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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

In the matter between:

Case No: 22983/23

ARNO SCHIPPER

Applicant

and

TIRISANO PROPERTY GROUP (PTY) LTD

First Respondent

Registration number: 2013/136691/07

Registered address: [...] P[...] K[...] Avenue
Platteklouf
Parow

EMALAHLENI LOCAL MUNICIPALITY

First Intervening Creditor

COURTHIEL HOLDINGS (PTY) LTD

Second Intervening Creditor

AQUARELLA INVESTMENTS 266 (PTY) LTD

Third Intervening Creditor

AND

In the matter between:

Case No: 16033/2023

EMALAHLENI LOCAL MUNICIPALITY

Applicant

and

TIRISANO PROPERTY GROUP (PTY) LTD

Respondent

COURTHIEL HOLDINGS (PTY) LTD

First Applicant for intervention

**AQUARELLA INVESTMENTS 266
(PTY) LTD**

Second Applicant for intervention

AND

In the matter between:

Case No.: 18657/2023

AQUARELLA INVESTMENTS (PTY) LTD

First Applicant

EMALAHLENI LOCAL MUNICIPALITY

Second Applicant

and

TIRISANO PROPERTY GROUP (PTY) LTD

Respondent

AND

In the matter between

Case no.: 3973/2024

COURTHIEL HOLDINGS (PTY) LTD
intervention

Applicant for

under case no. 16033/2023

and

EMALAHLENI LOCAL MUNICIPALITY

First respondent

Hearing: 18 March 2024

JUDGMENT DELIVERED ELECTRONICALLY ON 8 MAY 2024

BLUMBERG AJ

[1] Tirisano Property Group (Pty) Ltd ('Tirisano') is a property-owning company. It derives its income from a mixed-use property located in Emalahleni (previously Witbank), Mpumalanga.

[2] This property, which comprises five erven, is referred to in the papers as 'the Witbank property' and I do the same in this judgment.

[3] At the end of 2023, Tirisano was in arrears on its municipal account in respect of the Witbank property in the admitted amount of R11.156 million.

[4] Tirisano's ongoing failure to settle its arrears prompted the local authority in question, the Emalahleni Local Municipality ('Emalahleni'), to launch proceedings in this court for Tirisano's winding-up. This Emalahleni did on 18 September 2023.¹ I refer to this as 'the Emalahleni winding-up application'.

[5] A slew of applications followed, all launched out of this court. I set these out in chronological order below.

The Aquarella application

[6] On 20 October 2023, Aquarella Investment 266 (Pty) Ltd ('Aquarella'), which was unaware of the pending Emalahleni winding-up application, launched its own application for the winding-up of Tirisano ('the Aquarella winding-up application').²

¹ Case number 16033/2023.

² Case number 18657/2023.

[7] Aquarella based its standing on claims arising from its sale of a property rental enterprise (known as 'the Umdoni Centre', in KZN) to Tirisano in terms of a sale agreement concluded between them on 25 August 2022.

[8] On learning of the Emalahleni winding-up application, Aquarella applied for leave to intervene therein ('the Aquarella intervention application').

[9] Tirisano, disputing Aquarella's standing as a creditor, opposed the Aquarella winding-up application, as well as the Aquarella intervention application.

[10] Emalahleni for its part sought and obtained leave to intervene in the Aquarella application.

The business rescue application

[11] On 14 December 2023, Mr Arno Schipper, a shareholder and co-director of Tirisano, launched an application for an order placing Tirisano in business rescue in terms of section 131(4) of the Companies Act 71 of 2008 ('the Companies Act') ('the business rescue application').³

[12] Each of Emalahleni, Aquarella and Courthiel Holdings (Pty) Ltd ('Courthiel') were granted leave to participate in the business rescue application, which they oppose.

The Courthiel intervention application

[13] On 27 February 2024, Courthiel launched an application for leave to intervene in the Emalahleni winding-up application ('the Courthiel intervention application').⁴

³ Case number 22983/2023.

⁴ Case number 3973/2024.

[14] Courthiel's standing as creditor of Tirisano is not in dispute. It acquired claims against Tirisano, by cession, that have their origin in Tirisano's 2013 purchase of the Witbank property (the seller thereof having ceded its claims against Tirisano to Courthiel in 2016).

[15] The Courthiel intervention application is unopposed.

[16] So too is the Emalahleni winding-up application.

MATTERS FOR DETERMINATION

[17] In light of what is set out above, the following matters are before me (all of which were argued on 18 March 2024):

17.1. the business rescue application;

17.2. the Emalahleni winding-up application;

17.3. the Courthiel intervention application; and

17.4. the Aquarella winding-up application and Aquarella intervention application.

[18] Each of the parties referred to above – viz. Tirisano, Mr Schipper, Emalahleni, Courthiel and Aquarella – was represented at the hearing by its own team of attorneys and counsel.

[19] The parties were *ad idem* that the following was the appropriate approach to the various matters before court, and it is the course that I intend to follow in this judgment:

- 19.1. The business rescue application should be decided first.⁵
- 19.2. Were the business rescue application to be granted, there would be no need to decide the other applications, as these would then be struck by the general moratorium on legal proceedings against a company in business rescue, in terms of section 133 of the Companies Act.
- 19.3. Conversely, were the business rescue application to fail, the provisional liquidation of Tirisano at the instance of Emalahleni would then follow on an uncontested basis – since the Emalahleni winding-up application is unopposed. In that eventuality, the appropriate course would be to grant a provisional winding-up order, and to postpone the Courthiel intervention application, the Aquarella winding-up application and the Aquarella intervention application pending the return day of the provisional order.

[20] Unless I state otherwise, where I refer to sections of legislation below, these are references to the Companies Act; and where I refer to affidavits, these are references to the papers in the business rescue proceedings.

THE FINANCIAL POSITION OF TIRISANO AND THE CASE FOR BUSINESS RESCUE – A SUMMARY

The Witbank property

[21] Tirisano is the registered owner of 15 properties.

⁵ This is logical in light of section 131(6) of the Companies Act, which provides that if liquidation proceedings have already being commenced against the company in question at the time an application is made for business rescue in terms of section 131(1), the liquidation proceedings are suspended until the court has adjudicated upon the business rescue application, or the business rescue proceedings end (i.e. if the court makes the order applied for).

[22] Six of these are managed as one commercial unit, and together make up the Witbank property. The Witbank property is Tirisano's only income-producing asset, and by far its most valuable, substantially eclipsing the combined value of its other properties.

[23] The Witbank property comprises a mixed-use retail component on the ground floor, and a residential component on the upper seven floors.

[24] The residential component is dedicated to student accommodation, known as the Khayaletu Student Residences ('Khayaletu').

[25] Khayaletu is occupied by students of the Tshwane University of Technology ('TUT') and of the Nkangala TVET College ('Nkangala'). The majority of these students are funded by the government bursary scheme managed by the National Student Financial Aid Scheme ('NSFAS'). NSFAS pays the institutions in question (TUT and Nkangala) for the provision of accommodation to the students. The institutions are in turn obliged to pay Tirisano.

[26] As will be seen, ongoing difficulties in obtaining payment from TUT and Nkangala have contributed to Tirisano's financial distress.

[27] In his papers in the business rescue application, Mr Schipper says that the market value of the Witbank property is approximately R365 million – R95 million for the retail component, and R270 million for the residential component.

[28] There are difficulties with this valuation that I will come to. It suffices for now to mention that the bulk of the value in the Witbank property – and hence in Tirisano's balance sheet – lies in the income stream attributable to Khayaletu (an income stream that, as will be seen, has not proved consistent or reliable enough to sustain the provision of basic municipal services such as electricity to the Witbank property).

[29] Three mortgage bonds securing a combined indebtedness of R165 million are registered over the Witbank property in favour of Courthiel.

[30] In his papers, Mr Schipper says that at present “*a capital amount of R170 million*” is owed to Courthiel by Tirisano. For its part, Courthiel alleges that it is owed R239.5 million by Tirisano.

[31] The difference between the two amounts is attributable to accumulated interest and other agreed charges.⁶

[32] In his replying affidavit, Mr Schipper refers to a “*factual dispute*” concerning the amount of Tirisano’s debt to Courthiel. I do not consider there to be one;⁷ but even if there were, *Plascon-Evans* would apply in favour of Courthiel’s version. I accordingly intend to approach the matter on the basis that Tirisano’s debt to Courthiel – which, I stress, is admittedly due and payable – is R239.5 million; and indeed this is the basis on which Mr Schipper’s counsel argued the matter.

The other properties

[33] As to the other nine of Tirisano’s 15 properties:⁸

The guesthouse properties

33.1. Three of these – viz. erven 2411, 2412 and 2414 Parow, Western Cape (‘the guesthouse properties’) – constitute a guesthouse.

33.2. They were purchased in 2020 for a combined amount of R13.246 million. Following renovations and improvements,

⁶ See annexure ‘J’ to Courthiel’s answering affidavit in the business rescue application.

⁷ On 8 February 2021, Mr Schipper signed an acknowledgment of debt, on behalf of Tirisano (at the time known as Southern Storm Properties 223 (Pty) Ltd) and in favour of Courthiel, in the amount of R200 809 680. There have been no capital repayments since then, and interest has accrued.

⁸ Unless otherwise indicated, what follows is a summary of undisputed allegations in Mr Schipper’s founding affidavit.

they are now valued at R 15.87 million. The outstanding mortgage loans over these properties total approximately R11.43 million.

33.3. There is therefore equity in the guesthouse properties in excess of R4 million.

33.4. Mr Schipper says that Tirisano is planning on consolidating these properties in order to develop a boutique hotel.

The guesthouse extension

33.5. Tirisano is also the registered owner of the adjacent erf 2[...] Parow ('the guesthouse extension'), which is apparently "*earmarked to be used for overflow accommodation for the Guesthouse business*".⁹

33.6. Mr Schipper resides on the guesthouse extension with his family, and uses it as offices for Tirisano.

33.7. According to the founding affidavit, the property was purchased for R6 million on 13 November 2022; it has been substantially improved and its current market value is R8 million; there is a mortgage loan of R5.5 million, leaving equity of around R2.5 million.

The Moorreesburg property

33.8. There are five other properties owned by Tirisano. Of these, the only one over which a mortgage bond is registered is

⁹ I mention that there is at present no guesthouse "*business*" nor is such a business planned. Tirisano's intention, according to Mr Schipper, is to develop a boutique hotel on the guesthouse properties. Whether, and how, erf 2426 features in those plans is not clear from the papers. But nothing turns on this.

erf 7[...] Moorreesburg ('the Moorreesburg property'), which was purchased for R1.275 million on 31 July 2020.

- 33.9. Mr Shipper says that Tirisano intends to undertake a small-scale residential development on this property, the market value of which is currently R1.498 million. There is a mortgage loan debt of R1.14 million, leaving equity of around R300 000.

[...] C[...] M[...] (unbonded)

- 33.10. Tirisano purchased erf 1[...] Newlands – situate at [...] C[...] M[...], S[...] Street – for R7.59 million on 30 September 2021. It is an investment property which is bond-free.

1[...] M[...] Road Heathfield (unbonded)

- 33.11. Erf 1[...] Heathfield – situate at 1[...] M[...] Road, Heathfield – was purchased for R5.2 million on 23 March 2022. It is an investment property apparently earmarked for future development. It is bond-free.

2[...] V[...] Road, Mowbray (unbonded)

- 33.12. Erf 3[...] Mowbray – situate at 2[...] V[...] Road – was purchased for R11.5 million on 23 June 2022. It is an investment property apparently earmarked for development as student accommodation. It is also bond-free.

- 33.13. In relation to the [...] C[...] M[...], 1[...] M[...] Road Heathfield and 2[...] V[...] Road Mowbray properties, Mr Schipper says that it is possible, but not likely, that these properties might have to be sold in business rescue to reduce Tirisano's overall debts.

The Llandudno property (unbonded)

- 33.14. Finally, there is erf 2[...] Hout Bay – a vacant plot situate at 4[...] F[...]’s B[...], Llandudno – which Tirisano purchased for R14 million on 16 August 2022. The current value of the

property, which is also bond-free, is said to be R19.5 million. Mr Schipper explains that this property is already on the market, and that it will in all likelihood have to be sold in business rescue to reduce Tirisano's debts.

Arrears owed to Tirisano by the tertiary institutions

[34] Tirisano has experienced ongoing difficulties in extracting payment, in respect of the provision of accommodation at Khayaletu, from TUT and Nkangala. It appears that very substantial arrears have accrued – dating back to 2019/2020.¹⁰

[35] I have found it difficult to discern from the affidavits the exact extent of Tirisano's claims against TUT and Nkangala. Mr Schipper's counsel argued the matter on the basis that Tirisano has claims of around R50 million against TUT, and a further claim of about R6 million against Nkangala; and I shall approach the business rescue application on that basis.¹¹

Tirisano's remaining liabilities

[36] Over and above its mortgage debts (as dealt with above), Tirisano has the following liabilities;

- 36.1. R4.2 million is owed to SARS. In round terms, R4 million comprises VAT arrears, together with interest and penalties thereon, which have accumulated since April 2022. The balance of around R175 000 is in respect of arrear PAYE payments (also together with interest and penalties thereon).

¹⁰ See for example para 138 of the founding affidavit.

¹¹ In his papers, Mr Schipper also refers to a substantial amount allegedly owing by Sefako Makgatho Health Science University in Ga-Rankuwa, Gauteng – referred to in the papers as 'SMU'. This apparently arises from SMU's breach of an agreement with Tirisano. There is reference in para 129 of the founding affidavit to an agreement reached with SMU as to the amount of this debt and how it would be paid by SMU. The alleged agreement is however neither particularised nor attached to the papers. Mr Schipper's counsel placed no reliance on this alleged debt in written or oral argument, and I shall not refer to it any further.

36.2. R22.9 million is owed to trade creditors, including Emalahleni.¹²

That Tirisano has, over a period of some years now, run up millions of Rands of arrear liabilities to SARS and Emalahleni reflects both the severity, and ongoing nature, of its liquidity problems. It would be fair to say that Tirisano has, for some years, operated in a liquidity crisis. How it has managed, until recently, to stave off liquidation applications by its creditors is dealt with further below.

36.3. R2.63 million is owed to ABSA Bank under a 'Covid term loan'.

36.4. Finally, Mr Schipper alleges that he has a loan account against Tirisano in the amount of R61 million – which he says he is willing to subordinate in business rescue.

Tirisano's income, expenses and cashflow

[37] It is alleged in the founding affidavit that based on what Tirisano can "expect" to receive from TUT and Nkangala, and after deduction of its various monthly outgoings,¹³ Tirisano "should" have a positive cashflow of approximately R480 000 per month.

Tirisano's financial distress and the causes thereof

[38] The reality is different. Tirisano has not been cashflow positive for some years (if it ever was). It will appear from what is set out above – and it is indeed common cause – that Tirisano is commercially insolvent (i.e. unable to pay its debts as they fall due),¹⁴ and is "*financially distressed*" within the

¹² The amount of R22.9 million in respect of trade creditors includes a debt of R9.53 million to Emalahleni. As pointed out in Emalahleni's heads of argument, however, the admitted debt owed by Tirisano to Emalahleni is in fact R11.16 million – R6.78 million in respect of consumption charges (electricity, water and sewerage) plus R4.38 million in respect of rates. For present purposes though, nothing turns on this discrepancy.

¹³ These are set out as being R1.6 million monthly interest owed to Courthiel; R1.8 million of monthly operating expenses; and R240 000 per month in respect of other loan instalments.

¹⁴ *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA) par 16.

meaning of section 131(4) (this being the premise of the business rescue application).¹⁵

[39] In assessing Tirisano's financial position, it is important to appreciate that there are two facets to Tirisano's admitted inability to pay its debts as they fall due. First, there is Tirisano's inability to meet its ongoing monthly commitments – including the most basic of these such as municipal charges for rates and electricity in respect of the Witbank property, and liability to SARS to account for and pay VAT and PAYE. Second, there is Tirisano's inability to repay its debt to Courthiel in the amount of R239.5, which is currently due and payable.

[40] In his founding affidavit, Mr Schipper attributes to Tirisano's financial distress to three factors, viz.:

- 40.1. First, the Covid pandemic – which Mr Schipper says brought about vacancy rates at Khayaletu that were “*slightly higher than forecast*”.
- 40.2. It appears however that Tirisano's inability to pay its debts preceded the onset of the Covid-pandemic, and has continued well after its abatement. The Covid pandemic does not feature as one of the causes for Tirisano's financial distress in the refined summaries thereof contained in the replying affidavit and in Mr Schipper's counsel's heads of argument. I therefore do not intend to refer to this aspect any further.

¹⁵ “financially distressed” is defined in section 128(1)(f) to mean “in reference to a particular company at any particular time, ... that –

(i) 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
(ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;”

- 40.3. Second, the delays in obtaining payment from the relevant NSFAS-funded tertiary institutions (an aspect already touched on above).
- 40.4. Third, the delays experienced by Tirisano “*in obtaining alternative funding, due to [Tirisano’s] inability to procure formal, bankable leases for its student accommodation from the aforesaid [tertiary] institutions.*”
- 40.5. The quotation is from para 35 of the founding affidavit. It refers to Tirisano’s unsuccessful efforts at raising bank-provided mortgage finance against the Witbank property, so as to settle the debt to Courthiel (and hence for a banking institution to replace Courthiel as Tirisano’s principal financier). Tirisano’s inability to do so is due to the fact that there are no formal leases in place in respect of the student accommodation (Khayaletu) at the Witbank property.

The case for business rescue

[41] Mr Schipper alleges that these difficulties “*are temporary in nature*” and that he has “*every reason to believe that they will be resolved in business rescue*”.¹⁶

[42] In line with the relevant provisions of the Companies Act, Mr Schipper advances a primary case, and an alternative case, for business rescue. Engaging with these requires that I set out the pertinent provisions of the Companies Act in brief, and I do so below.

[43] In terms of section 131(1), an “*affected person*” may apply to a court for an order placing a company under supervision and commencing business

¹⁶ Founding affidavit para 36.

rescue proceedings. (As a creditor of Tirisano, Mr Schipper is an “*affected person*” as defined.)¹⁷

[44] Section 131(4) provides in relevant part that a court, after considering such an application, may adopt one of two possible courses of action. First – and subject to satisfaction of the requirements in section 131(4)(a) – the court may place the company in business rescue. The applicable requirements – as they pertain to the present matter – are (i) that the company is financially distressed,¹⁸ and (ii) that there is a reasonable prospect for “*rescuing the company*”.¹⁹

[45] Second, the court may dismiss the application.²⁰

[46] As to the second of the two applicable requirements for placing a company in business rescue – i.e. that there is a reasonable prospect for “*rescuing the company*” – the quoted phrase has a defined meaning. In terms of section 128(1)(h), “*rescuing the company*” means “*achieving the goals set out in the definition of ‘business rescue’ in paragraph (b)*”.

[47] Paragraph (b) of section 128(1) in turn defines “*business rescue*” 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;*

¹⁷ See section 128(1)(a)(i). Mr Schipper has a loan account claim against Tirisano.

¹⁸ Section 131(4)(a)(i).

¹⁹ The concluding phrase of section 131(4)(a).

²⁰ Together with any further necessary and appropriate order, including an order placing the company in liquidation – see section 131(4)(b).

- (ii) *(a 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;"* (emphasis added)

[48] In *Oakdene*,²¹ the SCA clarified the meaning and application of the provisions referred to above as follows:

"The potential business rescue plan s 128(1)(b)(iii) thus contemplated has two objectives or goals: a primary goal, which is to facilitate the continued existence of the company in a state of solvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation."

[49] In line with this, the case for placing Tirisano in business rescue proceeds, as I have mentioned, on a primary basis and an alternative basis.

The primary case: continuation of Tirisano on a solvent basis

[50] The primary case advanced is that there is a reasonable prospect – within the meaning of section 131(4) – of facilitating, by way of a business rescue plan, the continued existence of Tirisano in a state of solvency.

²¹ *Oakdene Square Properties (Pty) Ltd and Others v Farm Botesfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) par 23.

[51] What is proposed in the founding affidavit is along the following lines:

- 51.1. A business rescue practitioner will be “*best suited to engage with [TUT and Nkangala] and NSFAS to resolve the issue of their failure to pay*” Tirisano.²²
- 51.2. The Llandudno property, which is already on the market, should be sold.²³ It is alleged in this regard that “*a business rescue practitioner would be able to do so at a much better return than what a liquidator may achieve by way of a forced sale*”.²⁴
- 51.3. Once these steps have been taken, Tirisano should be cashflow positive, and in a position to settle its outstanding debts to SARS and its various trade creditors including Emalahleni.
- 51.4. To the extent that the arrears owed to Tirisano by TUT and Nkangala are not recovered in business rescue, any resulting shortfall can be made up by selling one or more of the bond-free properties (in relation to which it is again contended that a business rescue practitioner would be able to obtain a better return than a liquidator).²⁵

[52] In the founding affidavit much store is placed in the fact that this proposal would allow Tirisano to retain its 33 employees²⁶ – most if not all of whom are employed at the Witbank property.²⁷

²² Founding affidavit paras 153 and 158.

²³ Founding affidavit paras 117 and 204.

²⁴ Founding affidavit para 117.

²⁵ Founding affidavit paras 110, 114 and 120.

²⁶ For whom Mr Schipper expresses concern in paras 22 and 28.3 of his founding affidavit, the latter reading as follows: “[Tirisano] *has 33 employees. Their and their families’ fate depend on the success of [Tirisano] being placed in business rescue as soon as possible to enable [Tirisano] to turn itself around and which will then statutorily lead to the employees remaining in employment with [Tirisano] whilst in business rescue.*”

²⁷ See para 72 of Mr Schipper’s answering affidavit, on behalf of Tirisano, in the Aquarella winding-up application.

[53] The obvious difficulty with the above proposal is that it does not provide for payment of the R239.5 million debt due to Courthiel. Cognisant of this, Mr Schipper alleged that a business rescue practitioner “*would be in the best position...to engage with Courthiel, with a view to restructure this debt*”.²⁸

[54] In its answering papers, however, Courthiel stated that it was unwilling to countenance a further restructure of its debt, having already done so on four previous occasions (see below). As was confirmed by Mr Schipper’s counsel in oral argument, this prompted a change of tack by Mr Schipper in reply – where he stated that instead of retaining the encumbered properties and selling the unencumbered properties (as was proposed in the founding papers), the business rescue practitioner would instead retain the unencumbered properties, and sell the encumbered ones²⁹ including the Witbank property – which, as I have mentioned, is Tirisano’s only income-producing asset and the locus of its 33 employees.

[55] The submission on behalf of Mr Schipper was that the sale of the Witbank property by the business rescue practitioner would facilitate the settlement of all of Tirisano’s debts, and allow it to continue in existence as a solvent property-owning and development company. I address this below.

The alternative case for business rescue: a better return for creditors or shareholders

[56] If however, it is not possible through business rescue for Tirisano to continue in existence on a solvent basis, then in that scenario Mr Schipper alleges that “*business rescue proceedings will result in a better return for [Tirisano’s] creditors and affected persons, than would result from its immediate liquidation.*”³⁰

²⁸ Founding affidavit para 84.

²⁹ Replying affidavit para 5.3.

³⁰ Founding affidavit para 21.2.

OPPOSITION TO THE BUSINESS RESCUE APPLICATION

[57] I have mentioned that each of Emalahleni, Courthiel and Aquarella opposes the business rescue application. They do so on the contended grounds that (i) the requirements for business rescue under section 131(4) are not satisfied – in particular the requirement of “a *reasonable prospect for rescuing the company*”; (ii) in any event, on the facts of this case, business rescue proceedings are not appropriate, and liquidation is the preferred remedy (for reasons elaborated upon below); and (iii) the business rescue application is brought in bad faith as a ploy to derail the liquidation applications, and it accordingly constitutes an abuse of process.

[58] Engaging with these grounds of opposition requires some acquaintance with Tirisano’s trading history – particularly in light of the serious allegations of mismanagement levelled by the three applicant creditors.³¹

[59] It is alleged that (i) over a period of some years, Tirisano has demonstrated a pattern of making payment undertakings to placate its creditors, only to breach those undertakings (and thereafter make further undertakings when its back is against the wall, financially speaking); (ii) Mr Schipper has permitted Tirisano to trade with reckless disregard for the interest of its creditors – in that while demonstrating a sustained inability to pay its debts (to SARS, Emalahleni and Courthiel amongst others) as they fall due, Tirisano has over the same period of time substantially expanded its property portfolio; (iii) in these respects, Mr Schipper’s conduct as a director of Tirisano warrants a declaration of delinquency (under section 162); and (iv) there is no reasonable prospect of Tirisano being rescued for as long as its current controllers remain at the helm.

[60] For reasons that I will come to, these allegations are not without merit – and, quite strikingly, they stand unanswered by Mr Schipper. In his replying affidavit, Mr Schipper chose not to deal with Emalahleni’s allegations of mismanagement and misconduct. He brushed these – and similar allegations

³¹ See in particular Emalahleni answering affidavit para 25 and following.

by Courthiel – aside as “*ad hominem attacks*” (meaning that they were purely personal attacks of no relevance to the merits of the business rescue application).³² He added that it would fall to the business rescue practitioner to investigate these matters, and that the creditors should “*take comfort*” from this.³³

[61] A similar dynamic played out in the papers in the Emalahleni winding-up application. Emalahleni – like Courthiel – seeks the winding-up of Tirisano on the dual basis that Tirisano is unable to pay its debts,³⁴ and that it would be just and equitable for Tirisano to be wound up.³⁵ The allegations made in support of the latter ground include that Tirisano has, on an ongoing basis, given undertakings to its creditors which it has dishonoured, and that it has traded recklessly.³⁶ The Emalahleni winding-up application is unopposed; no opposing affidavit was delivered; and these allegations stand uncontroverted.

TIRISANO’S TRADING HISTORY

[62] Tirisano came into existence in 2005 as a close corporation by the name of Southern Storm Properties 223 CC. The close corporation was converted into a company on 7 August 2013. Its name at the time was Southern Storm Properties 223 (Pty) Ltd, which changed its name to the current one, Tirisano Property Group (Pty) Ltd, on 25 June 2021.

Acquisition of the Witbank property, restructure of the debt, and dealings with Courthiel

[63] In 2013, Tirisano purchased a rental enterprise encompassing the Witbank property from Soundprops 132 (Pty) Ltd (‘Soundprops’) for R61 million (‘the Witbank sale agreement’). The purchase consideration was payable in three tranches: R4 million immediately; R14 million by 30 September 2013; and R43 million (or the Euro equivalent as at 1 October 2013) on 1 October 2014 –

³² Replying affidavit para 3.3.1.

³³ Replying affidavit para 5.7.

³⁴ Section 344(f) of the Companies Act 61 of 1973.

³⁵ Section 344(h) of the Companies Act 61 of 1973.

³⁶ See for example para 85 of the founding affidavit in the Emalahleni winding-up application.

with the outstanding sums attracting interest at an agreed rate. Tirisano moreover agreed to have a bond registered over the Witbank property in the amount of R50 million plus a further R5 million.

[64] Two shareholders of Tirisano, viz. Mr Schipper and one Mr Gavin John Whiteford, were also parties to the Witbank sale agreement. They signed as sureties for Tirisano.

[65] The September 2013 payment of R14 million was duly made. Tirisano was however not in a position to meet its obligation to pay the balance of R43 million on 1 October 2014.

[66] When this became apparent, Soundprops and Tirisano concluded an addendum to the Witbank sale agreement in August 2014 ('the first addendum') – in terms of which Tirisano would pay a further R5 million. The resulting R48 million would be paid in two tranches: R28 million by 30 November 2014, the balance by 25 July 2016.

[67] I pause to mention this. On the basis of Tirisano's inability to meet its 1 October 2014 payment obligation to Soundprops, the respective counsel for the applicant creditors submitted – correctly in my view – that Tirisano's state of financial distress and commercial insolvency had commenced almost a decade before the business rescue application was launched on 14 December 2023.

[68] Tirisano did not meet its payment obligations under the first addendum, failing to pay the amount of R28 million that was due on 30 November 2014. The parties accordingly entered into a further addendum in December 2014 ('the second addendum'), in terms of which the payment date for the R28 million tranche was extended from 30 November 2014 to 31 March 2015, and Tirisano committed to pay the balance of the R48 million by 25 July 2015 (as per the first addendum).

[69] Further default by Tirisano, coupled with a need on its part for further funding to complete work on the Witbank property (for purposes of its

conversion to student accommodation), led to the conclusion of a further addendum in July 2015 ('the third addendum'). In terms thereof, Tirisano agreed that it owed R51.9 million as at March 2015; a further loan of R65 million was advanced to it; facility fees of R20 million were agreed upon; and so too a second bond of R95 million over the Witbank property. Repayment was to be made by 30 June 2016 – with the proviso that that date would be automatically extended to 28 February 2017 “*should [Tirisano] be unable to raise the necessary funds*” by 30 June 2016.

[70] I highlight this in light of Mr Schipper’s allegation in his founding affidavit to the effect that the difficulties experienced by Tirisano “*in obtaining alternative funding*” – which he says is one of the two central causes of Tirisano’s financial distress – “*are temporary in nature*” and easily resolved. I will return to this.

[71] I mention too that according to clause 11.2 of the third addendum, Mr Schipper was at that stage (mid-2015) the sole shareholder in Tirisano.³⁷

[72] In March 2016, Soundprops ceded its claims against Tirisano, along with the mortgage bonds over the Witbank property, to Courthiel.

[73] As appears from what is set out above, Courthiel’s predecessor, Soundprops, was well remunerated (in the form of breakage and facility fees) for the payment extensions it granted to Tirisano. From Tirisano’s perspective, this to my mind reflects the extent to which it was, at that early stage already, willing to incur further debt in order to defer repayment of its existing debt.³⁸

[74] The pattern continued, and Tirisano defaulted on its obligations under the third addendum. This led to the conclusion of a further addendum on 31 January 2017 ('the fourth addendum'). In it, Tirisano acknowledged that its

³⁷ Whether or not that remains the position is not squarely addressed in the papers. In certain of his later correspondence – for example his letter to Courthiel on 30 July 2021, to which I refer below – Mr Schipper referred to the “*new BEE partners*”. But how this partnership is or was structured in relation to Tirisano is not clear from the papers.

³⁸ A similar point is made in the final sentence of para 14.13 of Courthiel’s answering affidavit.

debt was now R159.78 million. This amount, together with a further R2.5 million as breakage costs, were agreed to be repayable by 31 August 2017. A third covering mortgage bond, of R20 million plus an additional sum of R2.5 million, was agreed to.

[75] By February 2021, Tirisano's debt to Courthiel had grown to R200 809 680. An acknowledgement of debt in this amount was signed by Mr Schipper on behalf of Tirisano (see above).

[76] On 30 July 2021, Mr Schipper wrote a letter to Courthiel in which he proposed a payment plan, viz. that Tirisano's debt to Courthiel be reduced to R175 million, with the repayment date extended "*a final occasion*" to 31 December 2022. He prefaced that proposal by explaining that the exchange-rate adjustment and interest recalculation in respect of the debt – both in line with the parties' agreement – came at what he described as "*a difficult time*" for Tirisano. Payment of the "*significant 2020 arrears*" owed by TUT had been expected a number of months prior, but had been further delayed. Following further engagements with TUT, payment was now expected by the end of the following week. Application had been made to ABSA for mortgage finance over the Witbank property for purposes of settling the debt to Courthiel. Mr Schipper expressed the belief that the impediments to finance approval had finally been removed – in that Tirisano had "*finally obtained the long-term lease commitment of TUT*". Notification of finance approval was, he said, expected from ABSA within the next two weeks. (This, again, is the "*alternative funding*" that Mr Schipper refers to in his founding affidavit as having been temporarily delayed. But his letter to Courthiel shows that by mid-2021, Tirisano had already encountered extensive difficulties and delays in seeking to raise "*alternative funding*" – which in the end never eventuated.)

[77] In the concluding part of the letter, Mr Schipper stated that he was "*fully aware of the extreme patience and immense frustration that must exist [on the part of Courthiel] with the ongoing lack of settlement/closure in our dealings and that this has extended way beyond any reasonable period.*" (emphasis added)

[78] Various assurances of this nature (in respect of imminent payments from the tertiary institutions, and mortgage finance approval) were repeated by Mr Schipper in the time that followed – Mr Schipper and Tirisano thereby managing to stave off the institution of proceedings by Courthiel to recover the debt owed by Tirisano (until recently at any rate).

Municipal arrears and Tirisano's dealings with Emalahleni

[79] An abbreviated account of Tirisano's dealings with Emalahleni – from 2020 onwards – is provided below. The relevant allegations are made in Emalahleni's founding affidavit in its winding-up application (which was incorporated into the papers in the business rescue application as an annexure to Courthiel's answering affidavit), as well as in Emalahleni's answering affidavit in the business rescue application. Again, all of these stand uncontroverted.

[80] The Emalahleni winding-up application is the second application of that nature brought by the municipality against Tirisano. The first was in February 2021 ('the first winding-up application').

[81] What preceded the launch of the first winding-up application was the following. (I deal with these events in some detail as they reflect a pattern of conduct that was repeated in the time between the settlement of the first winding-up application, and the launch of the present winding-up application by Emalahleni).³⁹

[82] By late 2019/early 2020, Tirisano's municipal account was substantially in arrears. On 21 April 2020, Emalahleni wrote a letter of demand claiming payment of the arrears in the amount of R5.786 million.

[83] When no payment was forthcoming, Emalahleni cut off the electricity supply to the Witbank property. This was on 10 July 2020. The following day

³⁹ Certain of the facts recounted below appear from the papers in the first winding-up application (which Emalahleni relied on as part of its opposition to the business rescue application).

Tirisano paid R400 000 to Emalahleni in order to have the electricity supply reconnected.

[84] Tirisano's written communications to the municipality at this time reflect attempts to come to terms, and requests that the matter be kept 'in abeyance' pending payment of arrears owed by the tertiary institutions to Tirisano – which, according to Mr Schipper's e-mail to Emalahleni's attorneys on 24 August 2020 amounted at the time to R19.8 million.⁴⁰ Mr Schipper mentioned in the e-mail that Tirisano had been given some breathing space by Courthiel: *"Our senior debt partner has been great in given (sic) lenient terms on delaying the payment – so at least we will not be falling behind until we collect the outstanding revenue."*

[85] To my mind, this was the time to initiate business rescue proceedings in respect of Tirisano. Mr Schipper acknowledged as much in the course of a meeting held with Emalahleni's attorney on 1 December 2020,⁴¹ where he said the following:

"...That we at this point just literally can't pay. I have got R250,000 in the bank account and I've still got to pay for the security around the building..."

"But short of that I just don't know if there is anything that we can – I know we have entered into the compromise but if there is anything I can do to apply for an extension formally, or whatever the case in terms of reducing the rates during this pandemic..."

"...The fact is I don't have that money, if I had it I would happily have paid it."

⁴⁰ 'FA6' to the founding affidavit in the first winding-up application.

⁴¹ A transcript of what was said at the meeting forms part of the papers in the first winding-up application.

“As I said the income has accrued, its not as though I’ve got the money and I am refusing to pay it, or I’ve spent the money without paying the Municipality, it’s certainly not the case...”

“...I don’t have the money. And there are retailers there who are just going to lose money and that’s just the reality of it. But I can’t take it further forward. It’s not my fault...”

“...As I am sitting here I can offer you R250,000 to get the lights back up but that’s not going to be enough. It’s a drop in the ocean. I mean we can pay R500,000 a month in terms of what our costs are and what our retail income is but I can’t settle this capital or the acknowledged amount...”

“...I mean if you want me to put myself into business rescue tomorrow I will do that, I will happily do that...” (emphasis added)

[86] As was correctly observed by counsel for Courthiel, the position that Tirisano found itself in at that stage already (late 2020) triggered an obligation on its directors, in terms of section 129(7), to deliver written notice to the company’s creditors to inform them of its financial distress, and the reasons for not adopting a resolution to commence business rescue proceedings.

[87] This was not done. Nor did the directors pursue business rescue proceedings. Instead, while seeking indulgences from creditors on the basis of Tirisano’s cash constraints, coupled with assurances that every conceivable effort was being made to pay, Tirisano was at the same time expanding its property portfolio. The Mooresburg property was purchased, with mortgage loan finance, on 31 July 2020 (the same month that the electricity supply to the Witbank property had been disconnected). The guesthouse properties were also purchased in the course of 2020, also with mortgage finance.

[88] This pattern of conduct continued after 2020 – and the applicant creditors understandably placed reliance on it in advancing their case that

Tirisano had been mismanaged and had traded recklessly. To my mind, these allegations called for a response by Mr Schipper (as one of Tirisano's two directors, and as the applicant in the business rescue application). None was forthcoming however.

[89] Returning to the narrative, Emalahleni and Tirisano concluded a settlement agreement on 4 November 2020, in which Tirisano acknowledged its debt to Emalahleni in the amount of R8 million, and gave undertakings to pay in fixed instalments.

[90] Emalahleni's allegation that Tirisano did not comply with any of the terms of that agreement is undisputed. This led to the first winding-up application being launched in February 2021.

[91] A by-now familiar pattern then played out. The first winding-up application was resolved in terms of a second settlement agreement concluded on 30 June 2021. This too contained an acknowledgment of debt by Tirisano – now in the amount of R9.2 million – together with undertakings to pay in fixed instalments.⁴² These were not honoured. A further settlement agreement - also not honoured – was concluded on 8 September 2021. Emalahleni disconnected the electricity supply to the Witbank property on 9 December 2021, and again on 21 July 2022.

[92] All the while Tirisano continued to seek indulgences – based on its cash constraints coupled with assurances that payment of the arrears owed by the tertiary institutions was imminent, and that every effort was being made to ensure prompt payment. And all the while Tirisano's directors, rather than pursuing business rescue, continued to expand the company's property portfolio: [...] C[...] M[...] was purchased for R7.59 million in September 2021; the Heathfield property was purchased for R5.2 million on 23 March 2022; the Mowbray property was purchased for R11.5 million on 23 June 2022; the

⁴² I mention that the debt acknowledged on 30 June 2021 had been denied in correspondence from Tirisano's attorneys on 26 May 2021.

Llandudno property was purchased for R14 million on 16 August 2022; the Umdoni Centre was purchased from Aquarella for R22.9 million on 25 August 2022; and the guesthouse extension was purchased for R6 million in November 2022. (The first four of these were apparently cash purchases, i.e. without the need to raise mortgage finance.)

[93] Predictably, Emalahleni eventually lost patience with Tirisano, and in September 2023 it launched the winding-up application now before me.

APPLICABLE LEGAL PRINCIPLES

[94] I have referred above to the applicable requirements, under section 131(4), that must be met before a court may make an order for the commencement of business rescue proceedings. I have also referred, with reference to *Oakdene*, to the two statutorily-recognised goals of business rescue, viz. *“either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than would result from a liquidation process.”*⁴³

[95] I add what follows.

[96] The primary purpose of business rescue is to rehabilitate viable companies that have fallen on hard times, but that are capable of being restored to profitability.⁴⁴

[97] It is intended as a speedy process aimed at a ‘quick-fix solution’,⁴⁵ to be utilised at the earliest possible moment.⁴⁶

⁴³ *Oakdene* 553 A-B.

⁴⁴ See *Van Staden N.O. and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) par 22; *Nedbank Ltd v Bestvest 153 (Pty) Ltd*; *Essa and Another v Bestvest 153 (Pty) Ltd and Another* [2012] 4 All SA 103 (WCC) par 34, Gamble J there citing the judgment of Rogers AJ (as he then was) in *Cape Point Vineyards v Pinnacle Point Group* 2011 (5) SA 600 (WCC) par 6.

⁴⁵ *Forty Squares v Noris Fresh Produce (Pty) Ltd t/a Golden Harvest & Others* 2023 (5) SA 249 (WCC) par 34.

⁴⁶ *Meskin Henochsberg on the Companies Act 71 of 2008* 456.

[98] In terms of section 131(4), an applicant must establish the existence of “a reasonable prospect for rescuing the company” (emphasis added). The evidential threshold that this requirement posits, and how that threshold is to be met, were determined by the SCA in *Oakdene*:

*“This leads me to the next debate which revolved around the meaning of ‘a reasonable prospect’. As a starting point, it is generally accepted that it is a lesser requirement than the ‘reasonable probability’ which was the yardstick for placing a company under judicial management in terms of s427(1) of the 1973 Companies Act...On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on ‘reasonable’ – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers.”*⁴⁷

[99] A factual foundation must be established, on the evidence, for the existence of a reasonable prospect of achieving the desired object.⁴⁸

[100] Conversely, mere “speculative suggestion” will not suffice.⁴⁹ Nor can a party approach the court “with flimsy grounds in the hope that the [business rescue] practitioner will provide the panacea to its problems”.⁵⁰

[101] Should the court find that the section 131(4) requirements are satisfied, it “may” (not must) make an order commencing business rescue proceedings.

⁴⁷ Par 29.

⁴⁸ *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) par 11, cited with approval by the SCA in *Oakdene* par 30 and 31.

⁴⁹ *Oakdene* 551J; *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd and Another* [2012] 4 All SA 590 (WCC) par 47.

⁵⁰ *Nedbank v Bestvest* par 41; *Zoneska* par 48.

This leg of the enquiry involves consideration of whether business rescue is the appropriate remedy in the circumstances.⁵¹ As the SCA put it in *PFC Properties*:⁵²

“Further [i.e. over and above satisfaction of the section 131(4) requirements] it must be just and equitable to place [the company] under supervision.”

[102] The enquiry is to be undertaken with due regard for the legislative preference – as reflected in the business rescue provisions of the Companies Act – for rescuing (rather than liquidating) viable companies that have fallen on hard times and that can be restored to solvency.⁵³

[103] Two further observations are apposite:

103.1. Given that, by virtue of section 132(2)(c)(i) read with section 152, rejection of a proposed business rescue plan by the majority creditors will normally sound the death knell for the proceedings, where the majority creditors (here, Courthiel) have stated that they will vote against a plan along the lines proposed, the court will take that into account (unless their attitude can be said to be unreasonable or *mala fide*).⁵⁴

103.2. Business rescue is, moreover, not intended to function as “*an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act*”.⁵⁵

[104] At the hearing, there was no dispute amongst the parties in relation to these principles.

⁵¹ See the first instance decision in *Oakdene* (2012 (3) SA 273 (GSJ)) par 49; and the SCA decision in *Oakdene* (which upheld the judgment *a quo*) par 35 to 39.

⁵² *PFC Properties (Pty) Ltd v CSARS* [2023] JOL 60041 (SCA) par 26.

⁵³ *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) par 21; *Oakdene a quo* par 18; *Nedbank v Bestvest* par 34.

⁵⁴ *Oakdene* par 38; *Zoneska* par 67; *Forty Squares* par 23 to 26.

⁵⁵ *Oakdene* par 33.

APPLICATION TO THE FACTS

A reasonable prospect of restoring Tirisano to solvency?

[105] I have set out Mr Schipper's respective proposals – in his founding affidavit and in reply – for restoring Tirisano to a position of solvency. I will overlook the change of tack in reply, and consider both proposed options.

[106] The difficulty facing Tirisano in the business rescue application is that – owing to the magnitude of the debt to Courthiel (R239.5 million) – a return to solvency would require either (i) refinancing the Witbank property (i.e. raising what Mr Schipper refers to as "*alternative funding*" by way of a mortgage loan over that property, in order to settle Courthiel's debt), or (ii) selling the Witbank property.

[107] But Tirisano's ongoing attempts, over a period of years, to raise alternative mortgage finance over the Witbank property have failed. The evidence shows that, contrary to what is alleged by Mr Schipper, the difficulties encountered in raising alternative finance are by no means "*temporary in nature*". On the contrary, they appear to be chronic, if not terminal.

[108] As I have mentioned, these difficulties are attributed to Tirisano's "*inability to procure formal, bankable leases*" from the relevant tertiary institutions. It was submitted on behalf of Mr Schipper that the business rescue practitioner would be well-placed to engage with TUT and Nkangala to negotiate and formalise lease agreements, and that the business rescue practitioner could be expected to achieve success in doing so, where Mr Schipper has failed.

[109] But that is mere speculation; it amounts to no more than an unsubstantiated "*hope that the practitioner will provide the panacea to [the company's] problems*" (see above); and it falls short of establishing a "*reasonable prospect for rescuing the company*".

[110] What I have set out above holds too for the allegedly temporary and easily resolvable difficulties encountered in extracting payment of arrears from the tertiary institutions.

[111] As to the case in reply (which centred around selling the Witbank property), the starting submission was that the market value of the Witbank property was in the order of R365 million; and accordingly that the sale thereof in business rescue would comfortably allow for the settlement of all of Tirisano's debts. This alleged market value was based on a July 2021 valuation report attached to the founding affidavit.

[112] As was accepted by counsel for Mr Schipper in oral argument, however, this valuation report cannot be taken as a reliable indicator of market value. In the first place, it is nearly three years out of date. In the second, it is premised on the assumption that there are formal leases in place in respect of the student accommodation component of the Witbank property (Khayaletu) – when, on Mr Schipper's own case, there are not. It matters not whether this assumption held true at the time that the valuation report was prepared (in July 2021). Because even if it did, it no longer does. Again, counsel for Mr Schipper fairly accepted this.

[113] The alternative valuation proposed – not on the papers, but in oral argument – was R160 million. This was based on the combined value of the mortgage bonds registered over the property in favour of Courthiel.

[114] It is by no means clear to me that a sale of the Witbank property for that amount – even combined with the hoped-for recovery of arrear rentals owed by TUT and Nkangala – would suffice to pay Tirisano's debts. But I put that aside.

[115] The more fundamental difficulty is that there is no evidence – in the form of a valuation report or otherwise – to support this alternative valuation,

which is in the circumstances speculative.⁵⁶ I do not see why the combined value of the mortgage bonds registered over the Witbank property (the most recent of which was in 2017) can be taken as a reliable indicator of present market value, particularly not in circumstances where the post-mortgage performance of the rental enterprise conducted on the Witbank property has proved so lacking (more on this below).

[116] Counsel's pivot, in oral argument, from a valuation of R365 million to a 'fallback' value of R160 million (some R215 million less) calls to mind the SCA's note of caution in *Boschpoort*, concerning the "*notoriously elastic and often highly subjective*" nature of asset-valuations:

*"That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets. Were the test for solvency and liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a practical and therefore effective legal environment for the adjudication of the liquidation of companies...."*⁵⁷

[117] There is moreover no indication on the evidence that anyone has expressed any interest in purchasing the Witbank property. To contend, as Mr Schipper does, that this commercial property can be sold for R160 million –

⁵⁶ Compare *Propspec* par 24.

⁵⁷ Par 17.

in circumstances where (i) there are no formal lease agreements in place, and (ii) the rental enterprise conducted thereon has over time proved incapable of generating sufficient cash even to keep the lights turned on – amounts in my view to pure speculation.

[118] To conclude: Mr Schipper’s case for business rescue rested heavily on the contention that Tirisano is factually solvent. It was suggested that this is common cause, but this is not so.⁵⁸ The contention that Tirisano is factually solvent is in the end premised on a value being placed on the Witbank property that is unsupported by the evidence, and that is arbitrary and speculative.

A reasonable prospect of a better return?

[119] As I have mentioned, the alternative case advanced for business rescue is that even if Tirisano cannot be restored to a solvent going concern, business rescue proceedings will result in a better return for its creditors and shareholders than would result from its immediate liquidation.

[120] Mr Schipper alleges in this regard that a business rescue practitioner would be in a position to sell Tirisano’s assets “*at a much better return*” than would a liquidator. The allegation is however made without elaboration or substantiation; and it is insufficient for purposes of establishing “*a reasonable prospect for rescuing the company*”.⁵⁹

[121] I accordingly find that the existence of a “*reasonable prospect for rescuing*” Tirisano, as contemplated by section 131(4), has not been established.

⁵⁸ On the contrary, in *Emalahleni and Aquarella’s* founding papers in their respective winding-up applications – both of which were incorporated into the papers in the business rescue proceedings – it is alleged in terms that Tirisano is factually insolvent. In any event, factual solvency, even if established, is not in itself determinative of a business rescue application: *Oakdene* 556A/B.

⁵⁹ See *Oakdene* 554A-B; *Oakdene* a quo par 48; *Propspec* par 24; and *Nedbank v Bestvest* par 53 and 58.

THE APPROPRIATE REMEDY

[122] On the facts of this case, I am in any event of the view that business rescue would not be an appropriate remedy. My reasons are the following:

122.1. The majority creditor, Courthiel, has stated that it will not support any business rescue plan along the lines proposed. Mr Schipper criticises this stance as being callous and in bad faith. I do not agree. In Mr Schipper's own words, Courthiel has shown leniency and extreme patience in its dealings, over the years, with Tirisano's ongoing default. And in circumstances where, when the shoe pinched, Mr Schipper was quick to jettison his professed desire to ensure that Tirisano's employees would remain in its employ,⁶⁰ it does not lie in his mouth to criticise Courthiel for being insensitive to the position of Tirisano's employees. Courthiel's stance is a genuine and legitimate obstacle to the success of business rescue proceedings that I must take into account. See the authorities cited above.

122.2. The proposal that Mr Schipper settled on in reply involved the sale of the Witbank property – by far Tirisano's most valuable asset, its only income-producing one, and the locus of most if not all of its employees. This proposal, if implemented, would leave Tirisano in a position where it is unable "*to continue normal trading*".⁶¹ This has shades of an informal winding-up.⁶²

122.3. Mr Schipper has delayed extensively in bringing proceedings to place Tirisano in business rescue. On his own showing, Tirisano has been a candidate for business rescue – in the

⁶⁰ Mr Schipper's counsel confirmed in argument that Tirisano would not retain its staff if it sold the Witbank property – which is what was proposed in reply.

⁶¹ In the liquidation context, see *FirstRand Bank Ltd v Shabalala* 2023 JDR 2095 (GJ) par 29 and 55.

⁶² Compare the facts in *PFC Properties* par 39; *Forty Squares* par 37 and 38; *Oakdene a quo* 287H/I and 288H to 289A; *Oakdene* par 39; *Nedbank v Bestvest* par 60.3.

sense at least of being financially distressed – since 2020. The delay is inimical to the purpose of the remedy; and in my view the following dictum in *Forty Squares* finds application on the present facts:

*“In my view, an application for business rescue was thus warranted earlier during 2022...Yet the directors did not follow that avenue then. They rather set about continuing to trade in contravention of the Companies Act (thereby preferring such creditors with whom they traded) and also went about attempting to reach compromises with a limited number of other creditors.”*⁶³

122.4. On the uncontested evidence before me, I cannot but agree with the contention on behalf of the three applicant creditors that Tirisano has been mismanaged – and indeed conducted with reckless disregard for the interest of its creditors. This has ramifications. First, I have real difficulty with the proposition that Tirisano should simply be permitted, post-business rescue, to continue in business under the stewardship of its current controllers. Second, the applicant creditors have – for these reasons – established a case for the winding-up of Tirisano on just and equitable grounds.⁶⁴ To my mind, the legislative preference for business rescue (as referred to above) does not extend to companies in these circumstances. Third, I agree with the submission on behalf of Courthiel that, particularly given the mismanagement of Tirisano, the powers of a liquidator are indicated. Besides anything else, action should be instituted, without delay, to recover the significant arrear rentals owed by TUT and Nkangala (portions of which may already be at risk of prescribing). In

⁶³ Par 42.

⁶⁴ Section 344(h) of the Companies Act 61 of 1973. As to the standing of a creditor to seek winding-up on just and equitable grounds, see Blackman et al *Commentary on the Companies Act* 14-104.

my view, the considerations mentioned in this paragraph strongly favour liquidation as the preferred remedy.

122.5. It was suggested in argument on behalf of Mr Schipper that the allegations of mismanagement can be left for the business rescue practitioner to investigate (and hence left out of the reckoning for purposes of adjudicating the business rescue application). I disagree. In deciding a business rescue application, the court is tasked with considering and determining, on the evidence before it, the appropriateness of business rescue proceedings. That duty is not to be abdicated to the business rescue practitioner.⁶⁵

122.6. In summary, I am of the view that Tirisano's chronic financial distress, and its ongoing mismanagement (on the evidence before me), place it outside the category of viable companies that were intended by the legislature to be candidates for rehabilitation under the business rescue regime.

CONTENDED ABUSE AND COSTS

[123] I have mentioned that, apart from the merits of the business rescue application, it was also contended that the application fell to be dismissed as an abuse of process (in that it was brought with an ulterior and improper purpose).⁶⁶ In light of the conclusions that I have reached on the merits, I need not decide this.

[124] Punitive costs were sought by Emalahleni and Aquarella. I am not persuaded that this is warranted.

CONCLUSION AND ORDER

[125] I conclude that the business rescue application must fail. It follows, for the reasons given in the introductory part of this judgment, that Tirisano falls to

⁶⁵ Southern Palace par 18.

⁶⁶ Which would, if established, constitute an independent ground for dismissal – see *PFC Properties* par 28 and 29.

be wound up at the instance of Emalahleni, and I intend to make a provisional order (as sought by counsel in oral argument). There is no dispute that the relevant formal requirements have been satisfied.

[126] In the premises, I make the following order:

126.1. The business rescue application under case number 22983/2023 is dismissed with costs, such to include the cost of two counsel where so employed.

126.2. In the application under case number 16033/2023 (the Emalahleni winding-up application):

126.2.1. The respondent, Tirisano Property Group (Pty) Ltd, is placed under provisional liquidation;

126.2.2. A rule nisi is issued calling upon the respondent and all interested parties to show cause, if any, to this court on 20 June 2024 as to why:

126.2.2.1. the respondent should not be placed in final liquidation; and

126.2.2.2. the costs of this application should not be costs in the liquidation;

126.2.3. Service of this order shall be effected:

126.2.3.1. by publication in one edition each of *The Cape Times* and *Die Burger* newspapers;

126.2.3.2. on the respondent at its registered address;

126.2.3.3. on the respondent's employees;

126.2.3.4. on any trade union which the Sheriff may establish represents any employees of the respondent, in terms of section 346(A)(1)(a) of the Companies Act 61 of 1973;

126.2.3.5. on the South African Revenue Services at 2[...] H[...] S[...] Street, Cape Town;

126.3. In (i) the application under case number 3973/2024 (the Courthiel intervention application), (ii) the application under case number 18657/2023 (the Aquarella winding-up application), and (iii) the application by Aquarella Investments (Pty) Ltd to intervene in case number 16033/2023 (the Aquarella intervention application):

126.3.1. The applications are postponed pending the return day in paragraph 126.2.2 above;

126.3.2. Costs are to stand over for later determination.

M BLUMBERG
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For Mr Arno Schipper: A Newton instructed by Lombard & Kriek

For Tirisano Property Group (Pty) Ltd: R Engela instructed by Cliffe Dekker Hofmeyr Inc.

For the Emalahleni Local Municipality: M Cajee instructed by Ka-Mbonana Cooper

For Courthiel Holdings (Pty) Ltd: B J Manca SC and AA Brink instructed by Pohl & Stuhlinger

For Aquarella Investments (Pty) Ltd: H N de Wet instructed by Werksmans Attorneys