



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

Reportable/Not Reportable

Case no: 16033/2023

In the matter between:

COURTHIEL HOLDINGS (PTY) LIMITED

APPLICANT

and

**TIRISANO PROPERTY GROUP (PTY) LIMITED
(IN PROV. LIQ.)**

FIRST RESPONDENT

(Registration No: 2013/136691/07)

THOMAS CHRISTOPHER VAN ZYL N.O.

SECOND RESPONDENT

cited in his capacity as one the duly appointed joint
provisional liquidators of

TIRISANO PROPERTY GROUP (PTY) LTD

**CHAVONNES BADENHORST ST CLAIR
COOPER N.O.**

THIRD RESPONDENT

cited in her capacity as one the duly appointed joint
provisional liquidators of

TIRISANO PROPERTY GROUP (PTY) LTD

MUSTAFA MOHAMED N.O.

FOURTH RESPONDENT

cited in his capacity as one the duly appointed joint
provisional liquidators of

TIRISANO PROPERTY GROUP (PTY) LTD

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

FIFTH RESPONDENT

Coram: SALLER AJ

Heard: 24 April 2025, 5 May 2025, 7 May 2025 and 17 September 2025

Judgment: 18 September 2025

JUDGEMENT

Saller AJ

- [1] The present application is the latest instalment in a long history of litigation arising from the financial difficulties experienced by Tirisano Property Group (Pty) Ltd (“Tirisano”), a property-owning company.
- [2] On 8 May 2024 this Court, *per* Blumberg AJ, placed Tirisano in provisional liquidation under Chapter 14 of the Companies Act 61 of 1973 (“the old Companies Act” and “the liquidation”) on application by the Emalahleni Local Municipality (“ELM”), after dismissing an application by one of Tirisano’s directors, Mr Schipper, for an order placing Tirisano in business rescue under section 131(4) of the Companies Act 71 of 2008 (“the Companies Act” and “the first Cape Town BR application”). Leave to appeal the dismissal of the first Cape Town BR application has since been refused by both this Court and the Supreme Court (“SCA”) of Appeal.

- [3] The current second to fourth respondents (“the provisional liquidators”) were formally appointed as Tirisano’s provisional liquidators on 20 May 2024. On 11 June 2024 their powers were extended by order of this Court *per* Andrews AJ, *inter alia* to litigate and conduct an enquiry under sections 417 and 418 of the old Companies Act.
- [4] On 19 June 2024, one day before the initial return day of the liquidation, TGM Properties and Consulting (Pty) Ltd (“TGM”) applied in the Mpumalanga Division of the High Court in Middelburg for an order placing Tirisano in business rescue (“the Middleburg BR application”). TGM is a shareholder of Tirisano.
- [5] The Middleburg BR application put the proverbial spanner in the works of the liquidation: under section 131(6) of the Companies Act, liquidation proceedings are suspended once an application for business rescue is filed.
- [6] On the liquidation’s further return day on 20 June 2024, this Court *per* Van Leeve AJ extended the rule *nisi* and postponed the matter to give Tirisano the opportunity to transfer the Middleburg BR application to this Division.
- [7] On the liquidation’s third return day on 22 August 2024, this Court *per* Sidaki AJ made orders which included joining the current applicant, Courthiel Holdings (Pty) Limited (“Courthiel”) as an applicant in the liquidation and further extending the return day. Courthiel is Tirisano’s main creditor, with a common cause debt owed of approx. R250 million.
- [8] On the liquidation’s fourth return day on 24 October 2024, this Court *per* Allie J made orders which included granting ELM leave to withdraw as applicant in the liquidation (which ELM formally did on 26 November 2024, leaving Courthiel as the sole applicant), and further extending the return day to 24 April 2025. She found that on the papers before her, she was unable to determine whether the Middleburg BR application constituted an abuse of process and that the Middleburg High Court had to be given the opportunity to

determine that application before the liquidation could be finalised in this Division.

- [9] In the run-up to the liquidation's fifth return day, a number of things happened.
- [10] First, on 19 December 2024 Tirisano's provisional liquidators applied for the liquidation of TGM, the applicant in the Middleburg BR application. On 14 March 2025, TGM was placed in provisional liquidation. The effect of this is that pending the extension of TGM's provisional liquidator's powers by a court or by creditors at the second creditors meeting, the Middleburg BR application cannot be withdrawn, or moved to this Division for joint determination with the liquidation. The Middleburg High Court has also, in the meantime, refused to make a final determination in the absence of the TGM's provisional liquidators.
- [11] Second, on 24 February 2025 Courthiel applied to convert the liquidation (in which it is now the only applicant) into business rescue proceedings under section 131(7), read with sections 131(4) and (5) of the Companies Act. This is the application I am currently seized with, and I refer to it as "the current application". Until the eve of the hearing, there was no substantive opposition (a notice of application to join / intention to oppose filed by one Mr Brown not being supported by affidavit).
- [12] Third, on 23 April 2025, the day before the fifth return day, the provisional liquidators filed a notice of opposition to the current application. On the morning of the fifth return day, they filed an opposing affidavit and applied for condonation for its late filing in the face of Courthiel's opposition. I granted condonation with costs reserved, and further postponed the matter (including an extension of the liquidation's rule *nisi*) subject to an urgent timetable for the filing of papers. Such papers were filed, as well as an application by the provisional liquidators for the striking out of parts of Courthiel's reply.
- [13] On 5 May 2025 the striking out application was argued. On the same day, I refused the application for striking out with costs reserved, stood the matter

down to 7 May 2025, and granted the provisional liquidators leave to file a further affidavit dealing with certain matters raised in Courthiel’s reply, including alternative relief sought by Courthiel in reply that the provisional liquidators be ordered to personally pay the costs occasioned by their opposition to the current application. Also on that day, Mr Brown filed a notice withdrawing his opposition, such as it was.

[14] On 7 May 2025 I heard argument on the merits of the current application. It is common cause that if the current application is refused, the return day for the liquidation must be further extended and the matter be postponed for determination on a future date.

[15] Shortly before judgment was to be delivered, Courthiel sought to place further evidence before the Court, a request the provisional liquidators opposed. I directed Courthiel to make formal application under rule 6(5)(e) (“the 6(5)(e) application”), including in its papers the new material sought to be introduced, and for any opposing party to similarly identify evidence it would seek to have admitted in answer in the event that the application was granted. This interlocutory application was argued on 17 September 2025. After hearing argument, I made an *ex tempore* order granting leave for the filing of the further affidavits.

[16] I propose dealing with the determination of the current application as follows: first, the applicable legal framework; second, Courthiel’s case on the papers; and, lastly, the question of costs.

THE LEGAL FRAMEWORK: SECTION 131 OF THE COMPANIES ACT

[17] The legal framework for the determination of the current application, as it is relevant to the present matter, is set out in Part A of Chapter 6 of the Companies Act.

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

proceedings. Under section 131(7) the court may also make such an order at any time during the course of liquidation proceedings relating to that company.

- [19] What is an “*affected person*” is defined in section 128(1)(a). It is common cause that, as creditor of Tirisano, Courthiel is an affected person as defined.
- [20] Under section 131(4)(a), a court seized with an application for business rescue may make such an order if it is satisfied that certain preconditions are met. These include that the company is financially distressed – it is common cause that this applies to Tirisano. It is a further express requirement of section 131(4) that the court be satisfied that “*there is a reasonable prospect for rescuing the company*”. That is the key dispute in the present matter.

A reasonable prospect

- [21] In Oakdene, the SCA considered what is meant when section 131(4) says that an applicant must show a “*a reasonable prospect*” of rescuing the company. Brand JA accepted that the bar had been lowered from that imposed by the erstwhile test of “*reasonable probability*” set out in section 427(1) of the old Companies Act. But a bar nevertheless remains:

*“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.”*¹

¹ Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) (“Oakdene”) para 29.

- [22] The SCA further endorsed the conclusion of Van der Merwe J in Propspec Investments² that what is required is that the an applicant “*place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.*”³ While the applicant need not to put up detailed financial information that it proposes should be included in a business rescue plan,⁴ it must establish on the record the grounds for what it says are reasonable prospects that the company can be rescued.⁵

Rescuing the company

- [23] Turning then to what is meant by “*rescuing the company*”, this is defined in section 128(1)(h), read with subsection (1)(b)(iii), to mean “*restructuring [the company’s] 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.*”

- [24] In Oakdene,⁶ Brand JA considered these provisions as well. He explained that business rescue proceedings had to be aimed at the achievement of two objectives, or goals, namely:

“ *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.*”

² Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another 2013 (1) SA 542 (FB) (“Propspec”).

³ Oakdene para 30, with referred to Prospect Investments paras 11 and 15

⁴ This will be determined by the business rescue practitioner after s/he conducts the mandated investigation under section 141 of the Companies Act: Oakdene para 31.

⁵ Oakdene para 31, with reference to Prospect Investments para 11

⁶ Oakdene par 23.

- [25] Brand JA grappled with the difficult question whether these two objectives are true and equal alternatives, or whether business rescue proceedings had to aim, in the first instance, at the continuation of the company in a solvent state. While the dictionary definitions of the words might suggest that an applicant had to show in the first instance that there was a reasonable prospect of returning and continuing the company in a state of solvency, he found that section 128 of the Companies Act gave the terms “*rescue*” and “*rehabilitation*” their own meaning. Consequently, he held that “*the achievement of any one of the two goals referred to in s 128(1)(b) would qualify as ‘business rescue’ in terms of s 131(4)*”,⁷ and that an applicant had to establish merely a reasonable prospect “*of achieving any one of the two goals contemplated in s 128(1)(b) on the facts of this case.*”⁸
- [26] However, this did not mean that business rescue proceedings in pursuit of the secondary goal can be regarded as an “*alternative, informal kind of winding-up of the company, outside the provisions of [the Companies Act]*”. Brand JA explained that “*A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings.*”⁹
- [27] Consequently, where an applicant relies on a reasonable prospect of achieving the secondary goal, it must demonstrate a real comparative advantage flowing from the choice of business rescue proceedings over liquidation.

The court’s discretion

- [28] Before turning to the case at hand, I mention one other aspect. The Companies Act has set out clear preconditions that must be met before an order placing a company in business rescue may be made. I do not believe that this Court may, under the guise of the discretion afforded to it, refuse to engage fully with the

⁷ Oakdene para 27.

⁸ Oakdene para 28.

⁹ Oakdene para 33.

question whether those preconditions are met. And if they are not met, there can be no question of making such an order merely on the grounds that it would be just and equitable to do.

- [29] In Oakdene Brand J considered the nature of the discretion afforded to the court, and cautioned against equivocation:

“In a case such as this, the court’s discretion is bound up with the question whether there is a reasonable prospect for rescuing the company. The other pertinent requirement in s 131(4), namely, that the company must be financially distressed, seems to turn on a question of fact. As to whether there is a reasonable prospect of rescuing the company, it can hardly be said, in my view, that it involves a range of choices that the court can legitimately make; of which none can be described as wrong. On the contrary, as I see it, the answer to the question whether there is such a reasonable prospect can only be ‘yes’ or ‘no’. These answers cannot both be right.”

- [30] It follows that a party cannot come to court seeking to convince the court of the equities of the matter while referring the hard factual questions raised by the statutory test to the business practitioner to resolve in due course.¹⁰

COURTHIEL’S CASE ON THE PAPERS

- [31] Courthiel’s case for business rescue is addressed somewhat tersely in the founding affidavit of Mr Wright under the heading Business Rescue Proposal. It amounts to this: Tirasano owns multiple properties, of which a mixed-use building in Witbank (“the Witbank property”) is the most valuable. The residential component of the Witbank property provides student accommodation. In the Middleburg BR application, it appears Mr Mogorosi attached a valuation to his papers which valued the Witbank property at

¹⁰ See for example this Court’s remarks in *Nedbank Ltd v Bestvest 153 (Pty) Ltd, Essa and Another v Bestvest and Another* 2012 (5) SA 497 (WCC) para 41; *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* [2012] 4 All SA 590 (WCC) para 48; both authorities endorsed by Blumberg AJ para 100.

R 392 million in June 2024, with Tirasano's other properties valued at "*some tens of millions more*".¹¹

[32] The debt owed to Courthiel stands at around R 250 million, increasing every month by about R 1.5 million in interest.¹² Mr Wright points out that if the Witbank property is sold "*for an amount close to the figure suggested by Mr Mogorosi, the proceeds will be sufficient to satisfy Courthiel's claim, and the claims of Tirasano's other small creditors.*" This would allow Tirasano to retain one or more of its other properties, Mr Wright suggests, and thus continue to operate albeit on a much smaller scale. Even if that ultimately proved not to be feasible and all of Tirasano's properties had to be sold, "*its creditors would do better than if the liquidation is only finally confirmed in some years' hence.*"

[33] It appears from this that Courthiel's case is that there are reasonable prospects that either the primary or the secondary statutory goal may be achieved through placing Tirisano in business rescue.

The primary goal: The likelihood of Tirisano continuing in a solvent state

[34] Courthiel's founding affidavit gives no indication of the amount of Tirisano's current indebtedness besides its debt to Courthiel, which is backed by "*several mortgage bonds*" against the Witbank property,¹³ nor Tirisano's overall financial position, nor its current or anticipated operational needs.

[35] Instead, Courthiel refers¹⁴ this Court to the Judgment of Blumberg AJ, saying it "*bears close reading*" and comprehensively deals with such issues. The founding affidavit does not traverse the Blumberg Judgment, beyond highlighting its findings that neither Tirisano nor its director Mr Schipper substantively opposed the liquidation and that Tirisano accepted that it is

¹¹ FA para 42 p 809.

¹² FA para 12 p 802; para 39 p 808.

¹³ FA para 12 p 802.

¹⁴ FA para 18 p 803.

financially distressed, that Courthiel's opposition to the first Cape Town BR application was a real obstacle to its success; and that delay has been a prominent feature of Mr Schipper's conduct.

[36] Courthiel submits that I am bound under the doctrine of precedent by the Blumberg Judgment unless I hold it to be clearly wrong. I have no reason to disagree with Blumberg AJ's compelling Judgment, and no difficulty with the proposition that I am bound by his findings of fact and law that form part of the *ratio decidendi* which led him to make the orders he did – including dismissing the first Cape Town BR application and placing Tirisano in provisional liquidation.

[37] That does not mean that the factual background which Blumberg AJ traversed in his Judgment (in an application to which neither Courthiel nor the provisional liquidators were parties) forms part of Courthiel's case in these proceedings. Despite my raising this issue at the hearing, the provisional liquidators nevertheless did not complain of the manner in which Courthiel presented its case. I am therefore prepared to regard all facts set out by Blumberg AJ in his Judgment to be common cause between the parties before me unless the current papers evidence the contrary.

[38] Turning, then, to the Witbank property that lies at the heart of Courthiel's proposed rescue of Tirisano, the Blumberg Judgment sets out the following facts (footnotes omitted):

“The Witbank property

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

[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.*

[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; 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.”*

[39] Blumberg AJ then proceeds to consider the case put up by Mr Schipper for business rescue in the first Cape Town BR application, which Courthiel at the time opposed. Mr Schipper’s primary case was based on a sale of some of Tirisano’s smaller properties and a proposed restructuring of its debt to Courthiel which would allow the Witbank property to continue as a going concern under the control of a business rescue practitioner.

[40] Courthiel opposed such a restructuring of debt. This effectively put the death-knell into Mr Schipper’s proposal, given what Blumberg AJ found to be Tirisano’s “*chronic, if not terminal*” difficulties in obtaining alternative finance, arising from Tirisano’s “*inability to procure formal, bankable leases*” for the Witbank property’s student accommodation (see paras [106] to [108] of the Blumberg Judgment.)

[41] It appears Mr Schipper then changed tack in reply and presented an alternative proposal to achieve the primary goal, premised upon the sale of the Witbank property. This is dealt with from para [111] in the Blumberg Judgment – I emphasise his factual findings that are also relevant to the determination of the current application:

“[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. 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] ...

[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 – 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. 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.”

[42] Returning to Courthiel’s papers in the current application, its primary case is remarkably similar to what appears to have been Mr Schipper’s proposal put up in reply in the first Cape Town BR application – the main difference being that Courthiel relies on a valuation report which Courthiel says is dated June 2024, that was attached to the affidavit of Mr Schipper’s co-director in Tirisano, Mr Mogorosi, in the Middleburg BR application (“the 2024 valuation”).

[43] The 2024 valuation (in an amount of R 396 million) places a similar value on the Witbank property as did the 2021 valuation (in an amount of R 365 million) that was on the record before Blumberg AJ, which he found to be unreliable and speculative. Courthiel does not attach the 2024 valuation to its papers in the current application, and does not traverse its content beyond stating the valuation amount.

[44] Courthiel also does not address the question which urgently presents itself, namely whether the key shortcoming which Blumberg AJ identified in relation to the 2021 valuation report (that is, that it was based on an assumption of formal leases being in place, when that did not appear to be the case) had been addressed in the 2024 valuation.

[45] Courthiel does attach Mr Mogorosi's founding affidavit in the Middleburg BR application to its own founding affidavit, as part of annexure "V" (unfortunately without, in turn enclosing the June 2024 valuation which is annexure FA8 thereto). The contents are not traversed in Courthiel's papers in the current application, and it is not clear to what extent Courthiel aligns itself with Mr Mogorosi's averments in an application it opposed. The authority of Swissborough Diamond Mines¹⁵ is well established to the effect that:-

"Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. ..."

[46] Relying on Swissborough Diamond Mines, in the matter of Engen Petroleum Limited v Webrref Trading¹⁶ the court, referring to the incorporation of affidavits and documentation solely by reference, stated as follows:

"One would think that the proposition only has to be stated for it to be rejected. A formulation as broad as this in an affidavit fails to define the issues between the parties and does not place the essential evidence before the Court seized with the matter. Neither the Court nor the other party will know prior to the hearing what is in issue."

¹⁵ Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 324F-G.

¹⁶ Engen Petroleum Limited v Webrref Trading No. 31 CC t/a Elm Street Service Station and Another [2017] ZAGPJHC 192 para 38.

- [47] The principle has been endorsed by our highest courts.¹⁷
- [48] Suffice to say that after a brief perusal of Mr Mogorosi's affidavit, it is clear from what he says there that the question of a long-term lease between Tirisano and the National Student Financial Aid Scheme ("NSFAS") relating to the student accommodation in the Witbank property – what Blumberg AJ referred to as bankable leases – remains key to the 2024 valuation of the property, but also that at the time of his affidavit such a lease had not been concluded.
- [49] In answer in the current application, the provisional liquidators rely on and attach Courthiel's own affidavit filed in response to Mr Mogorosi in the Middleburg BR proceedings, complaining that in those proceedings Courthiel "*held a diametrically opposing view*"¹⁸ to what it adopts in the current proceedings, namely that in the earlier proceedings it was of the view that business rescue was not the appropriate remedy to deal with Tirisano's undisputed financial distress.
- [50] Courthiel's about-turn in its attitude towards business rescue proceedings is not dispositive. Whether or not an order placing Tirisano in business rescue is the appropriate relief is for this Court to determine. Here, I am concerned with the factual basis on the papers potentially giving rise to a reasonable prospect of rescuing Tirisano within the meaning of sections 128 and 131 of the Companies Act.
- [51] The provisional liquidators do not engage with the 2024 valuation in their answer. However, it is clear they deny its conclusion when they say that the market value of the Witbank property is far less than the debt owed to Courthiel – which it is common cause presently amounts to some R 250 million.

¹⁷ Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA) para 43; Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another 2017 (6) SA 1 (CC) para 171.

¹⁸ AA para 40 p 1096.

[52] In support, the provisional liquidators put up an affidavit of one of their appointed service providers who is employed to maintain and administer the Witbank property, Mr Mitchell. Mr Mitchell says that he is aware that Courthiel's Mr Wright has received offers for the Witbank property of approximately R 170 million, and he, Mr Mitchell has received an oral offer from an unnamed person in an amount of R 175 million. Mr Mitchell says this latter offer was put to Courthiel, who rejected it as too low.¹⁹ This is not denied in reply, other than through the assertion of Mr Wright on behalf of Courthiel that he is "*aware of interest in the property at a price substantially more than that referred to Mr. Mitchell*" ²⁰ – an averment so vague that it does not dislodge Mr Mitchell's evidence.

[53] In reply, Courthiel also faults the provisional liquidators for failing to obtain a proper valuation of the Witbank property,²¹ which these explain, at least in part, by saying that Courthiel has refused their request to approach estate agents to market the property.²² Be that as it may, it loses sight of the fact that it is Courthiel as applicant who must put up a factual basis that satisfies this Court that there is a reasonable prospect of rescuing the company.

[54] Courthiel further challenges Mr Mitchell's expertise to value the Witbank property.²³ I do not understand Mr Mitchell to hold himself out as an expert on property valuation, but to be putting up facts of which he has knowledge regarding the interest expressed by potential buyers in the Witbank property. The effect of that evidence is no more – and no less – than to demonstrate the value which the Witbank property might realise in a sale. This calls for an explanation of the significant discrepancy between the value of the Witbank property which Courthiel suggests in its founding papers might be achieved (close to R 396 million) and the interest, such as it is, which has been shown in

¹⁹ Mitchell para 3 p 1176.

²⁰ RA para 31 p 1213; paras 55-57 p 1218.

²¹ RA para 56 p 1218.

²² Further affidavit Van Zyl para 6 p 1303.

²³ RA para 55 p 1218.

the property to date by potential purchasers (no more than R 175 million). Courthiel does not take up that invitation in reply.

[55] Instead, its response is say that “*the only real way to test what [the Witbank property] is worth is to try to sell it*”.²⁴ That is true only in the most literal sense – and of no assistance to this Court in determining whether the requirements for the making of an order placing Tirisano in business rescue are met.

[56] I therefore proceed on the basis that the value which the Witbank property may fetch if sold is in the region of R 175 million.

[57] Overlooking, for the moment, the general rule that a party is not allowed to make out their case in reply, Courthiel’s further case regarding Tirisano’s financial position in its replying affidavit is the following: it points to an improved condition of the Witbank property and improved tenant situation (presumably, compared to the situation Blumberg AJ laid out);²⁵ it says that the provisional liquidators have collected R 33 million in rental which is ceded to Courthiel;²⁶ it refers to Tirisano’s claims in respect of rental owed in an amount of R 95.1 million according to Mr Mogorosi;²⁷ and it refers to Courthiel’s other properties, and their valuation²⁸ by Mr Mogorosi (the unbonded properties are said to be worth R 43 million) and by Blumberg AJ (who found that there was equity of R 6.8 million in the bonded properties, and accepted a valuation of the unbonded properties of just under R 43.8 million).

[58] In respect of the current condition of the Witbank property and current occupancy, that would have been taken into account by prospective purchasers who, on the evidence before me, have been prepared to offer R 175 million for the property in its current condition.

²⁴ RA para 57 pp 1218.

²⁵ RA para 31 pp 1212/3.

²⁶ RA para 11 p 1205; para 33 p 1213.

²⁷ RA para 33 p 1213.

²⁸ RA para 32 p 1213.

- [59] In respect of Tirisano's outstanding claims, Blumberg AJ noted that he was unable to determine the exact amounts of such claims, but he approached the matter on the basis that some R 56 million were owing to Tirisano in respect of student accommodation (para 35 of his Judgment). Courthiel does not begin to explain on what basis Mr Mogorosi arrives at a much higher figure, and this must be regarded as speculative.
- [60] Courthiel says that Tirisano's income collected since June 2024 (R 33 million and R1.5 million) excludes accrued amounts,²⁹ and I proceed on the basis that Tirisano's claims remain as they were on the papers before Blumberg AJ, with its income since then constituting an asset in addition to such claims.
- [61] As regards claims against Tirisano, on the other hand, the replying affidavit identifies various creditors,³⁰ but provides no detail regarding their claims. It is the provisional liquidators who put up a list of creditors in their answering papers,³¹ indicating debts of some R350 million, which Courthiel does not dispute in reply.
- [62] It further appears that Tirisano has attempted to settle some of these debts, including through making payments without the knowledge and consent of the provisional liquidators.³² I do not take account of these payments which are likely neutral in a balancing of Tirisano's assets and liabilities: if Tirisano has, since the Blumberg Judgment, applied some of the assets he took into account to paying its liabilities to which he also had regard, that does not advance Courthiel's case before me.
- [63] Courthiel does not take account of the costs incurred by the provisional liquidators to date, which on Courthiel's own version are very significant, and does not anticipate the likely costs of the proposed business rescue in the

²⁹ RA para 28 p 1270.

³⁰ RA para 7 p 1204.

³¹ AA para 8 p 1088; annexure 'TVZ4' p 1139.

³² AA paras 15-19 pp 1090-1091; paras 20-23 pp 1091-1093.

future, including the costs of recovering amounts owed to Tirisano which Courthiel says the business rescue practitioner can achieve – presumably through litigation for which funds must be made available – and how such costs may be paid.

[64] When all of the above is taken into account, it is far from clear on what basis Courthiel submits that there is a reasonable prospect of returning Tirisano to solvency “*such that all creditors can be repaid*”,³³ and thereafter continuing Tirisano’s business in a solvent state. Courthiel says that Tirisano has “*unbonded property worth approximately R 43 million which can be sold, one by one, to settle the creditors and restore the property to solvency*”.³⁴ It also points out that so long as even one property remains, Tirisano will be restored to solvency.³⁵ That is so – but there is little by way of evidence on the basis of which I might be satisfied that there is a reasonable prospect of this eventuality coming to pass.

[65] Courthiel somewhat coyly suggests that if the business practitioner finds it “*necessary for Courthiel to abandon a portion of its claim in order to ensure that other creditors’ interests are covered, that may well be done*”.³⁶ That falls far short of the kind of undertaking I might take into account in balancing the evidence to determine whether or not to make an order placing Tirisano under business rescue.³⁷

[66] Simply put, it is not enough for Courthiel to posit that a business rescue plan may aim at the successive sale of Tirisano’s properties to satisfy its debts. It must put up a factual foundation, in accordance with the accepted rules of motion proceedings, on the basis of which this Court can be satisfied that the

³³ RA para 50 p 1216.

³⁴ RA para 57 p 1218.

³⁵ RA para 57 p 1218.

³⁶ RA para 51 p 1217.

³⁷ This calls to mind the “*spes of a commitment*” which Eloff AJ discounted in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* 2012 (2) SA 423 (WCC) para 18 as irrelevant to the question before the court whether an order placing the company in business rescue should be made.

proposed path has at least a reasonable prospect of success in restoring Tirisano to solvency and continuing its business in a solvent state. On the papers before me, I am not so satisfied.

The secondary goal: a better return for creditors

[67] Turning then to the secondary goal, there is no denying that Courthiel's case has intuitive appeal, in circumstances where it is common cause that the Middleburg BR proceedings, and consequently, the liquidation proceedings in this Division, will not be finally determined in the near future.

[68] The unfortunate lack of clarity about the way forward in the liquidation is due at least in part to the nature of things – TGM's provisional liquidators were appointed on 17 April 2025 (after TGM was provisionally liquidated on 14 March 2025), and at the time of the main hearing on the merits on 7 May 2025, they had not yet had an opportunity to investigate TGM's financial position nor to consult with TGM's director Mr Morogosi. An extension of their powers in order to participate in the Middleburg BR application on behalf of TGM can only be achieved after the second creditors' meeting or on application to court for that purpose.

[69] It appears from the most recent affidavits in the rule 6(5)(e) application that TGM's liquidation is opposed, in turn causing a likely delay in the second creditors meeting. Further, that TGM's provisional liquidators have still not been granted extended powers, and it is not clear whether they have sought such powers.

[70] The recent affidavits also confirm that the Middleburg BR application remains pending. There is some dispute as to the precise grounds for that application's recent return day being struck from the roll, the reasons for the order not yet being available, but the parties were *ad idem* that it arose, at least in part, from the inability of TGM's liquidators to file papers on TGM's behalf without their powers being extended. With the Middleburg BR application in limbo, the liquidation, too, cannot be finalised.

- [71] Courthiel frankly says that it would prefer the immediate liquidation of Tirisano. But that is not open to it in the present circumstances. So, it says, it is forced to choose between business rescue now, and moving for the final liquidation of Tirisano on an unknown date many months, possibly years, in the future. Given that unhappy choice, it asks for business rescue.³⁸
- [72] The crux of Courthiel’s argument is that a business rescue which can proceed immediately will, one might say axiomatically, be in the interests of creditors when weighed against liquidation proceedings that can only proceed at an uncertain but distant point in the future.
- [73] In argument, Courthiel placed emphasis on the word “*immediate*” in section 128(1)(b)(iii) of the Companies Act, which qualifies the liquidation proceedings against which business rescue is to be measured in satisfaction of the secondary goal. The implication is that where, as here, immediate liquidation is not practically possible, the statutory test will be satisfied because a business rescue practitioner can realise Tirisano’s assets without delay, while the provisional liquidators are prevented from perfecting a sale of Tirisano’s assets while the Middleburg BR application is pending.
- [74] When considering the proper interpretation of section 128(1)(b)(iii) of the Companies Act, it is by now well established that this is an objective exercise, with the language the starting point and its meaning to be considered within the immediate statutory context and against the achievement of the statutory purpose.³⁹ The starting point is therefore that the equities of the present, highly unusual, case cannot determine the objectively correct interpretation of section 128(1)(b)(iii).
- [75] The next point to note is that there is nothing in the language of section 128(1)(b)(iii) to suggest that earlier – even much earlier – returns are

³⁸ FA paras 40-41 p 808; RA para 6 p 1204.

³⁹ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18; Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others 2024 (1) SA 567 (CC) at para 140.

axiomatically better returns. On the contrary, the well-accepted statutory purpose of business rescue proceedings is to delay the immediate liquidation of a company's assets "*for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend*".⁴⁰

[76] I am mindful that liquidation proceedings are ordinarily considered urgent.⁴¹ However, in the absence of a statutory provision to that effect, what amounts to a procedural privilege creditors enjoy when litigating liquidation proceedings does not translate into a substantive right on their part. Much less does it make business rescue proceedings the appropriate remedy to overcome delays in the liquidation, all the more so where the delay is a direct result of the manner in which the Companies Act itself regulates the interface between liquidations and business rescue through section 131(6).

[77] This interpretation is further supported by the fact that the weighing up the relative merits of liquidation and business rescue proceedings is not provided for in section 131(7) – the subsection dealing with the conversion of liquidation proceedings to business rescue proceedings – but in section 128(1)(h), read with subsection (b)(iii), which provide the definitions that apply to business rescue proceedings generally. This includes voluntary business rescue by board resolution (see section 129(1)(b)) which may not be launched if liquidation proceedings are pending (section 129(2)(a)). In other words, the legislation envisages instances when a court is called to consider the prospects of achieving of the secondary goal of business rescue in circumstances where liquidation proceedings are, by definition, not "*immediate*".

[78] In my view, the phrase "*immediate liquidation*" does no more than highlight one of the key features that ordinarily distinguishes liquidation from business rescue – with the former aiming solely at the realisation of the company's

⁴⁰ Van Staden and Others NNO v Pro-Wiz (Pty) Ltd [2019] ZASCA 7; 2019 (4) SA 532 (SCA) para 22.

⁴¹ Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd [2022] ZASCA 143 (24 October 2022) para 30, referring with approval to Van Greunen v Sigma Switchboard Manufacturing CC [2003] ZAECHC 12 paras 8-10

assets, while in the case of the latter the company's assets will only be realised after the appointed business rescue practitioner has considered the feasibility of the continued operation of the company.

[79] It follows that the delay in the finalisation of the liquidation proceedings, even an egregious one, cannot, without more, satisfy this Court that there is a reasonable prospect that Tirisano's creditors will receive better returns if Tirisano is placed in business rescue than if it remains in provisional liquidation until such time as the Middleburg BR proceedings are determined and the liquidation can be finalised.

[80] In argument, Courthiel alluded to the fact that it is the sole applicant in both the liquidation and the business rescue proceedings, and that neither application is substantively opposed by any other creditor. It pointed out that, notionally, it was open to Courthiel to move for a discharge of the liquidation application,⁴² with the result that the appointment of the provisional liquidators – the sole source of opposition to the current application – would end.

[81] That may be so, although a lack of opposition would not absolve this Court from satisfying itself that an order placing Tirisano in business rescue can be lawfully made. Be that as it may, the fact remains that the current application is and remains opposed, that the provisional liquidators remain in office, and that Courthiel does not dispute their right to appear and oppose the application.

[82] It follows that in order to succeed in reliance on the secondary goal, too, Courthiel must show, on the facts of the case and in accordance with the ordinary rules governing opposed motion proceedings, that there is a reasonable prospect of a better return for creditors if Tirisano is placed in business rescue than would result from the continuation of the liquidation proceedings and their finalisation in due course.

⁴² Something also alluded to in the RA para 13 p 1205.

[83] Furthermore, I agree with the provisional liquidators when they say⁴³ that this enquiry must encompass all creditors, and not only the creditor who happens to be the applicant in the business rescue proceedings, that is, Courthiel, even if it is the majority creditor.

[84] Turning then to Courthiel's case on the facts, it says the following of the benefit to creditors (emphasis in the original):⁴⁴

“The benefit to the creditors is that a business rescue may restore the company to solvency, and result in the payment of what is due to them and will do so without further delay by the Middelburg business rescue application.”

[85] I have already dealt with the reasonable prospect of a return to solvency above – no factual foundation beyond speculation has been laid out.

[86] As regards the payment of amounts due to creditors, if Courthiel were able to show on its papers reasonable prospects, within the meaning of the relevant provisions, of a business rescue practitioner ultimately realising sufficient assets to pay all of Tirisano's creditors what is due to them, I would have no difficulty in granting the application since the evidence before me suggests that the provisional liquidators may not be able to achieve such a result by liquidating Tirisano's property. But in this respect Courthiel's application comes up against the same difficulty it did in relation to the primary goal – it has failed to lay out a factual foundation.

[87] The starting point is that Courthiel does not suggest that the Witbank property can or should be kept as a going concern in order to generate an income under the control of the business rescue practitioners – before Blumberg AJ Courthiel was adamant that it would not agree to restructure its mortgage-backed loan to allow Tirisano to continue running the Witbank property as a going concern, and it does not say on the current papers that it has changed its mind. There is

⁴³ AA paras 41, 44-45 pp 1097/8.

⁴⁴ RA para 63 p 1220.

also nothing to suggest that under the control of a business rescue practitioner Tirisano will gain access to commercial loans that it did not have previously. The upshot of this is that once the Witbank property is sold, Tirisano will not have a significant source of income.

[88] Of course, a business rescue practitioner would be able to deal with the Witbank property in a manner that aims to maximise its value before it is realised, for example through renovation or other improvements. The same goes for Tirisano's other properties. But in the current circumstances, somewhat ironically, so can the provisional liquidators. It appears from the evidence that the provisional liquidators have effected improvements to the Witbank property, increased student occupancy, and improved the collection of rental payments.⁴⁵ Simply put, the business of Tirisano currently continues. Courthiel does not say that a business rescue practitioner will be able to deal with the property in a manner that is not currently open to the provisional liquidators pending the return day of the liquidation, aside from fully realising it.

[89] That leaves the fact that interest is accruing on Courthiel's debt at a rate of approx. R 1.5 million per month until such time as the Witbank property is realised.⁴⁶ The provisional liquidators have provided a schedule (provided to Courthiel as part of the provisional liquidator's reporting, and included in their further affidavit⁴⁷) which reflects a monthly income from the Witbank property that significantly exceeds such interest.

[90] Courthiel has taken the view that it wants repayment of its loans as soon as possible and is understandably frustrated at the delay in the liquidation proceedings. But the preference of the majority creditor is not the test. Before I am able to make an order placing Tirisano in business rescue relying on the secondary goal, I must be satisfied on the facts before me that there is a reasonable prospect of a better return for the company's creditors as a whole if Tirisano is placed in business rescue. That is not a case made out.

⁴⁵ Further affidavit Van Zyl paras 14-16 pp 1305-1306.

⁴⁶ FA para 39 p 808 (the amount is not disputed by the provisional liquidators, and so it is of no import that in reply Courthiel puts the amount at only R 1 million).

⁴⁷ "TVZD2" p 1353.

- [91] Instead, it is hard to escape the conclusion that what Courthiel is proposing amounts to an informal winding up of Tirisano that aims to escape the Companies Act's provisions which have stymied Courthiel's efforts to date to have Tirisano liquidated, rather than to achieving a better return for creditors through business rescue. That does not satisfy the statutory test, conflicts with the principles set out in Oakdene, which I am bound by.
- [92] The provisional liquidators have also opposed the application on a number of other grounds, which I deal with briefly.
- [93] First, they say that, having regard to the reckless mismanagement of Tirisano, business rescue is inappropriate. They rely on the factual findings of Blumberg AJ to that effect (at paras 122.4 and 122.5 of his Judgment),⁴⁸ and additionally highlight transactions they consider void dispositions which have taken place since Tirisano was placed in provisional liquidation.⁴⁹ They also refer to what they say are financial irregularities committed by Tirisano and Mr Schipper.⁵⁰ With reference to Brand JA's discussion in Oakdene, they say that it is "*the investigatory machinery of the insolvency laws*" that is the appropriate mechanism to investigate and recover funds improperly disbursed and this will be to the benefit of creditors.⁵¹

⁴⁸ AA para 13 p 1090.

⁴⁹ AA paras 14-27 pp 1090-1093

⁵⁰ AA paras 28-32 p 1094

⁵¹ AA para 12 pp 1089/9, with reference to para 35 of Oakdene:

"[35] Reference to these transactions of doubtful validity, and the other sinister aspects in the management of the company's affairs, lead me to the conclusion that liquidation proceedings are in fact better geared for the situation that arose in this case. On the respondents' version the company has been stripped of all its income and virtually all its assets while under the management of Dimetrys Theodosiou. These allegations are, of course, denied by the appellants. But, as I see it, that is not the point. The point is that these are the very circumstances at which the investigative powers of the liquidator – under s 417 and 418 of the 1973 Companies Act – and the machinery for the setting aside of improper dispositions of the company's assets – provided for in the Insolvency Act 24 of 1936 – are aimed. In this light I believe there is a very real possibility that liquidation will in fact be more advantageous to creditors and shareholders – excluding, perhaps, the appellants – than the proposed informal winding-up of the company through business rescue proceedings."

- [94] In reply, Courthiel points out that unless Tirisano remains in liquidation, there is no need to recover payments that are found to have been owing merely to preserve the *concursum creditorum*. That is so.
- [95] Courthiel accepts, however, that it is likely that some significant payments were made without a lawful basis and that Tirisano has been mismanaged to the detriment of creditors, but says that the business rescue practitioner will be able to investigate the company's claims and recover funds through ordinary litigation.⁵²
- [96] Significant liquid funds would be required to fund such litigation, and it is not clear that they will be on hand once the Witbank property is sold. On the other hand, the "*the investigatory machinery of the insolvency laws*" is not an end in itself but serves the proper winding up of companies in the interests of creditors. None of them have opposed the current application, where relief is sought that would entail the loss of this protection afforded to them.
- [97] Had I found that Courthiel has made out a case on the facts that the statutory prerequisites for business rescue are met, on balance I would have exercised my discretion in favour of making an order placing Tirisano in business rescue. However, since that it is not a finding I am able to make, the question of my discretion does not arise.
- [98] Lastly, the provisional liquidators also say that the current application cannot be determined until such time as the provisional liquidators of TGM have extended powers that will allow them to participate in these proceedings on behalf of TGM. They rely on section 131(3) of the Companies Act, which provides that "[e]very affected person has a right to participate in the hearing of an application of this section". It is common cause that TGM is an affected party, being a shareholder of Tirisano.
- [99] Courthiel's response is to say that TGM was served the application while it was not yet in provisional liquidation, and that its directors nevertheless chose not

⁵² RA paras 35-47 pp 1213-1216.

to oppose the current application within the required timeframes. While this is correct, the attitude of TGM's provisional liquidators may be quite different.

[100] On the other hand, the delay by TGM's provisional liquidators in seeking extended powers to litigate on TGM's behalf – something that had still not occurred as late as the final hearing of the matter on 17 September 2025 – suggests otherwise. A party's right to participate in litigation is not unencumbered by procedure. In the present matter, TGM's provisional litigators have had some five months to apply for extended powers that would allow them to participate in the current application if they considered it necessary in the interests of TGM. They have not done so, and in those circumstances there is no infringement of TGM's right to participate in these proceedings if the current application is determined.

COSTS

[101] The question of costs arises in relation to the main application and the various interlocutory applications.

The main application

[102] In respect of the main application, in reply Courthiel sought costs on a punitive scale against the liquidators on the grounds of very serious allegations of misconduct. Albeit that Courthiel has not succeeded in the main application, if its allegations of misconduct on the part of the provisional liquidators were proven, they might bear on the question of costs.

[103] The main allegations are that, first, the provisional liquidators opposed the current application in their own personal financial interest;⁵³ second, that they failed to provide reports and be transparent in their administration of the Witbank property;⁵⁴ and third, that the provisional liquidators made an inappropriate proposal to Courthiel's attorney, to benefit him in exchange for

⁵³ RA para 16 p 1206.

⁵⁴ RA paras 17.1-17.3 pp 1207-1208

convincing his client to abandon the current application.⁵⁵ Courthiel also lists a number of other respects in which they are dissatisfied with the manner in which the provisional liquidators have administered the estate – none of those complaints rise to the level of misconduct that might substantiate a punitive costs order and it is not necessary for me to determine them.

[104] I find Courthiel’s allegations of misconduct not sufficiently substantiated. Liquidator’s fees are regulated, there is no evidence that they have been incurred improperly, and, as appears from what I have said above on the merits, the provisional liquidator’s opposition to the current application was warranted. It is clear that Courthiel disagrees, strongly, with the provisional liquidator’s strategic decisions in the current and other litigation. That alone does not substantiate bad faith.

[105] As regards transparency, the provisional liquidators placed on record their ongoing reports, which dispel Courthiel’s accusations. The reports are substantial and engaging.

[106] Lastly, as regards what Courthiel implies was a bribe of its attorneys, the provisional liquidators convincingly set out the context in which they offered to engage Courthiel’s preferred attorneys, and show that this suggestion ultimately originated with Courthiel.

[107] On the papers before me, I find no grounds to make a finding of improper conduct against the provisional liquidators, and no reason to depart from the ordinary rule that costs should follow the result. The parties were agreed that costs on a scale C are warranted.

The interlocutory applications

[108] The provisional liquidators applied for condonation for the late filing of their answering affidavit on the day of the first hearing on 24 April 2025. They frankly conceded that it is open to this Court to apply the healing balm of a costs order in the event that condonation is granted, as it was.

⁵⁵ RA para 17.8 p 1209.

[109] The explanation for the extreme lateness of the answering affidavit was terse. The provisional liquidators relied on the provisional winding up of TGM, of which Courthiel was informed on 18 March 2025 and which they say might have moved Courthiel to abandon the current application; that they were informed on 22 April 2025 that there would be no opposition to the current application by an unnamed “*institutional creditor*”; and that on 23 April 2025 they were informed that TGM’s provisional liquidators intended to withdraw the Middleburg BR application – something that has still, to date, not happened.

[110] None of these facts have a bearing on the merits of the current application which is unrelated to TGM’s provisional liquidation. It appears from the papers that it was, or should have been, clear to the provisional curators well ahead of the hearing that Courthiel intended to proceed with the current application regardless of any action which TGM’s provisional liquidators might take in the future. The provisional liquidators do not explain why the answering affidavit could not have been filed, if not in accordance with the rules, then at least significantly earlier than it was – thereby obviating the need for the postponement that followed. In those circumstances, the provisional liquidators must bear the wasted costs of 24 April 2025 and it is appropriate that they bear those costs in a personal capacity.

[111] As regards the striking out application, both sides had substantial success and there will be no order as to costs in relation to that application.

[112] Lastly, as regards the rule 6(5)(e) application, Courthiel has succeeded in the face of the concession by the provisional liquidators, rightly made, that the evidence sought to be introduced included new and material facts. Courthiel should be awarded the costs of that application.

ORDER

[113] In the premises I make the following order:

1. The application for business rescue is dismissed with costs on a scale C, such costs to include the costs of two counsel where so employed, subject to the following:
 - a. The second to fourth respondents are ordered to personally and jointly and severally pay the wasted costs occasioned by the late filing of their opposing affidavit, including the wasted costs of appearance on 24 April 2025.
 - b. There is no order as to costs of the striking out application.
 - c. The second to fourth respondents are ordered to pay party-party costs on a scale B occasioned by the application under rule 6(5)(e).
2. The rule *nisi* is extended to, and the application for final liquidation is postponed for hearing on, 27 November 2025.

K S SALLER
ACTING JUDGE OF THE HIGH COURT

Appearances