



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: 1692/2023

In the matter between:

ISLANDSITE INVESTMENTS 180 (PTY)

First Applicant

KURT ROBERT KNOOP N.O.

Second Applicant

JOHAN LOUIS KLOPPER N.O.

Third Applicant

(2nd and 3rd applicants cited in their capacities as
business rescue practitioners of the 1st applicant)

and

DHANESVARIN APPAVOO N.O.

First Respondent

(1st respondent cited in his capacity as the
curator bonis of the 1st applicant)

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second Respondent

In re the *ex parte* application of:

CASE NO: 2427/2021

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Applicant

and

IQBAL MEER SHARMA

First Defendant

NULANE INVESTMENTS 204 (PTY) LTD

Second Defendant

ISLANDSITE INVESTMENTS 180 (PTY) LTD

Third Defendant

KURT ROBERT KNOOP N.O

Fourth Defendant

JOHAN LOUIS KLOPPER N.O.

(4th and 5th defendants cited in their capacities as business rescue practitioners of the 1st defendant)

Fifth Defendant

ISSAR GLOBAL LIMITED

First Respondent

ISSAR CAPITAL (PTY) LTD

Second Respondent

TARINA PATEL-SHARMA

Third Respondent

CORAM:

VAN RHYN, J

HEARD ON:

13 APRIL 2023

DELIVERED:

3 MAY 2023

- [1] This is an opposed urgent application instituted by the applicants for payment of legal fees from assets that have been placed under curatorship by an order of this court on 2 June 2021 in terms of the provisions of Sections 25 and 26 of the Prevention of Organised Crime Act¹ ("POCA").
- [2] The application is opposed by the first respondent, Dhanesvarin Appavoo, an Insolvency Practitioner of Dredin Consulting (Pty) Ltd, appointed by the court as *curator bonis*, (the "*curator bonis*") in terms of section 28(1)(a) of POCA and the second Respondent, the National Director of Public Prosecutions (the "NDPP").
- [3] First applicant is Islandsite Investments 180 (PTY) (LTD) ("Islandsite"), a company in business rescue, with registered address situated at Midrand, Gauteng. The second applicant, Mr Knoop and third applicant, Mr Klopper are cited in their capacities as the Business Rescue Practitioners of the first applicant (the "BRPs").
- [4] The application was launched on an urgent basis on 4 April 2023. The NDPP was afforded one day to file a notice of intention to oppose the application and another day to file an answering affidavit. The *curator bonis* served an answering affidavit on 8 April 2023. The application for condoning the late filing of the NDPP's answering

¹ Act 121 of 1988.

affidavit as well as an application for the late filing of the applicant's replying affidavit, were not opposed. When the matter was called on 13 April 2023, I heard arguments from the parties on both urgency and the merits of the application.

- [5] The background to the matter is as follows: On 16 February 2018 the directors of Islandsite resolved to commence with voluntary business rescue proceedings and that the company be placed under supervision in terms of section 129(1) of the Companies Act.² On 20 February 2018 the BRP's were appointed and on 6 November 2020 re-appointed. On 2 June 2021 the NDPP obtained a provisional preservation order in terms of the provisions of section 26 of POCA under case number 3971/2021 against, amongst others, Islandsite and, in their representative capacities, the two BRPs.
- [6] The rule nisi was extended on numerous occasions and is scheduled for hearing on 19 and 20 October 2023. On 27 August 2021, the applicants brought an urgent application seeking the release of realisable property within the *Curator Bonis*' control to meet the reasonable legal expenses of the applicants in connection with the POCA proceedings and any related criminal proceedings (the "first urgent application"). On 14 September 2021, by agreement between the parties, Molitsoane J ordered the *Curator Bonis* to pay an amount of R 1 008 992.50 for the reasonable and necessary legal expenses incurred by the BRPs in the main restraint proceedings.
- [7] On 8 September 2022 the applicants launched an urgent application against the *Curator Bonis* and the NDPP, under case number 4348/2022 (the "second urgent application"), for payment of legal costs in respect of different underlying litigation. The application was struck from the roll for lack of urgency. The *Curator Bonis* and the NDPP contend that the same basic arguments raised in the second urgent application apply to the application at hand.
- [8] The BRPs seek the following relief in their amended notice of motion:

² Act 71 of 2008. Section 129(1) provides as follows:

'(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company...'

8.1 an order in terms whereof the *Curator Bonis* is directed to release assets under restraint to pay the legal expenses incurred (or to be incurred) by the BRPs relating to the urgent application by Ms Ronica Ragavan under case number 1410/2023 in accordance with the rate card attached to the founding affidavit and limited to an amount of R700 000.00;

8.2 an order in terms whereof the *Curator Bonis* is directed to release assets under restraint to pay the legal expenses incurred (or to be incurred) by the BRPs relating to this application in accordance with the rate card attached to the founding affidavit limited to an amount of R453 400.00.

- [9] On 26 April 2018 the business rescue plan for Islandsite was duly approved in terms of section 152(2) of the Companies Act. The approved plan contemplates the sale of various immovable properties of which Islandsite is the registered owner. During December 2022 the BRPs, the *Curator Bonis* and the NDPP jointly agreed to sell a property, owned by Islandsite, situated at Constantia, Cape Town (the "property"). On 6 February 2023, Islandsite received an offer to purchase the said property in the amount of R20 000 000.00. The offer was subsequently accepted the BRPs and the *Curator Bonis*.
- [10] On 22 March 2023 Ms Ragavan, a director of Islandsite, brought an urgent application under case number 1410/2023 in this court (the "Ragavan application") seeking an interdict against the BRPs and the *Curator Bonis* from, in any way, selling or alienating the property, alternatively from transferring the property to the purchaser in terms of the agreement of sale. Both BRPs are cited in their official capacities and therefore contend that it is incumbent upon them to participate in the proceedings and to oppose the Ragavan application. By agreement between the relevant parties, Part A of the Ragavan application was postponed to be heard on 20 April 2023. The BRP's filed a notice to oppose, a notice disputing the authority of Ms Ragavan and her legal representatives to bring the application and an answering affidavit in the Ragavan application.
- [11] The BRPs, through the goodwill of their attorneys of record who agreed to act on a deferred payment basis pending the outcome of this application, proceeded to file the notices and answering affidavit in the Ragavan application and launched this urgent

application seeking orders to obtain payment from the *Curator Bonis* in respect of the current urgent application as well as the Ragavan application in the amounts mentioned in the notice of motion. The BRPs, through their attorney, sent letters to the *Curator Bonis* on 12 March 2023, 22 March 2023 and 30 March 2023 requesting the *Curator Bonis* to agree to payment of the BRPs legal representatives' fees in respect of the Ragavan application.

- [12] Initially the *Curator Bonis* replied that he had engaged the NDPP regarding the request and was awaiting a response. However, on 31 March 2023 the *Curator Bonis* replied that a court order to authorise the release of funds for legal fees to be paid from the curatorship will be required. Therefore, on 4 April 2023, the BRPs issued this urgent application. Mr Scott, counsel on behalf of the applicants, argued that the BRPs acted with the requisite diligence in instituting this application. The BRPs had to consider the Ragavan application and had to engage with the *Curator Bonis* and the NDPP before approaching the court on an urgent basis.
- [13] The BRPs delivered a notice in terms of the provisions of Rule 7(1) of the Uniform Rules of Court in the Ragavan application and raised the point that Ms Ragavan do not possess the necessary authority to litigate on behalf of Islandsite as it is a company in business rescue. On the basis that the *Curator Bonis* has failed to file a Rule 7 notice, it is argued that, in their absence at the hearing on 20 April 2023, this dispositive point may be lost or not considered if not advanced by the BRPs who filed the Rule 7 notice. The exclusion of the BRP's participation at the hearing will give rise to harm that cannot be redressed in the ordinary course.
- [14] Mr Scott argued that it is therefore unfair to expect from the BRPs legal representatives to contribute time and to incur expenses to oppose the Ragavan application which application is on the roll for hearing within a week from the hearing of this application.
- [15] In respect of the merits of the application the BRPs contend that paragraph 1.11 of the restraint order empowers the *Curator Bonis* to pay expenses related to restrained assets that would ordinarily be carried by the estate. The restraint order, in particular paragraph 1.11 thereof entitles the *Curator Bonis* to pay the expenses contemplated in paragraph 2 and 3 of the notice of motion. Reliance is also placed on the provisions of paragraph 19 of annexure B of the restraint order which provides as follows:

“the curator bonis shall only pay legal costs for any person subject to curatorship if ordered to do so by a court or with the prior written consent of the National Director of Public Prosecutions.”

- [16] Mr Zietsman SC, counsel on behalf of the *Curator Bonis* argued that the BRPs have not made out a case for the relief sought, both in respect of urgency as well as regarding the merits of the application. Islandsite is illiquid, remains financially distressed and there are no liquid assets that are readily available. Even if the order is granted, the court order will have no practical effect until such time as Islandsite has been placed into funds and the *Curator Bonis* will therefore not be able to satisfy such order.
- [17] In the answering affidavit filed in the Ragavan application by the BRPs, a copy of which is appended to this application, it was clearly stated that the continuous litigation instigated by Ms Gupta and Ms Ragavan have caused delays which, along with Islandsite's inability to raise funds by disposing of assets in terms of the business rescue plan, have left Islandsite without funds to repair the property. The *Curator Bonis* furthermore contends that if the interdict is granted in the Ragavan urgent application of which Part A was to be heard on 20 April 2023, the transfer of the property for an amount of R20 000 000.00 will not proceed, or not soon, and the *Curator Bonis* will not be able to comply with the order.
- [18] In respect of the merits, Mr Zietsman SC argued that the nature of the proceedings between the Ms Ragavan and the BRPs concerns the authority of the BRPs to consent to the sale of the property. It is a question of law and is similar to the issue in **Ragavan and Others v Optimum Coal Terminal (PTY) LTD (In Business Rescue) and Others**³. The issue raised by the BRPs in the Ragavan application has to be answered in accordance with the provisions of the Companies Act and does not concern the provisions of POCA. The *Curator Bonis* opposes the application for payment of the legal costs already incurred or to be incurred by the BRPs on the basis that the BRPs has not made out a case for the relief claimed.
- [19] The NDPP opposes the application on the basis that the matter is not urgent in that the BRPs have known since 2 June 2021, when the restraint order was granted against Islandsite and the BRPs in their representative capacities, that they are

³ (136/2020) [2023] ZASCA 34 (31 March 2023).

prohibited from dealing with Islandsite's property other than in terms of the restraint order. Since 10 March 2023 the BRPs had knowledge of the anticipated Ragavan application. Therefore, this is a typical example of self- created urgency and as a result the application should be struck from the roll for that reason alone.

- [20] In respect of the merits, Ms De Villiers, counsel on behalf of the NDPP argued that the BRPs have not identified any specific provision in the restraint order permitting them to administer Islandsite's assets and to incur very substantial legal expenses in doing so. The relief sought is thus vague and does not disclose a cause of action. The application is furthermore unnecessary, unreasonable and wasteful which will lead to the unnecessary dissipation of the value of the assets of Islandsite and property under restraint. In this regard Ms De Villiers contends that the Ragavan application will be opposed by the *Curator Bonis* and it is unnecessary for the BRPs to oppose the Ragavan application merely on the basis that they are the only parties who filed a Rule 7 notice.
- [21] The legal principles to adopt when dealing with urgent applications are governed by the provisions of Rule 6(12) of the Uniform Rules of Court. The court has discretionary powers to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as it deems fit. Urgent applications require an applicant to persuade the court that non-compliance with the rules and the extent thereof, are justified on the grounds of urgency. The applicant must demonstrate why he claims that he could not be afforded substantial redress at a hearing in due course⁴.
- [22] A respondent confronted with an urgent application, in an endeavour to avoid judgment being given by default, is obliged to, provisionally, accept the time periods set by the applicant and then at the hearing of the matter argue its objections regarding the urgency of the matter, if any.⁵ Upon reading the founding affidavit, answering and replying affidavits and the annexures thereto, it became apparent that the applicants would have difficulty in meeting the requirements of establishing the urgency for which it contended. The history of the matter is set out by the NDPP. It is

⁴ *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers) and Another* 1977(4) SA 135 (W) at 137F; *Cekeshe and Others v Premier, Eastern Cape and Others* 1998 (4) SA 935 at 948 A- 949C.

⁵ *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) at [37], [38] and [40].

clear that the ongoing dispute between the BRPs and the *Curator Bonis* pertaining to the control and release of assets under the restraint for payment of the BRPs legal fees has been ongoing for a considerable time, in fact since the restraint order was granted on 2 June 2021.

- [23] The NDPP has made its stance in respect of payment of the BRPs legal expenses known since 14 September 2021, namely that such payment can only be made pursuant to an order in terms of section 26(6) of POCA and paragraphs 1.42 and 1.43 of the restraint order. Furthermore, payment of such expenses is conditional upon the expenses being reasonable and properly motivated as set out in the order granted on 14 September 2021 in the first urgent application.
- [24] The primary object of POCA is to fight, *inter alia*, organised crime and money laundering activities by targeting the proceeds of unlawful activities. POCA confers certain statutory powers, duties and authority to the appointed *curator bonis* who is tasked with overseeing the business and property that forms the subject of the preservation order. Business rescue proceedings have a different objective, namely to, *inter alia*, facilitate the rehabilitation of a financially distressed company in a manner that balances the rights and interests of all the relevant stakeholders. Clearly, the business rescue proceedings and any attempt by the *curator bonis* at preservation of all assets, may lead to disputes between the business rescue practitioner and the *curator bonis* in the event of sales of assets envisaged in terms of the business rescue plan.
- [25] The *Curator Bonis* and the NDPP referred to the fact that Islandsite is illiquid and financially distress with the result that no liquid assets are currently available for disposal by the *Curator Bonis* to pay the legal costs claimed by the BRPs. The BRPs acknowledged as much. It is therefore common cause that in the event of an order being granted by the court in accordance with the prayers 2 and 3 of the Notice of Motion, such order cannot be executed by the *Curator Bonis*.
- [26] A court will not make an order that cannot be enforced. When Mr Scott was asked to address the problem that no funds are available to satisfy any order if granted. He indicated that the order may be granted on the basis that in the event of funds becoming available, such payment should be effected to the BRPs. A court order

must be effective, enforceable and immediately capable of execution.⁶ Only an order *ad pecuniam solvendam* (for the payment of a sum of money) or *ad factum praestandum* (for the performance of a specific act) satisfies this requirement.

- [27] Taking cognisance of the many uncertain future events pertaining to the possible outcome of the Ragavan application, the judgment in the section 174 of the Criminal Procedure Act in the criminal case in terms whereof the *Curator Bonis* has been appointed, (which has been delivered since this matter was heard), having a direct influence on the availability of funds, I am of the view that this court cannot grant an order of which the efficacy remains uncertain and dependent upon the liquidity of Islandsite in future.
- [28] The BRPs seek an order which, on their own version, is not capable of execution at the time of hearing of the matter. If a party request a court for an order on an urgent basis which cannot be enforced, that is a very good reason for refusing to grant the relief sought.
- [29] In this matter the NDPP and the *Curator Bonis* were denied a considerable period to carefully consider the merits of the application and the legal representatives of the NDPP and the *Curator Bonis* had to file their answering affidavits within a very short period of time. The applicants thus fail to justify the procedure and the time limits imposed upon the *Curator Bonis* and the NDPP to such an extent that the matter warrants being struck from the roll with costs.

ORDER

- [30] 1. The application is struck from the roll for want of urgency.
2. The First Applicant is ordered to pay the respondents costs.



VAN RHYN, J

⁶ Thutha v Thutha 2008 (3) SA 494 at [15].

On behalf of the applicants:

Adv. T Scott
MCINTYRE VAN DER POST ATTORNEYS
BLOEMFONTEIN

On behalf of the First Respondent:

Adv. J Zietsman SC
SYNINGTON & DE KOK ATTORNEYS
BLOEMFONTEIN

On behalf of the Second Respondent:

Adv. S de Villiers
THE OFFICE OF THE STATE ATTORNEY
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