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

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

Case number: 4437/2024

In the matter between:

FIRSTRAND BANK LIMITED 1st Applicant
[Acting through its Rand Merchant Bank Division]
[Registration Number: 1929/001225/06]

INVESTEC BANK LIMITED 2nd Applicant
[Registration Number: 1969/004763/06]

and

AZRAPART (PTY) LTD 1st Respondent
[Registration Number: 2011/002042/07]

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION 2nd Respondent

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CORAM: VAN ZYL, J

HEARD ON: 21 AUGUST 2024

DELIVERED ON: 3 SEPTEMBER 2024

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[1] This matter served before me as an urgent application to place the first respondent into business rescue in terms of section 131 of the Companies Act, 71 of 2008 ("the Act").

[2] The application is being opposed by the first respondent.

[3] Mr Antonie SC, assisted by Ms Cooke and Mr Snyman, are appearing on behalf of the applicants. Mr Cilliers SC, assisted by Mr Sive, is appearing on behalf of the first respondent.

[4] At the commencement of the hearing, both parties provided me with their respective heads of argument. Their trouble in this regard is appreciated.

[5] For the sake of efficacy, I requested counsel to address me on the points *in limine*, as well as on the merits of the application, which they duly did.

[6] In view of the findings I am to make in this judgment, I do not intend to give an exposition of all the facts.

<u>Ad urgency/Supplementary affidavits of the first respondent:</u>

[7] The issue of urgency is being vehemently opposed by the first respondent.

[8] One of the main grounds of urgency raised by the applicants in support of their contention that the applicants will not be able to obtain substantial redress at a hearing in due course, is that should

the appointment of the joint business rescuers be delayed, it gives rise to the risk that the Property Manager may terminate its Services. The background to the appointment and the alleged importance of the appointment of the Property Manager, are set out in the founding affidavit. I deem it apposite to quote quite extensively from the papers in this regard:

"56.2 At the beginning of 2024, a new, independent asset and property manager, namely Flanagan and Gerard Frontiers Proprietary Limited ("**F&G**") and Luvon Investments Proprietary Limited ("**Luvon**") (acting jointly) ("**Property Manager**"), was appointed to *inter alia* take over the management and development function in respect of the Fourways Mall, including the preparation and implementation of strategies and project programmes to restructure and maximize the performance of the Fourways Mall. The aforesaid forms part of the overall property, development and asset management services rendered by the Project Manager in respect of the Fourways Mall ("**Services**"). The Property Manager commenced rendering the Services in or about February 2024 and continues to render these Services.

56.3 The Property Manager is able to terminate its services at any time. The reason is that there is currently no long term agreement in place with the Property Manager. The property management agreement in terms of which the Property Manager was appointed ("**Property Management Agreement**") required certain deliverables, including the provision of a bank guarantee for an upside fee which would become payable if certain performance milestones were to be achieved by the Property Manager.

56.4 The Property Manager has agreed to continue rendering the Services, however, the Property Manager has made it clear to the applicants that it requires the deliverables in terms of the Property Management Agreement to be met on an urgent basis. The risk of the Property Manager ceasing to provide the Services, and the negative impact this would have on the performance of the Fourways Mall, is one of the main reasons for the urgent appointment of a business rescue practitioner who is able to take steps to finalise and put in place the medium to long term appointment of the Property Manager to render the Services.

56.5 An executive committee ("***Exco***") was established on or about 29 January 2024.

....

56.5.4 The powers and responsibilities of the Exco and consequently the decisions to be taken at the Exco meetings, include the approval of *inter alia* the annual budget, leasing (conclusion, amendment and renewal of leases), operational expenditure, capital expenditure and administration.

56.5.5. Save in the event of default or failure to attend and Exco meeting that has not been cancelled, the quorum for an EXCO meeting shall be an F&G representative and all three representatives of the applicants and the Co-Owners, unless otherwise agreed to by all three representatives.

57. The Property Manager, under the supervision of the Exco has been providing the Services (which have included implementing repairs, maintenance and capital expenditure projects in respect of the Fourways Mall) since its appointment in February 2024. The Property Manager has had, and continues to have, a

positive impact on the management and performance of the Fourways Mall. By way of a few examples...

58. The continued presence and Services of the Property Manager are essential to the successful restructuring of the Fourways Mall."

[9] The applicants then conclude at paragraph 108.5 of the founding affidavit as follows in respect of this aspect:

"108.5 Paragraphs 56.3 and 56.4 above explain the urgency of the application arising from the ability of the Property Manager to terminate its Services at any time, and therefore the urgent need for the appointed business rescue practitioners to secure the medium to long term appointment of the Property Manager."

[10] In response to the aforesaid, the first respondent alleges as follows in the answering affidavit:

"68. The reliance on a possible loss of the Property Manager, F&G, as a ground for urgency, is no more than a deceiving ruse. In this regard:

68.1 As appears from annexure page 3 of the interim agreement with F&G annexure "AA1", at page 3 thereof under the heading '*Right to Participate in FWM*', it has been proposed to F&G that, subject to the conclusion of written agreements, it will have the right to purchase a total of 15% of Fourways Shopping Centre...

68.2 It is proposed that the price for the 15% will be geared so as to create substantial financial benefit to F&G. It will thus be entitled to acquire this 15% at a profound discount to its market value, making it very unlikely that F&G would simply walk away. This proposal was set out in various drafts of the final agreement to be concluded with F&G, which drafts were presented to me for consideration. That final agreement with F&G has not been conclude.

68.3 In any event, as appears from the interim management agreement "AA1", under the heading '*Services Contract*' and the provision relating to '*Early Termination*', the interim agreement does not afford F&G the right to unilaterally terminate the interim agreement on notice. F&G would thus expose itself to a substantial claim for damages if it repudiates the management by simply walking away.

68.4 After this application was instituted, F&G, with the consent of applicants and their input, issued a notice to tenants on 12 August 2024 which confirmed in express and unambiguous terms that they would continue to provide management services to the Fourways Mall, i.e. business as usual. I attach a copy of the notice as "AA3". Thus, not only does this assertion not justify urgency, but it casts doubt on the applicants' credibility as they knowingly advanced a false assertion to fabricate a basis for urgency. This alone warrants the application being struck off the roll with costs on a punitive scale.

68.5 It is, accordingly, not possible for F&G to terminate the interim management agreement as alleged, and very unlikely that it will do so."

[11] The first respondent thereupon makes assertions in the answering affidavit why F&G's departure a consequence that in any event can be remedied in the ordinary course.

[12] The applicants deal with the issue pertaining to the Property Manager in their replying affidavit by stating the following:

> "40. The first respondent contends that there is a binding interim agreement with the Property Manager, F&G. In this regard, it relies upon annexure "AA1", styled "*Heads of Agreement*" (Record p. 865).
>
> 41. On any interpretation of "AA1", it constitutes an agreement to agree. In this regard I refer specifically to the following:
>
> ...
>
> 41.5 Subsequent to the conclusion of "AA1", the Property Management Agreement was concluded with the Property Manager (i.e. the Services Contract). Attached, marked "RA9", is a copy of the Property Management Agreement and addendum thereto. This agreement, however, has lapsed due to non-fulfilment of certain suspensive conditions in respect thereof (including the provision of the bank guarantee referred to in paragraph 17).
>
> 42. Currently, there is no Property Management Agreement in place and it goes without saying that the Property Manager is extremely uncomfortable with the current position. In fact, the Property Manager informed me of its concerns regarding the current position and that it is not prepared to continue rendering the Services if the conclusion of a formal contract and the deliverables in terms thereof are delayed."

[13] The applicants obtained an affidavit from one Mr Holley late afternoon of the day before the hearing of the application. With the consent of the first respondent, the said affidavit was received into evidence. From the affidavit it appears that Mr Holley is the director of F&G. In paragraph 4 of the affidavit he states as follows:

> "I confirm that there is no formal agreement in place in respect of the Services and that the Property Manager is extremely uncomfortable with the current position. The Property Manager has also informed the applicants of its concerns regarding the current position and that it is not prepared to continue rendering the Services if the conclusion of a formal agreement and the deliverables in terms thereof are delayed."

[14] At the commencement of Mr Cilliers` argument he sought leave on behalf of the first respondent to introduce two further affidavits into evidence.

[15] The first further affidavit titled "*First Respondent`s Further Affidavit*" ("the first further affidavit"), has attached to it a document, dated 20 August 2024, issued by Accelerate Property Fund Limited, the co-owner, with the first respondent, of Fourways Mall, and titled "*CONCLUSION OF PROPERTY, DEVELOPMENT AND ASSET MANAGEMENT AGREEMENT AND POTENTIAL DISPOSAL OF MINORITY INTEREST IN FOURWAYS MALL*". I deem it necessary to quote the first two paragraphs of the said document:

> "**1. INTRODUCTION**
>
> **1.1** Shareholders are referred to the announcement released on the Stock Exchange News Service ("**SENS**) on 18 December 2023, in which shareholders were advised that the Company and

Azrapart Proprietary Limited ("**Azrapart**"), co-owners of Fourways Mall ("**the Mall**" or "**FWM**") had entered into a heads of agreement in relation to the appointment of Flanagan and Gerard Frontiers Propriety Limited ("**F&G**") as the asset and property manager for the Mall.

1.2 Shareholders are hereby advised that the Company, Azrapart, F&G, Fourways Precinct Proprietary Limited ("**Fourways Precinct**"), Fourways Mall Managing Agent Proprietary Limited ("**FMMA**") and Luvon Investments Proprietary Limited ("**Luvon**") <u>have now entered</u> into a Property, Development and Asset Management Services Agreement ("**the Agreement**"), in terms of which F&G and Luvon (collectively the "**Property Manager**") <u>have been jointly appointed</u> by the current property manager (namely Fourways Precinct, who will be replaced by FMMA), as the property and asset manager, and by the Company and Azrapart ("**Co-owners**"), as the development manager, for the properties and letting enterprises that make up the Mall ("**Properties and Letting Enterprises**")." (My emphasis)

[16] The second further affidavit titled *"First Respondent's Second Further Affidavit"* ("the second further affidavit") has attached to it a signed agreement, dated 20 August 2024, concluded between the first respondent, Redcore Hospitality Holdings Limited ("Redcore") and Eriologix Proprietary Limited, the sole shareholder of the first respondent. For present purposes the contents of the said affidavit and the terms of the signed agreement speak for themselves.

[17] After some deliberations between counsel and their respective attorneys and amongst counsel themselves, Mr Antonie indicated that the applicants do not object to the second further affidavit being received into evidence, but object to the first further affidavit to be

so received. The objection was based thereon that the status of the document attached thereto is unknown and that it constitutes hearsay evidence.

[18] I indicated that I would accept both further affidavits into evidence.

[19] Both the documents attached to the respective affidavits only came to hand on the day of the hearing of the application; in fact, I gathered that it only came to hand during the time when the hearing of the application had already commenced.

[20] With regard to the document attached to the first further affidavit, I am of the view that the court cannot merely turn a blind eye thereto. I do realise that it constitutes hearsay evidence, but I consider it in the interest of justice that the parties be granted a proper opportunity to grapple with the issue set out in the said document, should they deem it fit to do so. Whilst I deliberately refrain and steer away from interpreting the said document at this stage of the proceedings, it seems evident that the contents of the document may cast a different light on the allegations made in the portions of the affidavits I quoted earlier. It, therefore, may have a crucial impact on the application as it stands and should therefore be addressed properly.

[21] With regard to the contents of the second further affidavit and the agreement attached thereto, it is evident from the totality of the application papers that the first respondent`s version with regard to an impending cash injection which the first respondent is allegedly to receive soon by means of a transaction with Redcore, goes to the

heart of the first respondent's opposition to both the urgency and the merits of the application. In the circumstances where the application in any event stands to be postponed, I deem it in the interest of justice that the parties also be granted an opportunity to supplement their papers in respect of the aforesaid agreement and any further developments in respect of the Redcore transaction, should they deem it fit to do so.

Notice to "*affected persons*":

[22] Section 131(2)(b) and 131(3) of the Act determines as follows:

"(2) An applicant in terms of subsection (1) must –

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section."

[23] Mr Cilliers referred to the judgment of **Lutchman NO v African Global Holdings** 2022 (4) SA 529 (SCA) where the Court of Appeal, with reference to **Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC** 2013 (6) 141 (KZP) at para 11.3, held at paras [38] and [39] as follows:

"[38] Each affected person — a shareholder or creditor of the company in liquidation, any registered trade union representing employees of that company or each of the individual employees — is entitled to oppose or support the business rescue application. That necessarily follows from the right afforded to each of them in terms of s 131(3) to participate in the hearing of the business rescue application. Each should have been notified of the business rescue application in terms of s 131(1)*(b)* in the prescribed manner.

[39] The service and notification requirements set out in s 131(2) of the Companies Act are not merely procedural steps. According to *Taboo*, '(t)hey are substantive requirements, compliance with which is an integral part of making an application for an order in terms of s 131(1) of the Companies Act'. Strict compliance with those requirements is required because business rescue proceedings can easily be abused." (My emphasis)

[24] Mr Cilliers referred to the "*Compliance Affidavit*" and its attachments filed by the applicants and submitted that it is not evident from the said affidavit and attachments that section 131(2)(b) of the Act has been duly complied with. A list of alleged creditors is attached to the Compliance Affidavit as annexure "NS5", but the list does not reflect the e-mail addresses of the respective creditors. Attached thereto are three e-mails, at p. 1118 – 1120 of the record, which allegedly reflect the e-mails sent to the respective creditors in three groups. However, as correctly pointed out by Mr Cilliers, those three e-mails only reflect e-mail addresses and not the names of the relevant creditors, some of which e-mail addresses are furthermore hardly legible.

[25] Surely it is not for the court to decipher which e-mail addresses are attached to which creditors. Because of the manner in which it is currently before court, it cannot be determined whether all the creditors have been duly notified and therefore constitutes non-compliance with section 131(2)(b) of the Act. It has to be done in a

manner by means of which the court itself can determine whether all creditors have indeed been duly notified.

[26] The application cannot be considered without due compliance with section 131(2)(b) of the Act. This necessitates that the application needs to be postponed in order for the applicant to comply with the provisions of the said section and to place proper proof thereof before court. In the circumstances a copy of the order to be granted in this judgment is also to be served upon the creditors, since they are entitled to know when the application will again serve before court. The order I am referring to is the order which will be containing the dates which I will make in due course, as explained at paragraph [28], *infra*.

Costs:

[27] In my view the wasted costs of 21 August 2024 occasioned by the postponement are to stand over for later adjudication. The court who will be determining the urgency and merits of the application after the filing of the supplementary affidavits, would be in a better position to determine same.

Practical considerations in determining dates:

[28] Because of the nature and voluminous extent of this application, I accept that the parties would prefer not to change counsel in this matter merely due to the postponement thereof and the possible unavailability of present counsel on certain dates. I consequently intend making an order by means of which the parties can

determine the relevant dates by agreement between them, in conjunction with my clerk, after judgment has been handed down in this matter, I will thereafter make an order in terms of the agreement between the parties. Should the parties not be able to reach an agreement, I will determine the dates and make an order accordingly. For the sake of clarity, I record that this matter is not to be considered to be part-heard before me, although it may be re-allocated to me in the discretion of the Judge President in the normal course of things.

Order:

[29] The following order is made:

1. The application is postponed to a date to be agreed upon between the parties.

2. Leave is granted to the first respondent to file a supplementary affidavit, if any, in respect of:

   2.1 The first and second further affidavits filed on 21 August 2024; and/or

   2.2 Further developments, if any, pertaining to the Redcore transaction.

   The said affidavit is to be filed on a date to be agreed upon between the parties.

3. Leave is granted to the applicants to file a supplementary affidavit, if any, subsequent to the filing of the first respondent`s aforesaid supplementary affidavit, in respect of:

    3.1 The first respondent`s first and second further affidavits filed on 21 August 2024; and/or
    3.2 The first respondent`s supplementary affidavit to be filed in terms of paragraph 2, *supra;* and/or
    3.3 Compliance with section 131(2)(b) of the Companies Act, 71 of 2008.

    The said affidavit is to be filed on a date to be agreed upon between the parties.

4. Supplementary heads of argument are to be filed on dates to be agreed upon between the parties.

5. Should the parties not be able to agree on the aforesaid dates, same will be determined by the court.

6. The wasted costs of 21 August 2024 occasioned by the postponement of the application, stand over for later adjudication.

[redacted]

C. VAN ZYL, J

On behalf of Applicants:	Adv M Antonie SC Assisted by: Adv A Cooke Further assisted by: Adv C Snyman Instructed by: Edward Nathan Sonnenbergs Inc. C/o PH Attorneys BLOEMFONTEIN E-mail: goertel@ensafrica.com lfield@ensafrica.com
On behalf of First Respondent:	Adv PG Cilliers SC Assisted by: Adv D Sive Instructed by: Fluxmans Inc. C/o EG Cooper Majiedt Inc. BLOEMFONTEIN E-mail: cstrime@fluxmans.com jshafir@fluxmans.com litigation7@egc.co.za