



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: **1993/2021**

In the matter between:

SAREL RENIER MARAIS

Applicant

and

WESTLINE AVIATION (PTY) TLD

1st Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

2nd Respondent

FIRSTRAND BANK LIMITED

3rd Respondent

CORAM: JP DAFFUE J

HEARD ON: 26 MAY 2022

ORDERS GRANTED ON: 26 MAY 2022

These reasons were handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 30 May 2022.

REASONS

I INTRODUCTION

[1] I had to adjudicate an application to place a company under business rescue and supervision as well as a counter-application by the company's major creditor for the provisional winding-up of the company. The following orders were granted on 26 May 2022:

- "1. The applicant's application to place the first respondent company, to wit Westline Aviation (Pty) Ltd in business rescue is dismissed with costs, such costs being the third respondent's costs, inclusive of the costs consequent upon the employment of two counsel.

2. Leave is granted to the third respondent in terms of the provisions of Uniform Rule of Court 6(7) and Uniform Rule of Court 24(2) to institute its counter-application as set out in the notice of counter-application against the first respondent in the main application.
3. Leave is granted to the third respondent in terms of section 133(1)(b) of the Companies Act, 71 of 2008 to bring this application and to request the relief sought in it.
4. The first respondent company is placed under PROVISIONAL WINDING-UP in the hands of the Master of the High Court.
5. A PROVISIONAL WINDING-UP ORDER is issued calling upon all interested parties to show cause, if any, to the court on the **21st day of JULY 2022 at 09h30** why a FINAL ORDER OF WINDING-UP should not be granted against the first respondent company.
6. Service of this rule *nisi* and a copy of the third respondent's counter-application and annexures thereto as well as a copy of the founding application in the main application and annexures thereto shall be effected on the first respondent company at its registered office or its principal place of business within the court's jurisdiction.
7. This order shall, without delay, be published in THE CITIZEN and the GOVERNMENT GAZETTE.
8. The sheriff shall ascertain whether the employees of the first respondent company are represented by a trade union and whether there is a notice board on the premises to which the employees have access.
9. A copy of the provisional winding-up order shall be served on -
 - 9.1 Every registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the first respondent company.
 - 9.2 The employees of the first respondent company by affixing a copy of the application and provisional winding-up order on any notice board to which the employees have access inside the first respondent company's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the first respondent company conducts any business.
 - 9.3 The South African Revenue Service.
10. Reasons shall be provided on Monday, 30 May 2022 to the parties by electronic means."

- [2] During the preparation of these reasons I noted that the court order issued did not correspond with the orders granted in open court. I refer specifically to paragraphs 2 and 3 of the order encapsulated above. Furthermore, insofar as I granted a winding-up order in accordance with the standard order normally given by me, I mistakenly referred to service of the rule *nisi* and a copy of the notice of motion and annexures which is in line with the standard order normally granted in these kind of applications. Obviously, in *casu* the standard order granted should have been in line with the wording in paragraph 5 of the counter-application and the wording of paragraph 4 of the typed order should have followed that wording. This has now been rectified in paragraph 6 of the amended order in accordance with the provisions of Uniform Rule of Court 42 which I was *mero motu* entitled to do as this part of the order was erroneously made. Consequently, the amended order to be issued shall also encapsulate this aspect.

II THE PARTIES

- [3] The applicant in the main application for business rescue and supervision is Mr Sarel Renier Marais ("Mr Marais"), a major male person and director of the first respondent, to wit Westline Aviation (Pty) Ltd ("Westline"). Mr Marius Bruwer, an attorney, who is also a director of the first respondent, appeared on behalf of the applicant before me.
- [4] The first respondent is Westline, a registered company that holds various air service licences with registered address and principal place of business at the New Tempe Airport outside Bloemfontein.
- [5] The Companies and Intellectual Property Commission is cited as the second respondent, but this entity did not take part in the proceedings before me.
- [6] Firststrand Bank Ltd ("FNB"), a commercial bank and registered credit provider and a major creditor of Westline, is cited as the third respondent in the main application. Advv DJ Van der Walt SC and S Tsangarakis appeared for the third respondent.

- [7] FNB filed a counter-application in which application it sought the provisional winding-up of Westline. Mr Bruwer appeared for Westline in this application.

III THE LITIGIOUS MATRIX

- [8] The following summary reflects the chronological history of the relevant events that culminated in the disputes to be adjudicated:

- 8.1 on 6 February 2021 FNB issued a so-called hybrid application against Westline under application 542/2021, seeking the winding-up of Westline, alternatively payment in the amount of R5 595 176.58 together with interest and costs;
- 8.2 on 25 March 2021¹ a money judgment was granted in accordance with a settlement agreement between the parties whereupon a total amount of R1 million was paid to FNB and on 8 April 2021², the date to which the application was postponed, a further money judgment was granted for payment of the amounts due to FNB in terms of an amended settlement agreement, the outstanding amount being R4 734 033 plus interest;
- 8.3 Mr Marais' application to place Westline under business rescue and supervision was issued under application 1993/2021 on 5 April 2021, more than a year ago;
- 8.4 on 9 July 2021 FNB filed a notice of counter-application together with its answering affidavit in resistance of the business rescue application as well as its founding affidavit in the counter-application;
- 8.5 although FNB elected not to proceed with the liquidation application, contemplated in the order of 8 April 2021 under application 542/2021,

¹ Annexure "FA15", pp 82 - 92

² Annexure "FA16", pp 93 - 101

this application was also enrolled for hearing on 26 May 2022, although FNB made it clear that they would not proceed with that application if leave is granted to it to proceed with the counter-application for winding-up in application 1993/2021;

- 8.6 Mr Marais failed to file a replying affidavit in the business rescue application and Westline not only failed to file an answering affidavit in application 524/2021, but also failed to file an answering affidavit to the counter-application in application 1993/2021 although a notice of opposition was filed;
- 8.7 no further steps were taken in the litigation until FNB decided in April this year to set down both applications 524/2021 and 1993/2021 for hearing on 26 May 2022;
- 8.8 FNB filed heads of argument in accordance with the Practice Directives of this division, but no heads of argument were filed by either Mr Marais or Westline, notwithstanding the fact that they were at all times represented by an attorney, to wit Mr R Coetzee of Steenkamp and Jansen Inc who signed the notice of intention to oppose the counter-application on behalf of Westline and the notice of motion in application 1993/2021.

IV THE BUSINESS RESCUE APPLICATION

- [9] The events on 26 May 2022 when the applications were called need to be recorded. Mr Bruwer confirmed that he was appearing for Mr Marais and Westline in his capacity as attorney employed by Steenkamp and Jansen Inc. He requested that the business rescue application be removed from the roll as he merely intended to make submissions in respect of the counter-application for provisional winding-up. I indicated to him that, bearing in mind the provisions of Uniform Rule of Court 41, he could not do that without the leave of the opponent or the court. I requested Mr Van der Walt to respond. He confirmed that they were taken by surprise as no leave was sought from FNB. They heard

about the intended application for the first time in court. He insisted that the matter should not be removed from the roll as Mr Marais could always enrol it again any time later. He submitted that the applications should be argued and adjudicated – *pari passu* - upon on the papers as they stand, with which submission I agreed. Upon reconsidering the matter and without arguing the merits of the business rescue application, Mr Bruwer submitted that the court may dismiss the main application for business rescue. When I requested submissions about the costs of the main application, he again made no submissions, save to say that an award of costs was in the court's discretion. Mr Van der Walt sought costs in favour of FNB, including the costs of two counsel, whereupon I made an order as reflected in paragraph 1 above. I requested Mr Bruwer whether it was necessary to provide any reasons for the order, but he forfeited the right to receive any reasons. Hereafter I allowed the parties an opportunity to argue the counter-application.

[10] Notwithstanding Mr Bruwer's stance on reasons, I shall herein later briefly deal with the business rescue application as much of the evidence relied upon by FNB in that application has been incorporated in the founding affidavit of the counter-application.³

[11] 'Business rescue' is defined in s 128(b) of the Companies Act⁴ to mean —
 “proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for —
 (i) the temporary supervision of the company, and of the management of its affairs, business and property;
 (ii) the temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 (iii) 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; ...”

³ Paras 19 & 20 of the founding affidavit in the counter-application read with paras 18 to 111 of the answering affidavit in the main application

⁴ 71 of 2008

- [12] In *Absa Bank Ltd v Caine NO⁵* I stated that business rescue proceedings were much better suited to provide solutions for financially distressed companies than judicial management under the previous Companies Act⁶ and continued as follows:

“Business rescue proceedings are much more flexible and financially distressed company friendly than judicial management. The potential business rescue plan provided for in ss 128(1)(b)(iii) has two objects in mind, the primary object being to facilitate the continued existence of the company in a state of solvency and secondly and in the alternative, in the event that the primary objective cannot be achieved or appears not to be viable, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. Consequently the Supreme Court of Appeal found in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) in para [26] as follows:

‘It follows, as I see it, that the achievement of any one of the two goals referred to in section 128(1)(b) would qualify as ‘business rescue’ in terms of section 131(4).’

As further stated by the Supreme Court of Appeal in para [27]:

‘... business rescue proceedings are not limited to the return of the company to solvency ...’”

- [13] In their article dealing with the last decade’s authorities pertaining to business rescue proceedings, O’Brien and Calitz⁷ used a medical metaphor which they believe are apposite to business rescue proceedings. They argue that as a medical practitioner cannot do anything for the dead, so, business rescue must have regard to the reality that some companies are simply beyond resuscitation. Also, in medical treatment the support of all structures available to a patient are important; likewise, with business rescue the support of the relevant stakeholders is important. Just as the recovery of a patient is difficult where there is serious disharmony among those who should ideally provide a support structure for the patient undergoing medical treatment, disharmony between relevant stakeholders of the company may make business rescue difficult, if not impossible.⁸ In *casu*, FNB can be equated to the affluent uncle of the seriously ill patient, Westline, confined to a ventilator providing oxygen in ICU. The affluent uncle is not prepared to spend any further money in the hope

⁵ [2014] ZAFSHC 46 at para 40

⁶ 61 of 1973

⁷ “Considerations that inform the view of whether there is a reasonable prospect of rescuing a company: A decade of legal precedent”, 2022 TSAR 25

⁸ *Ibid.* p 27

that the patient will recover. Nobody else can provide financial support although the patient's brothers believe that his life can be saved. Medical opinion is that the chances of recovery are slim. The hospital is not prepared to provide further assistance in the absence of financial backing. The outcome is not difficult to predict.

- [14] A substantial degree of urgency is envisaged once a company has decided to adopt a resolution to institute business rescue proceedings. While sentiments expressed in adopting business rescue procedure to avoid liquidation of a company may be noble, it should not lead to a situation that an extraordinary amount of time is taken in an attempt – often futile - to achieve this result. Delay is often at the expense of the rights of creditors. Although this is not an application to terminate business rescue proceedings, I respectfully agree with the following *dictum* of Kusevitski AJ in *South African Bank of Athens v Zennies Fresh Fruit CC*:⁹

“In my view the mechanisms of business rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. The delay in the finalisation of the business rescue proceedings is unreasonable in the circumstances and I am satisfied that an order terminating the proceedings is justified.”

A balancing of the various rights of affected persons and that of the company should always be paramount in order to achieve fairness.

- [15] In *Diener NO v Minister of Justice and Correctional Services and others*¹⁰ the Constitutional Court summed up the purpose of business rescue proceedings in the following words:

“[54] The purpose of business rescue is to assist a financially distressed company with paying its debts, avoiding insolvency, and maximising the benefit to stakeholders upon liquidation (if inevitable). It is stated expressly in s 7(k) of the Companies Act that one of the purposes of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'. It must be emphasised that this must be done while balancing the rights of all affected persons, including creditors, employees, and shareholders. The primary goal of business rescue is to avoid liquidation and its attendant negative consequences on stakeholders. In addition, a secondary

⁹ 2018 (3) SA 278 (WCC) at para 43; see also *Advanced Technologies & Engineering Co (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquées SAS* GNP 72522/11

¹⁰ 2019 (4) SA 374 (CC)

purpose is to achieve a better outcome on liquidation or disinvestment, whereby '[t]he underlying principle behind restructuring or reorganisation proceedings is that a business may be worth a lot more if preserved, or even sold, as a going concern than if the parts are sold off piecemeal'. At the same time, where it is not viable to rescue a company, it should be liquidated and its business sold. Business rescue can only begin where there is a reasonable prospect of saving the company. This was highlighted in *KJ Foods*, where the Supreme Court of Appeal quoted with approval the High Court in *DH Brothers Industries*, which stated that — 'Chapter [6] as a whole reflects "a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction" *but only of viable companies, not of all companies placed under business rescue.*'

This is in line with the ultimate aim of balancing the rights and interests of all relevant stakeholders." (emphasis added)

[16] In *casu*, Mr Marais correctly conceded that Westline is commercially insolvent, although it was averred that its assets exceeded its liabilities and that it was not factually insolvent. In this regard Westline relies on the say-so of Mr Marais and outdated financial statements for the year ending 28 February 2020. I shall deal with factual solvency when I evaluate the evidence and submissions pertaining to the winding-up application later herein. Save for the payment of R1 million referred to above, Westline has not made any further payments to FNB since 1 April 2021. Although Mr Marais tried to make out a case that Westline's difficulties had arisen as a result of the Covid pandemic, FNB presented uncontested evidence that Westline was already financially distressed before the Covid pandemic hit this country.¹¹

[17] Mr Marais believed that Westline could be saved by making use of the aircraft that are mortgaged in favour of FNB, but FNB made it clear that it was not prepared to assist Westline in this regard and that it would vehemently oppose any business plan to be prepared by a business rescue practitioner based on the information provided in the founding affidavit. Mr Marais made the point in the founding affidavit that the plan to rescue Westline was not premised on the injection of post commencement finance insofar as it "possesses of all the necessary equipment in order to render training services."¹² He stated that once "business is back to normal, Westline's income will slowly increase and, within at least the next 15 (fifteen)

¹¹ See *inter alia* the answering affidavit: para 32, pp 151 - 156 & paras 36 - 43, p 159 - 161

¹² Founding affidavit: para 69, p 28 read with

months, return to normal.” Then it will be able to meet its financial obligations.¹³ I agree with FNB that the proposed business rescue plan, insofar as it may be found that a proper plan was put on the table which I am not prepared to accept even for the argument, is based on the proposition that Westline can carry on conducting business with FNB’s money and security in circumstances where FNB is not interested in a continued business relationship with Westline. FNB has a cession in its favour over all debts due to Westline and Westline will not be able to continue to trade and generate a profit simply because all monies earned will have to be paid to FNB by virtue of this security. Secondly, FNB is not prepared to allow Westline to use the aircraft to generate income. These aircraft are subject to registered aircraft mortgages in favour of FNB and by utilizing them, they will be exposed to risk and a decrease in value if used during the business rescue process which will dilute and diminish FNB security.¹⁴

[18] If the time when the business rescue application was issued and the delay in finalising that application is considered, Mr Marais and Westline did exactly what is not required of affected persons and a company in financial distress, *ie* to keep creditors on a string instead of finalising the business rescue process as soon as possible.

[19] No reasons have been advanced as to why Mr Marais shall not pay the costs of the business rescue application incurred by FNB, inclusive of the costs of two counsel. Consequently, such order is appropriate in the circumstances.

V EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES PERTAINING TO THE WINDING-UP APPLICATION

[20] As mentioned, the winding-up application was not opposed insofar as no answering affidavit had been filed. No heads of argument were filed on behalf of Westline. Mr Bruwer made it clear during oral argument that he did not rely on any technical points or possible non-compliance with statutory requirements.

¹³ *Ibid*: para 52, p 23

¹⁴ FNB relied in this regard on: *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at para 38

That was a wise decision. I was satisfied that all statutory requirements pertaining to the provision of security and service had been complied with. Mr Bruwer also insisted to argue the winding-up application on the evidential material before the court, expressly stating that Westline did not intend to file an answering affidavit.

- [21] In principle an applicant seeking a provisional winding-up order must merely establish its entitlement to such order on a *prima facie* basis, *ie* it must show that the balance of probabilities on the affidavits is in its favour.¹⁵ I also wish to quote the following *dictum* of Brand J (as he then was) in *Payslip Investment Holdings CC v Y2K Tec Ltd*¹⁶ and wish to emphasize that this is applicable for provisional winding-up orders only and not final orders:

"Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, *inter alia*, the strength of the respondent's case and the prospects of *viva voce* evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and *bona fide* grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general."

In casu no evidence was presented on behalf of Westline, neither in the business rescue application, nor in the counter-application, to dispute FNB's version that Westline is not only commercially insolvent, but also factually insolvent. I shall deal briefly with these allegations hereunder. More importantly, FNB's status as creditor and the amount due to it is common cause and not in dispute. Some authorities will be referred to in the next paragraphs where after the parties' submissions will be considered.

¹⁵ *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 975 J – 979 F

¹⁶ 2001 (4) SA 781 (CPD) at 783

- [22] More than a century ago Innes CJ made the following statement in *De Waard v Andrews & Thienhaus Ltd*:¹⁷

“To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.”

- [23] It is also necessary to refer to the often quoted *dictum* of Berman J in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others*:¹⁸

“The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.”

- [24] Recently Wallis JA considered the test for commercial insolvency in a unanimous judgment of the Supreme Court of Appeal. He held as follows in *Murray NO and others v African Global Holdings (Pty) Ltd and others*:¹⁹

“[31] The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due'. Put slightly differently, it is whether the company —

'has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading — in other words, can the company meet current demands on it and remain buoyant?'

Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.” (Emphasis added and footnotes omitted)

¹⁷ 1907 TS 707 at p 733

¹⁸ 1993 (4) SA 436 (C) at 440 F – 441 A

¹⁹ 2020 (2) SA 93 (SCA) at para 31

- [25] Mr Bruwer repeatedly tried to rely on facts not forming part of the evidential material before the court and even legislation to obtain what he called a “just and equitable” order. Mr Van der Walt objected to this unprocedural approach, but I decided to provide some lee-way to Mr Bruwer. I shall return hereto.
- [26] It is trite law that a party relying in litigation – motion procedure included – on statutory provisions must quote the specific Act and the relevant section with clarity. The same applies to regulations, ordinances or other statutory provisions. Evidence tendered from the bar is unacceptable and inadmissible. The affidavits in motion proceedings serve not only as the pleadings, but must contain the essential evidence which would ordinarily be led at the trial.²⁰ A party opposing relief in motion procedure must comply with the well-known and oft-quoted *dicta* of the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*.²¹ *In casu*, Westline did not even file an answering affidavit in an attempt to engage with relevant factual averments.
- [27] Contrary to the trite legal principles, Mr Bruwer made two points. First, there was an alternative remedy available to FNB and winding-up procedure was not called for. Second, it was not just and equitable to wound up Westline. In the process he *inter alia* referred to an article dealing with aviation finance as well as the Convention on the International Recognition of Rights in Aircraft Act (“the Rights in Aircraft Act”).²² He wrongly referred to a 1953 Act instead of the 1993 Act. The relevance of either the article or the Act escapes me. FNB referred to this Act to confirm that aircraft owned by Westline were subject to aircraft mortgages. I repeatedly asked Mr Bruwer to which section of the Act he was referring, but he merely insisted that it was “a short Act” without providing the alleged relevant section. I did not foresee that this piece of legislation would be dealt with during argument, but I undertook to do my own research in this regard. My *prima facie* view as expressed during argument was that the only

²⁰ *Transnet Ltd v Rubenstein* 2006 (1) 591 (SCA) at 600G – H; see also *Minister of land Affairs and Agriculture and others v D & F Wevill Trust and others* 2008 (2) SA 184 (SCA) at 220B - E

²¹ 2008 (3) SA 371 at para 13

²² 59 of 1993

relevance might be pertaining to aircraft mortgages and a mortgagee's right to liquidate its security, in the same vein as the perfection of notarial bonds, but that a creditor who has such security is not necessarily barred from applying for winding-up although it is a factor to be considered.

- [28] The Rights in Aircraft Act referred to by Mr Bruwer was studied by me over the weekend. This Act contains absolutely nothing to support Mr Bruwer's submission that a provisional winding-up order should not be granted. It deals with the mortgage of aircraft, the priority of mortgages and the rights of mortgagees. As anticipated, s 7 of the Act, dealing with the rights of mortgagees, stipulates as follows which is in line with the perfection of notarial bonds:

"7 Rights of mortgagee

- (1) The mortgagee under a registered mortgage of an aircraft or a share in an aircraft shall be entitled to recover the amount due under the mortgage in any court of competent jurisdiction, and when giving judgment or thereafter the court may direct that the mortgaged aircraft or share be sold in execution of the judgment.
- (2) Subject to the provisions of subsection (1), the mortgagee under a registered mortgage of an aircraft or a share in an aircraft shall not merely by virtue of the mortgage be entitled to sell or otherwise dispose of the mortgaged aircraft or share."

The article referred to above, by Van Zuylen and Msimang,²³ which Mr Bruwer handed up to me from the bar deals with aviation finance and the security provided by mortgages over aircraft. Again, there is nothing that supports any of Mr Bruwer's submissions. Mr Bruwer's allegation that the mortgaged aircraft were worth much more than FNB's claim is not supported by any evidence.

- [29] Bearing in mind the common cause fact that Westline is commercially insolvent, it is strictly speaking unnecessary to deal with factual insolvency. I shall therefore just briefly refer to the version presented by FNB in this regard.

²³ Van Zuylen and Msimang, *Aviation Finance in South Africa*

[30] Westline terminated its insurance policy in respect of all the aircraft mortgaged to FNB without FNB's knowledge, consent or permission and although it obtained alternative insurance, it did not cede its rights in terms of the relevant insurance policy to FNB.²⁴ This poses a serious risks to FNB and must be considered in the light of Mr Bruwer's submissions pertaining to FNB's security over the aircraft. According to the version of FNB which should be considered as uncontested at this stage, notwithstanding certain allegations in Mr Marais' founding affidavit in the business rescue application, Westline is factually insolvent in an amount of R5 140 847.04.²⁵ Westline has not shown that it is factually solvent in the sense that its liabilities, fairly estimated, exceed its assets fairly valued. Mr Marais' version that Westline is factually solvent in the amount of approximately R13 million is based on inadmissible evidence, irrelevant and does not have any probative value.²⁶ No affidavit was filed of any expert to establish the market value of its corporeal assets. Its financial statements for the year ending on 29 February 2020 are more than two years old. It is also interesting to note that the loan agreements of related parties, indicating an indebtedness to them by Westline, to wit Central AMO (Pty) Ltd, Charann Hanger Trust and Mrs DA Marais, showed an increase over the period from March 2019 to 29 February 2020 in an amount of R5 290 283. FNB alleged that a reasonable deduction may be made from this that Westline, whilst being commercially insolvent, colluded with these related parties to the prejudice of its creditors. In the absence of any contradictory evidence, this appears to be justified.²⁷

[31] In conclusion, Mr Bruwer's submission that an alternative remedy existed is not founded on any acceptable evidence. To the contrary, FNB is fully entitled to obtain finality. It is evident that Westline is unable to pay its debts and I am also satisfied that it is just and equitable that it be wound up.

²⁴ Paras 22.4 and 22.5 of the founding affidavit to the counter-application read with the applicable paragraphs of the answering affidavit in the business rescue application

²⁵ Answering affidavit in the business rescue application, paras 18 – 27, pp 145 – 150

²⁶ Founding affidavit, paras 38 – 38.2, p 19

²⁷ Founding affidavit in the counter-application, para 27, p 13

[32] Mr Bruwer submitted that the application for winding-up should be dismissed, alternatively that the application be postponed for six weeks to enable Westline to settle its debt. This submission was again confirmation that Westline did not have any defence whatsoever, did not dispute FNB's debt and merely wished to obtain a further delay. As mentioned, the last payment made by Westline to FNB was on 1 April 2021. There was no reason to adhere to Mr Bruwer's request.

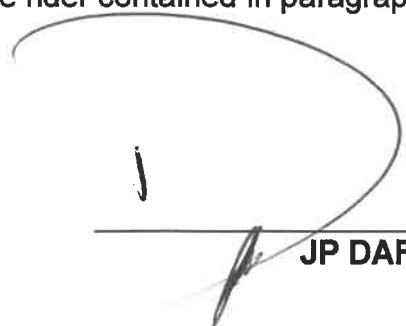
[33] The point that Mr Bruwer wanted to drive home is that Westline is a valuable asset to the Free State aircraft community and it would be a sad day if it had to be wound up. Many employees would become unemployed and no company would be available to take charge of the Tempe Airport over which Westline has complete control. No further training would be provided to aspirant pilots from within and outside the borders of this country. Furthermore, the equity in the aircraft mortgaged in favour of FNB by far exceeded its claim. None of these submissions are based on acceptable evidence.

VI CONCLUSION

[34] In conclusion, and after having been satisfied that FNB had *prima facie* proven an entitlement to a provisional winding-up order, the orders were granted as encapsulated in paragraph 1 above with the rider contained in paragraph 2.

On behalf of the applicant &
1st respondent:
Instructed by:

Mr M Bruwer
Steenkamp Jansen Inc
BLOEMFONTEIN



JP DAFFUE J

On behalf of the 3rd respondent:
Instructed by:

Advv DJ Van der Walt SC & S Tsangarakis
Symington & De Kok
BLOEMFONTEIN