REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

(1) REPORTABLE: ELECTRONIC REPORTING
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. YES

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In the matter between:

Case No. 2011/6253

FIRSTRAND BANK LTD Applicant

versus

ARBOUR VILLAGE (PTY) LTD Respondent

And, in the matter between:

Case No. 2011/42528

EII HOLDINGS (PTY) LTD Applicant

versus

ARBOUR VILLAGE (PTY) LTD Respondent

JUDGMENT

MEYER, J

[1] The applicant in *Firstrand Bank Ltd v Arbour Village (Pty) Ltd* (case no 2011/6253) sought the provisional winding-up of the respondent company ('Arbour') on the ground that it is unable to pay its debts as envisaged in s 344(f), read with secs 345(1)(a) and 345(1)(c), of the Companies Act 61 of 1973 ('the 1973 Act'), and the applicant in *Eii Holdings (Pty) Ltd v Arbour Village (Pty) Ltd* (case no 2011/42528) sought instead for business rescue proceedings in respect of Arbour to be commenced with in terms of the business rescue mechanism provided for in terms of the provisions of the new Companies Act, 71 of 2008 ('the 2008 Act'). Firstrand Bank Ltd ('Firstrand'), being an affected person, opposed the business rescue application. These are my reasons for having dismissed the business rescue application with a costs order in favour of Firstrand and for having placed Arbour under provisional winding-up immediately upon the conclusion of the hearing of the applications.

[2] Portion 4 of Erf 243 U[…..] Registration Division ET Province of K[……] in extent 8,4643 hectares ('the property') was transferred and registered into the name of Arbour on 26 August 2008. The purchase consideration for the property was the sum of R40 million plus R5,6 million VAT. Arbour acquired the property in order to develop it into a sectional title residential development, called 'Arbour Village', in A [….], K[….]. The plan was for the property development to be undertaken in three distinct phases. The first phase, which is now completed, comprises 22 sectional title residential units, ten of which had already been erected on the property at the time when Arbour acquired it. The plan was to erect a further 169 sectional title units as part of the second and third phases of the property development. Arbour has not proceeded with phases two and three of the development.

[3] Firstrand granted a Commercial Property Finance Loan Facility to Arbour on 14 March 2008 ('the loan agreement'). Firstrand maintains that it advanced the total capital sum of R47, 713, 551.60 to Arbour pursuant to the conclusion of the loan agreement and a further sum of R7, 410, 000.00, which is a non-refundable administration fee. The present entitlement of Firstrand to the administration fee is in issue. Arbour maintains that Firstrand would only have been entitled to such fee had the development of phases two and three been proceeded with, which is not happening. Arbour also avers that Firstrand only advanced the total capital sum of R39, 771, 019.21 to it. Arbour's calculation *inter alia* fails to take account of a debit in the sum of R1, 710, 000.00 that is included in Firstrand's calculation of the capital sum of R47, 713, 551.60, which is an initiation fee that was agreed upon in terms of the loan agreement. I accordingly consider it fair to accept that capital amounts totalling at least about R41 million were advanced to Arbour in terms of the loan agreement.

[4] It is not seriously disputed that Arbour's indebtedness to Firstrand became due and payable on 26 October 2010. FNB refuses to afford any further funding to Arbour. An amount of just over R19 m had thus far been repaid to Firstrand. Some of the units in Phase I have been sold and transferred into the names of the buyers thereof. Offers to purchase all the remaining units in Phase I have now been received, but are subject to Firstrand's approval, which is required since the offers are for lesser prices than those agreed upon between Arbour and Firstrand in terms of the loan agreement. Such sales would yield a net amount of approximately R11 m that would be repaid to Firstrand, if it approves of the sales. Even if this amount is taken into account and it is accepted that Firstrand will soon have been repaid the total capital amount of about R30 mil, then presently owing and payable to Firstrand,

apart from interest amounting to millions of rand, remains an outstanding capital amount of no less than about R11 m in respect of the capital sums that have been advanced to Arbour. The value of that portion of the property that was earmarked for the development of the second and third phases is the only remaining asset of Arbour, and it is worth about R10 million. It is not suggested that Arbour has any other assets or financial resources. Its only other debts are said to be its shareholders' loan accounts although no particulars in respect thereof have been disclosed.

[5] Arbour is on the facts presented profoundly insolvent, commercially and factually, and its winding-up was inevitable if it was not placed under business rescue.

[6] Eii applies, in terms of s 131(1) of the 2008 Act, for an order placing Arbour under supervision and for the commencement of business rescue proceedings in respect of it on the grounds that Arbour is 'financially distressed' or that 'it is otherwise just and equitable to do so for financial reasons' and that there is a 'reasonable prospect' for rescuing it as contemplated in secs 131(4)(a)(i) and 131(4)(a)(iii) of the 2008 Act.

[7] A company is 'financially distressed' within the meaning of s 131(4)(a)(i), read with s 128(1)(f), of the 2008 Act if 'it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months' or 'it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months'. S 128(1)(b) of the 2008 Act defines the expression 'business rescue', which, in terms thereof

> ‘means 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) a temporary moriatorium on the rights of claimants against the company or in respect of property in its possession;
>
> (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 maximizes 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’.

In terms of s128(1)(h), ‘”rescuing the company” means achieving the goals set out in the definition of “business rescue” in paragraph (b)’.

[8] I agree with the following passages in the judgment of Binns-Ward, J in *Koen & Anor. v Wedgewood Village Golf & Country Estate (Pty) Ltd & Ors* (WCC) (unreported case no 24850/11, 9-12-2011), paras [17] – [18], and with the remarks of Eloff, AJ in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks and another intervening)* (WCC) (unreported case no 15155/2011, 25-11-2011), para [24], which were referred to and accepted in *Koen*:

> ‘[17] It is evident in the provisions of s 131(4) that a person making an application for business rescue in terms of s 131(1) of the 2008 Companies Act must satisfy the court that there is a *reasonable prospect* that the subject company can be rescued in the relevant sense by being placed under supervision. The information or evidence that will suffice to meet the requirement will depend on the object of the proposed business rescue; viz. whether it is to achieve the continued existence of the company on a solvent basis, alternatively, to allow the company’s business to be managed for an interim period to allow for a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company. Whatever the object of the proposed business rescue, however, in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved. While it is the function of the business rescue practitioner, if appointed, to draw up a business rescue plan to be considered by the ‘affected persons’, the founding papers in a business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or, at

the very least, make out a case for the court to hold that an investigation by a business rescue practitioner to that end, in terms of s 141(1) of the Act, appears to be justified.

[18] In respect of what will, in general, be required of an applicant seeking a supervision order to put a company into business rescue to return it to solvent operation, I agree with the remarks made by Eloff AJ in *Southern Palace* supra, at para 24. The learned judge considered that at least *'some concrete and objectively ascertainable details* [should be given] *going beyond mere speculation in the case of a trading or prospective trading company, of:*

(i) the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

(ii) the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

(iii) the availability of any other necessary resource, such as raw materials and human capital;

(iv) the reasons why it is suggested that the proposed business [rescue] *will have a reasonable prospect of success.*

[17] In an application in which the object of the proposed business rescue is to secure a better return than would be obtained under immediate liquidation the applicant would be required to set out in the founding papers a reasoned factual basis for the alternative scenarios that the court will have to consider and lay a cogent foundation to enable the court to determine that there is a reasonable prospect that a better return evident on one of those scenarios can be achieved.

[18] Vague and speculative averments in the founding papers will not suffice to provide a proper basis for a court to make the required determination that there is a reasonable prospect, if the company were to be placed under supervision, that the contemplated business rescue objective could be achieved.'

[9] It is instructive to also refer to the remarks of Eloff, AJ in *Southern Palace*, para [25], with which I also agree, in respect of what will, in general, be required of an applicant seeking a supervision order to procure a better return for the company's creditors and shareholders than would result from the liquidation thereof, which are that

'one would expect an applicant for business rescue to provide concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available. It is difficult to see how, without such details, a Court will be able to compare the scenario

> sketched in the application with that which would obtain in an immediate liquidation of the company. Mere speculative suggestions are unlikely to suffice.'

[10] It is undisputed that Arbour is in financial distress and I accordingly need not consider the provisions of s 131(4)(a)(i), read with s 128(1)(f), of the 2008 Act. The deponent to the founding and replying affidavits of Eii, Mr JD Els, who is a director of Arbour and of Eii, which latter company holds 20% of the shareholding of Arbour, attributes the financial demise of Arbour in the founding papers essentially to Firstrand's conduct since it, so it is *inter alia* alleged, at the time of entering into the loan agreement granted 100% loan finance to prospective buyers and it subsequently imposed more stringent lending criteria. Firstrand disputes that it is responsible for the financial demise of Eii and states that Eii has failed to demonstrate that Arbour's precarious financial position has not been caused by '… the world-wide economic melt-down' and that the changed economic situation caused a change in its lending criteria. There is merit in this contention since Mr Els also states in the founding affidavit that '[m]any sales were concluded but none of the purchasers, because of the new stringent lending criteria applied by the banks, could qualify for finance to purchase the properties which they were endeavouring to purchase.' Mr Els, in the replying affidavit, also attributes blame to Mr HJ Kay, who, from June 2010 until January 2012, was a director of Arbour and who is the beneficial holder of 80% of its shareholding.

[11] The case of Eii in support of the proposed business rescue is that the development has become more popular as a result of the completion of a big shopping complex adjacent to it during late 2009 and because of plans 'to develop other adjacent land into office parks and residential apartment blocks.' Sales of the phase I residential units have picked up from November 2010. Seventeen of the

residential units had been successful sold by the time the business rescue proceedings were launched. It is alleged that Mr Kay permitted members of his family, friends and business associates to occupy completed units in the development free of charge, which resulted in such units not being marketed and sold even though there was at the time alleged to have been a waiting list for prospective purchasers interested in purchasing units in the development. The remaining units have either been sold since the launching of the business rescue proceedings or offers to purchase them have been received, which offers are subject to Firstrand's approval, a requirement because the offers are for less than the selling prices agreed to between Firstrand and Arbour in terms of the loan agreement. The contention is that '… the recent surge in sales indicate that there is a reasonable prospect of rescuing the company …' and that an investigation by a business rescue practitioner is justified. It is said that the business rescue practitioner will be best positioned to evaluate Arbour's '… affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued'.

[12] The encouraging sales history portrayed by Eii in respect of the residential units comprising phase I of the development does not, in my view, establish a cogent evidential foundation to support the existence of a reasonable prospect of salvaging the business of Arbour or of securing a better return to Firstrand and to the shareholders of Arbour than would probably be achieved in its immediate liquidation nor does it establish a sufficient basis for holding that an investigation by a rescue practitioner in terms of s 141(1) of the 2008 Act is justified. Arbour, irrespective of the 'surge in sales', still remains unable to repay its indebtedness to Firstrand to the extent of many millions of rands, which indebtedness is now long overdue. No

information is given in the founding papers of the likely costs of rendering Arbour able to commence with the development of phases II and III or of the likely availability to it of loan capital to undertake such future development. A substantial capital injection is required and the likelihood of that happening has not been addressed. There is no reasoned factual basis laying a cogent foundation for considering whether or not another plan or scenario has a reasonable prospect of yielding any better result than Arbour's immediate liquidation.

[13] The liquidation proceedings against Arbour, which had already commenced on 2 February 2011, was met by Eii's application for Arbour to be placed under business rescue. It was issued on 25 July 2011, which was the day on which the winding-up application was enrolled for hearing after it had previously been postponed upon the application of Arbour to be permitted to file an answering affidavit out of time. Firstrand, being a creditor of Arbour and therefore an 'affected person' in terms of s 128(1) of the 2008 Act with a right, in terms of s 131(3) thereof, to participate in the hearing of an application for business rescue, gave notice of its intention to oppose the application on 30 August 2011, and its answering affidavit was filed on 20 September 2011. Eii's replying affidavit was filed on 12 March 2012, which was the day on which the winding-up application was again enrolled for hearing.

[14] Application was made for condonation of the late filing of the replying affidavit at the commencement of the hearing before me. I refused the application and ruled that the replying affidavit is to be disregarded, except for the averments relating to the alleged conduct of Mr Kay, to which I have referred to earlier on in this judgment, as well as averments relating to the further sales of residential units, because such matters only came to the knowledge of the deponent, Mr Els, after the date before

which Arbour's replying affidavit should have been filed. The replying affidavit was filed about six months after the time for the filing thereof had elapsed in terms of the Uniform Rules. No reasonable explanation covering the full period of the delay was given. See: *Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC), para [22].

[15] The replying affidavit in any event essentially contains speculative suggestions by Mr Els relating to alternative forms of development that could be undertaken on the remainder of the property, a vague allegation that 'various developers have shown interest and commitment to proceed with the development', and an allegation that 'Riverside Park Trading 9 (Pty) Ltd has shown keen interest to proceed with the development of a retirement home facility on the remaining developable land'. By letter dated 23 February 2012, Arbour has given Riverside Park Trading 9 (Pty) Ltd a period of 60 days to undertake a viability investigation and to present a development proposal. That period had long transpired by the time of the hearing of these applications on 12 June 2012.

[16] A case for business rescue had not been made out with or without regard to the allegations contained in the replying affidavit. Arbour's winding-up was accordingly inevitable. I issued a provisional winding-up order and not a final one at the request of both parties.

P.A. MEYER

JUDGE OF THE HIGH COURT

Date of hearing:	12 June 2012
Date of Judgment:	8 August 2012
Counsel for Firstrand Bank Ltd:	Adv. JE Smit
Counsel for Arbour Village (Pty) Ltd and for EII Holdings (Pty) Ltd:	Adv. PJ Vermeulen
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