith to resolve the matter without recourse to litigation and refer to the draft application.

[3] Pleadings, p. 111

[17] The Applicants record that they are in the dark as to what the state of readiness of transfer of the property is and that should an undertaking be provided not to transfer, the Applicants will agree to any reasonable extension of time and postponement of the hearing. The Respondents provided an undertaking until 28 April 2023.

[18] The mandate to sell the property was clearly only granted until or before 17 February 2023. It was not sold then and Mrs Ragavan could reasonably have accepted that it will not be sold unless new information about a mandate is communicated.

[19] In East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others[4], on which Mr Hellens SC for the Applicants also relied, the Court stated that it is important in urgent applications, in determining whether an applicant will not be able to obtain substantial redress at the proper time, that the facts of each case have to be considered:

> *"[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the*

---

[4] (11/33767) [2011] ZAGPJHC 196 (23 September 2011). See also: Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others (35248/14) [2014] ZAGPPHC 536; 2016 (4) SA 99 (GP) (7 August 2014); South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014)

<u>Applicant was attempting to settle the matter or collect more facts with regard thereto</u>." [my emphasis]

[20] *Ex parte* <u>Minister of Social Development and Others</u>[5], on which Mr PJJ Zietsman SC for the Curator relies, is distinguishable. It appears in that matter that there was a delay of approximately 18 months. He also referred to <u>Nelson Mandela Metropolitan Municipality v Greyvenouw CC</u>[6]. There were attempts to address the dispute between 7 November 2022 and 19 December 2002. The Court held:

> *"[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when courts are enjoined by rule 6(12) to deal with urgent applications in accordance with procedures that follow the rules as far as possible, this involves the exercise of a judicial discretion by a court 'concerning which deviations it will tolerate in a specific case'.*
>
> *[38] Secondly, it is not in every case in which the applicant may have departed from the rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. <u>Each case depends on its special facts and circumstances</u>."* [my emphasis]

[21] Mr Scott, who appeared for the BRPs, referred me to the Order of Naidoo J, dated 30 March 2023[7] where the Respondents reserved their rights, notwithstanding an agreement that the matter be postponed for hearing of Part A on 20 April 2023, and time frames stipulated for filing of further papers, to rely on defences raised in their answering affidavits. He *inter alia* referred to <u>Sutherland Transport (Pty) Ltd v Willard Batteries, a division of</u>

---

[5] (CCT14/06) [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) (9 March 2006)

[6] (3263/02) [2003] ZAECHC 5 (21 February 2003)

[7] Pleadings, p. 269

Powertech (Pty) Ltd[8]. It, however, in the same paragraph also provides that an Applicant has to set out a factual basis for abridgement of the periods:

> *[15] ...I'm not aware that it is a requirement for establishing grounds for urgency that an applicant is required to put up a substantial body of evidence to substantiate and its allegations of fact in relation to those grounds of urgency. A claim for urgent consideration of a matter is, after all, no more than an appeal to the court based on substantial and reasonable grounds to condone the applicant's non-compliance with the ordinary rules of procedure and to permit the presentation of the applicant's case, other than in the ordinary course. An applicant is required to set out the basis of its claim for urgency with sufficient detail to enable the court to assess whether the inherent prejudice to a party who is brought to court on truncated or reduced time periods is justified, having regard to the general exigencies of the matter. In my view the applicant has indeed set out factual basis upon which it alleges that there is cause for an appropriate reduction of the time periods provided for in the rules."*
> [my emphasis]

[22] The Respondents knew that judgment in the criminal trial could probably be delivered on 21 April 2023. They were favoured with the Heads of Argument in that matter. The Curator must have anticipated that there was a chance that it will be the end of his appointment if the accused were acquitted or if there was a discharge in terms of section 174 of the CPA. Islandsite was under business rescue since 2018. The sudden sale of the property outside the date of mandate, the lack of timeous engagement by the BRPs and the Curator with VDM, and the dispute on the value of the property are important factors which I took into consideration in exercising my discretion. The reservation of rights when the matter was postponed

[8] (816/2015) [2015] ZAECPEHC 21 (31 March 2015)

can, in my view, only relate to the balance of the points *in limine* as the matter was removed from the urgent roll, and postponed for argument.

[23] The result of the removal of the matter by Naidoo J, by agreement between the parties, in my view regularised the process. The Court in Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others the Court [9] held:

> *"[9] One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it "as to it seems meet" (rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (which must "as far as practicable be in accordance with" the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."* [my emphasis]

[24] The Fourth Respondent, the purchaser, does not oppose the interim relief. The BRPs have not shown material prejudice to them. The Curator has

[9] (379/05) [2006] ZASCA 51; 2006 (4) SA 292 (SCA) ; [2006] 2 All SA 565 (SCA) (31 March 2006)

fiduciary duties and no personal interest in the value of the property. He stood to get paid, either from Islandsite or from the State.

IV JURISDICTION

[25] When the matter was heard, I expressed my *prima facie* view that the application appears to be linked to the POCA order. It should be common cause that the POCA order is the only *nexus* between the Applicants, the Respondents, the property and this Court.

[26] Sections 28 and 29 of POCA provide for powers of the Court that made the POCA order. Where a High Court has made a restraint order, *that court* may at any time appoint a *curator bonis* subject to the directions of *that court*. A High Court which has made a restraint order in respect of immovable property, may at any time with a view to ensuring the payment to the State, *inter alia* order the Registrar of Deeds concerned to endorse any one or more of the restrictions contemplated in subsection (2) on the title deed of the immovable property.

[27] Would the orders of this Court be *effective* outside the Free State Province? In Bid Industrial Holdings v Strang and another[10], the SCA held that the principle of effectiveness, despite its having been described as "the basic principle of jurisdiction in our law" is largely for the Plaintiff to assess and to act accordingly. In Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others[11], relied on by Mr Scott, the SCA also held that: *"Although effectiveness 'lies at the root of jurisdiction' and is the rationale for jurisdiction, 'it is not necessarily the criterion for its existence.' What is further required is a ratio jurisdictionis. The ratio, in turn, may for instance be domicile, contract, delict and, relevant for present purposes, ratione rei*

[10] [2008] 2 All SA 373 (SCA) at para [57]

[11] (40/2010) [2010] ZASCA 96; 2010 (6) SA 329 (SCA) ; [2011] 1 All SA 449 (SCA) (3 September 2010)

sitae.[12] *It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction*." [my emphasis] An important factor may be access to the Courts as guaranteed in section 34 of the Constitution.[13] There was no complaint by the Respondents in this regard.

[28] Although the POCA order referred to other parties as well, Islandsite was affected and the Curator appointed in terms of that order. This Court, on the date of issue of this application, had jurisdiction which it retains. Although the application is brought self-standing, it is in fact linked as it deals with the powers and conduct of the Curator and the BRPs.

[29] Section 21 of the Superior Courts Act[14] provides that a Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause, in this instance the POCA order, in relation to which such court has jurisdiction. The location of the property (*forum rei sitae*) is not in itself determinative for jurisdiction in this application. Rule 37(6)(e) of the Uniform Rules of Court makes provision for transfer of matters to another Court if the parties agree or so wish.

[30] Mr Zietsman referred to Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd[15]. The Court held that '*causes arising*' does not refer to causes of action but to all factors giving rise to jurisdiction under the common law.[16] The POCA order clothed the Free State Division with specific statutory powers over the Curator and the property.

V NON-JOINDER

---

[12] See also: Els v Weideman and Others 2011 (2) SA 126 (SCA) 135A

[13] See: South African Human Rights Commission v Standard Bank of South Africa Ltd and Others (CCT 291/21) [2022] ZACC 43; 2023 (3) BCLR 296 (CC) (9 December 2022)

[14] 10 of 2013

[15] 2005 (6) SA 205 (SCA) at para [10] – [11]

[16] At para [11]

[31] The BRPs and the Curator take the point that the Registrar of Deeds was not joined. They argue that the property is situated in Cape Town and therefore this Court does not have jurisdiction. Reliance is placed on section 97(1) of the Deeds Registry Act[17].

[32] The Applicants do not seek relief against the Registrar of Deeds not to effect registration of the property. I took three factors in consideration when I granted the order. The first is that the purchaser does not object to the order. The second is that the effect of the order would prohibit the Respondents to transfer the property on risk of contempt. The third is that a party who does not join another party can hardly later complain if the third party execute his functions in the absence of restrictions placed on him. Nothing stands in the way of the Applicants to join the Registrar under Part B, which is the substantive part of the application, if they so wish. As far as the urgent application is concerned, this was not in my view a material defect.

[33] Even if I am wrong, the facts in Neves v Neves N.O.[18] are distinguishable. The Applicant, In that matter, seemed to be ignorant of the fact that for the transfer to be reversed, the papers will be required to be executed by the Registrar. The Court held that any court order directing that the registration of transfer is to be reversed will necessarily affect or involve the Registrar and that as such, the Deeds Office should be part of the proceedings.[19] The Applicants do not seek a reversal or registration.

[34] Mr Zietsman argued that over and above the non-joinder of the Registrar of Deeds, the NDPP was also not joined. Mr Hellens argued that the NDPP was provided with the application and refers to an email dated 22 March

[17] 47 of 1937

[18] 2021 JDR 0716 (MN)

[19] At para [12]

2023.[20] A person/entity only becomes a party by formal joinder. The NDPP did not join or imitate that it will join or has to be joined. I referred to the NDPP's letter[21] which referred to the Curator's correspondence that was not included in the pleadings. The Curator had specific statutory duties and to the extent that he may have failed them, he would be liable. The relief in Part A is not final and I am not called upon to express myself on the merits of Part B. The Applicants did not seek an urgent review of the decision of the NDPP and as the papers stood before me, it did not have a direct and substantial interest.

VI LACK OF *LOCUS STANDI*

[35] The starting point is section 133 of the Companies Act. The relevant part reads as follows:

> "**133. General moratorium on legal proceedings against company.**—(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
>
> (*a*) with the written consent of the practitioner;
>
> (*b*) with the leave of the court and in accordance with any terms the court considers suitable;"

[36] The present application is against the BRPs and the Curator. The BRPs and the Curator states that the section contains a prohibition and that neither of the Applicants have standing. What would the position be if BRPs and a Curator perform functions that the Board view as inimical to the interest of the Company? To whom

[20] Pleadings, p. 381, para 39; p. 407 - 408
[21] Pleadings, p. 367

must the Directors or any other party who has a material interest in the company's affairs complain? Logic dictates that the BRPs will never authorise a Board to take steps against them.

[37] In my view, section 133, caters for a situation where litigation is adverse to the company. One may argue that the present application is adverse to the company as it necessitates the BRPs, who are appointed for the management and control of the company, to expend costs. Paragraph 10 of the relief under Part B alleges that the BRPs failed to demonstrate the proper degree of care in the performance of their duties and that it also be declared that the business rescue proceedings has terminated.

[38] Section 139 of the Companies Act provides that a BRP may be removed by a court upon request of an affected person, or on its own motion. The court may remove a practitioner from office on the ground that there is incompetence or failure to perform the duties of a business rescue practitioner of the particular company.[22]

[39] My reading of the Companies Act does not provide for an absolute bar against the directors from taking any steps to protect the company against the BRPs. The Board continues to exercise functions, although subject to the express instructions or direction of the BRPs. The Applicants' action on behalf of the company against the BRPs cannot be void. The BRPs in any event did not state that they would have authorised the Applicants to take steps against them.

[40] There has to be a safeguard for the company to protect itself against BRPs that allegedly do not comply with their obligations. There is no reason for a company to sit idle and see how it is prejudiced merely because business rescuers took control and management.

---

[22] Henochsberg on the Companies Act 71 of 2008, November 2022 – S1 30, p. 523

[41] By way of analogy, the SCA in Mostert and Others v Nash and Another[23] held:

> *"The issue is the validity of the fee agreement between the curator and the FSB. There are no trustees to protect the interests of persons, such as pensioners, former members or a former principal employer. The invalidity of the fee agreement is directed at recovering funds for the Sable Fund that would in turn form part of a surplus in the fund available for distribution in accordance with a surplus apportionment exercise. That provides a sufficiently direct and substantial interest in the outcome of the litigation to confer standing on Mr Nash and Midmacor.*
>
> *[23] At the risk of piling Pelion upon Ossa there is a further ground for recognising standing on the part of Mr Nash and Midmacor. It lies in s 5(8) of the FI Act[24] [Financial Institutions Act], which provides that:*
>
> > *'Any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the registrar with regard to any matter arising out of, or in connection with, the control and management or the business of an institution which has been place under curatorship.'*
>
> *... The conclusion of the fee agreement is an action by the curator and the FSB in connection with the control and management of the Sable Fund. While the section might not permit of a challenge by someone with no connection whatsoever to a fund that can hardly be said of Mr Nash and Midmacor. The claim that they lacked locus standi to bring these proceedings must be rejected."*

[42] Bermann J in Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others[25] held:

---

[23] (604/2017) [2018] ZASCA 62; [2018] 3 All SA 1 (SCA); 2018 (5) SA 409 (SCA) (21 May 2018)
[24] 28 of 2001
[25] [1993] 2 All SA 534 (C)

"To hold that after the granting of a provisional liquidation order the directors of the company which has been provisionally liquidated by virtue of such order have lost their locus standi in judicio to oppose the granting of a final order would fly in the face of the very object and purpose of the rule nisi and it would, therefore, be quite wrong to emasculate such object and purpose by finding that the directors have lost their residual power to show cause why the company should not be would up, for that matter to anticipate the return day of the rule nisi. It would be quite ludicrous to hold that a director, or a company acting through its directors, is not an interested party when it comes to deciding whether it and/or they have the right to be heard on the return day of the rule nisi."

[43] In The Prudential Authority v 3Sixty Life Limited and Others[26], albeit on different facts, it was stated:

"It would be contrary to the interests of justice and the principle of audi alteram partem to deprive an entity in the position of 3Sixty of the right to be heard in order to oppose the granting of a final curatorship order, where a provisional order had been granted on an ex parte basis. To deprive the board of that power and leave it vested in a curator who acts under the control of the Authority under section 5(6) of the FI Act, would render the express provisions of sections 5(2)(b) and 5(8)(a) nugatory."

[44] Section 36 of the Constitution of the Republic of South Africa provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. An interpretation of the Companies Act that places an absolute limitation would in my view not only be an unreasonable limitation but would also make the right of access to the Courts nugatory.

[26] (58950/2021) [2022] ZAGPJHC 732 (30 September 2022)

[45] Mr Scott referred to SA Airlink v SAA (SOC) Limited and Others[27]. The facts are distinguishable. Airlink was a creditor. The facts are also distinguishable from the facts in Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others[28]. The Applicants take issue with the BRPs and the Curator, not the company. The Companies Act nowhere equate the status of the BRPs with that of the legal persona.

[46] I found that the Applicants have *locus standi*. I do not need to express myself on the applicability of section 133 in these circumstances. Erring on the side of caution, I granted the Applicants leave in terms of section 133 of the Companies Act.

VII ***PRIMA FACIE*** **RIGHT**

[47] I considered a number of facts to determine whether there is a *prima facie* right. I found that the Applicants had standing to enforce rights in the best interest of the Company. The respective parties placed reliance on diverse documents to advance a *fair* price for the property. These ranged from R8.5 million[29] to R 30 750 000.00 for property with the same surface.[30] The agent suggested R19 million in June 2022[31] and the Curator recommended the same price in October 2022. It is unknown what recommendations were made to the NDPP. It was eventually advertised 6 months after the initial recommendation for a price marginally more that determined in June 2022.

[48] I found one *professional* valuation by Ixabiso Valuation Service. Hardy Properties did not provide a sworn valuation. Nothing showed that the market was properly evaluated.

---

[27] (238/2020) [2020] ZASCA 156 (30 November 2020)
[28] (136/2022) [2023] ZASCA 34
[29] Pleadings, p. 342 - 343
[30] Pleadings, p. 75
[31] Pleadings, p. 353

[49] It is important to remember that this was a preservation order. There were offers to preserve the property at no cost for Islandsite.[32] On the papers, the debt and possible repair costs did not exceed approximately R2 million. Islandsite was placed under business rescue in 2018 and it was not apparent from the papers what the BRPs did for approximately 5 years to maintain the property.[33]

[50] Mr Hellens argued that Islandsite was not illiquid[34] and that the Curator was therefore not empowered by clause 1.11 of the POCA order[35] to sell the property. The sale agreement incidentally states that: "*This offer is subject to the purchaser being satisfied with the outcome of a due diligence by no later than 28 February 2023*". The outcome is unknown.

[51] The Curator states that the sale was lawful but did not provide any evidence regarding liquidity.[36] The BRPs merely stated that the sale was lawful and that legal argument will be presented. There appeared to be movable assets to the value of R206 431 752.00 (forced sale value).[37]

[52] Paragraph 2 of Annexure B to the POCA order provides that the Curator must *actively market* the assets and solicit *offers*. A *single* estate agent was granted a *sole mandate* for *three months* at a *fixed price of R20 million*[38], and the date until when offers would be considered was extended without the Applicants' knowledge. The letter from the Curator to the BRPs contained a host of questions to which I could not find a reply.

---

[32] Pleadings, p. 85
[33] Pleadings, p. 87
[34] Pleadings, p. 15, para 28
[35] Pleadings, p. 37, para 1.11
[36] Pleadings, p. 303, para 61
[37] Pleadings, p. 193
[38] Pleadings, p. 332

[53] In Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others[39] the Constitutional Court stressed the importance of consultation, albeit in the context of the Minerals Act. The judgment makes it clear that consultation is not merely a formal exercise - although it does not include reaching an agreement - but nonetheless involves the active participating of the landowner in respect of possible interference with its rights in respect of the property. The Court held:

> *"[65] One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. ... The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land. ... another, more general, purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done, so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures of the application goes against them and whether to take the [administrative] action concerned on review. The consultation process and its result are an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair."* *[my emphasis]*

[39] (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010)

VIII REASONABLE APPREHENSION OF IRREPARABLE HARM

[54] The Applicants submitted that the property was sold well under market value with no attempt to realise the full value. It was to be sold within the scope of a statutory regime. There were no expenses that could not have been satisfied through other liquid assets and no reason was proffered why they were not consulted. Islandsite was not illiquid. There was no proper engagement by the Curator with the Applicants that may have explained his reasoning. Mrs Ragavan did not lose her responsibilities as director merely because of the appointment of the Curator. It was submitted that all aforesaid rights will be lost if it is sold for less.

[55] Would the Applicants suffer irreparable harm? If it is accepted that the Curator and the BRPs failed to challenge the averment that the estate is not illiquid, there would not be objective cause for the sale. It would be of little, if any assistance to the Applicants to sue for damages if the property never had to be sold in the first place. Islandsite had plans with the property and if the relief is not granted, the opportunity, over and above the value, would be lost.

[56] The Curator wanted to liquidate the property to fund various expenses, including his own and the BRPs' fees. Mr Hellens submitted that the Curator can only recover his fees when approved by the Master of the High Court. There is no proof that the Master consented. It is not clear who exactly decided to sell. The Curator on the one hand states that he resolved to sell as Islandsite was illiquid and he need his fees. The BRPs on the other hand said they had to pay operational expenses of Islandsite and that the sale was provided for in the business rescue plan.

[57] In Nestor and Others v Minister of Police and Others[40] it was held that an applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow. He only has to show that it is reasonable to apprehend that injury will result. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.

IX BALANCE OF CONVENIENCE

[58] The purchaser does not complain to be inconvenienced. The BRPs does not state that the estate is illiquid and that the income from this sale is the only option available. There was an offer to renovate and restore the property. The purchaser wants to flatten the structures. Rebuilding will be expensive and in my view extremely inconvenient.

X NO ALTERNATIVE REMEDY

[59] As stated above, and for purposes of interim relief only, I accept that the intention was to preserve the property. The sale, if continued with, will leave an alternative remedy meaningless.

XI COSTS

[60] I ordered that the cost under Part A be costs in the cause. The outcome of Part B may either be in favour of or adverse to the Applicants. I, specifically, do not distinguish between the Applicants as a Court who hears Part B may be in a better position to determine the respective liabilities of the parties to the litigation as a whole.

---

[40] 1984 (4) SA 230 (SWA) at 244

[redacted]

P R CRONJÉ, AJ

On behalf of the Applicants:	Adv MR Hellens SC Adv Ben Prinsloo Instructed by: Van der Merwe & Van der Merwe **Honey Attorneys** BLOEMFONTEIN
On behalf of First and Second Respondents:	Adv. T Scott Instructed by: Smit Sewgoolam Inc. **McIntyre Van der Post Attorneys** BLOEMFONTEIN
On behalf of the Respondents:	Adv. PJJ Zietsman SC Instructed by: Werksmans Attorneys **Symington & De Kok** BLOEMFONTEIN