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

Case No.:19854/2022

In the matter between:

ILITHA GROUP HOLDINGS PROPRIETARY LIMITED Applicant
(Registration Number: 2008/[…])

and

SUNRISE ENERGY PROPRIETARY LIMITED First Respondent
(Registration Number: 2005/[…])
(Registered Address: Off the Mr559,
Industrial Area, Saldanha, Western Cape, 7395)

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Second Respondent

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED Third Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 14 DECEMBER 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicant seeks an order placing the first respondent *("Sunrise")* under supervision and that business rescue proceedings should commence in terms of section 131(1), read with subsection (4) of the Companies Act 71 of 2008 (*"the Act').* An order is also sought for interim appointment of two named business rescue practitioners in terms of section 131(5) of the Act, pending ratification by Sunrise's creditors.

[2] This is Part B of the application brought by the applicant. In terms of Part A which was launched on 23 November 2022, the applicant sought urgent directives for hearing of the matter in the fast lane of the Third Division. By agreement between the applicant and Sunrise, a court order was issued on 6 December 2022 postponing the matter to 18 May 2023, and the costs were to stand over for later determination.

[3] On 18 May 2023, the third respondent *("JDC")* applied for leave to intervene as a party to the proceedings and to file an answering affidavit. Although the application was opposed by the applicant, it was granted, resulting in postponement of the matter to 4 September 2023. By 4 September 2023, some significant events had occurred, resulting in delivery of further pleadings and submissions. But first, the facts.

B. THE FACTS

[4] The applicant holds 9% of the issued share capital in Sunrise, whilst the IDC holds 31% thereof. The majority shareholding of 60% is held by the Mining Oil and Gas Proprietary Limited (*"MOGS* "). In tum, 51% of MOGS' shareholding is held by Royal Bafokeng Holdings Proprietary Limited (*"RBH* "), whilst 9% thereof is held by the Public Investment Corporation (*"PIC").*

[5] Sunrise holds a multi-phase, 25 year-long construction licence granted by the National Energy Regulator of South Africa *("NERSA* ") in terms of the Petroleum Pipelines Act 60 of 2003. In terms of the licence, it is permitted to construct, operate and manage a comprehensive Liquified Petroleum Gas *("LPG")* bulk import, handling and storage facility in the Saldana Bay Port (*"the Terminal")* whose purpose is to receive, store and distribute LPG. In addition to the NERSA construction licence, it holds a Terminal Operators Agreement with Transnet National Ports Authority *("TNPA* ") to construct and operate the LPG Terminal, which is the only one of its kind in the Western Cape.

[6] It is common cause that Sunrise required significant upfront capital and debt financing to construct the infrastructure required for the Terminal, the costs of which amounted to approximately R1.1 billion. It was funded for that endeavour by shareholder loans and senior debt obtained from the IDC and the PIC.

[7] In 2018 the IDC and the PIC extended an interest and capital payment moratorium in favour of Sunrise (*"the debt moratorium"),* the effect of which was that the payment of interest on the senior debt was limited to 50%. The debt moratorium was extended until May 2021.

[8] On 16 March 2018, Sunrise concluded a Throughput and Handling Agreement with an LPG aggregator known as Vita Gas (Pty) Ltd (*"the Vita Gas Agreement").* The Vita Gas Agreement was for a total period of 20 years, though renewable in 5-year increments.

[9] By June 2022, the board of directors of Sunrise *("the Board"),* including Mr Harmse who is a director of the applicant, had resolved to formally invoke dispute resolution mechanisms against Vita Gas, citing contravention of the Petroleum Pipelines Act, the Terminal Operators Agreement concluded with the

TNPA and the NERSA licence. This led to arbitration proceedings which were pending at the time that these proceedings launched.

[10] In addition to the arbitration proceedings, Sunrise lodged a complaint with the Competition Commission against Vita Gas, which was referred, on 28 October 2022, for adjudication to the Competition Tribunal, whilst in January 2023, Sunrise also brought an application for interim relief in that forum. The Competition Tribunal proceedings were pending when these proceedings were launched by the applicant.

[11] On 6 September 2022 the majority shareholders of Sunrise passed a resolution in terms of which a debt restructuring and refinancing plan (*"the debt restructuring plan")* was to be undertaken in respect of Sunrise. Then, on 28 February 2023 the Board passed a resolution authorizing Sunrise to sign a refinancing term sheet between RBH and JDC as lenders and Sunrise as borrower, and a term sheet between RBH and Sunrise, both term sheets being subject to shareholder approval.

[12] In terms of the debt restructuring plan, MOGS and RBH were to replace Sunrise's senior debt providers (IDC and the PIC) with RMB Holdings (Pty) Ltd. RBH holds a 13% equity in RMB Holdings. A portion of the IDC's senior debt of R205 million was to be converted, in terms of the debt restructuring plan, to an additional 9% equity for the IDC. Then, R250 million of the IDC's senior debt will be subordinated to the new senior debt to be provided by RMB Holdings. The remaining balance of IDC's senior debt of R210 million was to either be repaid by Sunrise to the JDC and/or replaced by RMB Holdings debt after 12 months.

[13] On 15 June 2023, before hearing of this matter and before hearing of the Competition Tribunal hearing, Vita Gas terminated the Vita Gas Agreement without prior notice, and Sunrise accepted the termination, though it

referred to it as repudiation. By 19 June 2023 Sunrise had secured a temporary aggregator, EML Energy to provide a shipment of LPG which was so delivered within 10 days of termination of the Vita Gas Agreement.

[14] These developments were set out in correspondence addressed to the applicant in which the applicant was implored to withdraw these proceedings. In one such letter, dated 28 June 2023, Sunrise provided the applicant with the details of the three-month interim arrangement reached with EML Energy, and stated that it had also embarked on a process to evaluate proposals for the use of the Terminal to supply LPG beyond September 2023. By the time these proceedings were heard the interim arrangement was to adhere at least until December 2023.

C. PRELIMINARY ISSUES

[15] A number of preliminary issues arose. First was the IDC's condonation application for the late filing of its answering affidavit, which was 17 court days late. Although the applicant initially opposed the application and also sought an order strike out certain matter from the founding application supporting the condonation, the opposition was withdrawn, rendering the striking application obsolete. The application for condonation was granted with no order as to costs.

[16] Next was the applicant's application to strike certain matter from Sunrise's supplementary affidavit. Sunrise brought an application to file a supplementary affidavit to explain, in essence, the fact that the Vita Gas Agreement had been terminated since the launch of these proceedings. There is no dispute that the supplementary affidavit was necessary. However, the applicant persists with the application to strike, which is dealt with later.

[17] The respondents, and in particular the JDC, have raised as a point *in*

limine, a subordination agreement reached between the parties (*"the Subordination Agreement")* which they say prohibits the applicant from launching these proceedings.

[18] It is common cause that the Subordination Agreement was concluded in 2017 between the applicant, Sunrise as Borrower, the IDC, MOGS and Bowwood and Main 254 (Pty) Ltd (*"Bowwood* ") as Debt Guarantor. The purpose was to subordinate the claims held by Sunrise's shareholders against it in favour of Bowwood.

[19] Clauses 6.1 and 3.2.13 provide as follows:

> "6.1 Each Shareholder, on its own behalf, hereby irrevocably and unconditionally undertakes in favour of the Lenders that it shall at no time until the Release Date effect any payment whatsoever (whether in cash or in kind) or take any other action or step which would contravene or be inconsistent or in conflict with the undertakings of such Shareholder in terms of clause 3.
>
> "3.2.13 No Shareholder shall enforce any judgment against the Borrower nor make an application for the liquidation, composition, compromise, administration, commencement of business rescue proceedings or any analogous or similar process of the proposal of a scheme of arrangement in respect of the Borrower, or collaborate with any other creditors of the Borrower in the making of such application, without the prior written consent of the Debt Guarantor, such consent not to be unreasonably withheld or delayed."

[20] It is common cause that the applicant did not seek prior written consent from Bowwood, the debt guarantor, before launching these proceedings. The respondents state that this constitutes a material breach of the terms of the

Subordination Agreement, and this application ought to be dismissed for this reason alone.

[21] In the replying affidavit, the applicant states that on 15 December 2022, after receiving the answering affidavit in which this issue is raised, it addressed a letter to the IDC's attorneys, who it says are also the legal representatives of Bowwood, requesting such consent, but had received no response at the time of delivering the replying affidavit. As a consequence, the applicant states that the IDC is estopped from raising the point *in* respond at all to its correspondence of 15 December 2022. In the further alternative, the applicant states that it does not concede that clause 3.2.12 of the Subordination Agreement precludes it from seeking the relief it seeks, although not much detail is provided in this regard. In yet a further alternative, the applicant adds that clause 3.2.13 of the subordination agreement is *pro non scripto* because the legislature could not have intended the parties to enter into a contract agreement which is contract contrary to the statutory provisions regulating the position of the company and its affected parties whilst it is in financial distress.

[22] In light of the view I take of the main matter, I do not consider it necessary to decide this issue. However, it is important to point out that, the *pro non scripto* argument raised in respect of clause 3.2.13 would affect all the parties to the subordination agreement, including Bowwood and MOGS, and they have not been cited as parties to these proceedings. Their rights, especially those of Bowwood as debt guarantor, would necessarily be prejudicially affected should such an order be made because the clause was undoubtedly inserted into the agreement to protect its position as against the lenders, and as a result, it would be inappropriate to conclude that the clause be *pro non scripto* without it being before the Court.

D. THE APPLICATION

[23] The applicant brought these proceedings on the basis of financial distress as defined in section 128(1)(*f*)(ii) of the Act, and/or just and equitable grounds for placing Sunrise under business rescue as contemplated in section 131(4)(i) read with sections 128(1)(f) and 131 (4)(iii) of the Companies Act. The financial distress was attributed to the onerous effect of the Vita Gas Agreement; the potential for the revocation of the debt moratorium; and the worsening of Sunrise's financial position over the short term.

[24] According to the applicant the Vita Gas Agreement was concluded at the insistence of MOGS's representatives on the Board, who failed to follow prescribed processes before its approval. The agreement was unduly onerous because, amongst other things, it created a situation in which Vita Gas was effectively the only customer permitted to use the Terminal, and the result was that there was no possibility for revenue growth through contracts with competing aggregators, and it stifled funding that was initially anticipated when the Terminal commenced operations. Furthermore, the applicant stated that the agreement possibly contravened the open access provisions of the NERSA licence and the accompanying Terminal Operator Agreement.

[25] As for the debt moratorium, the applicant avers that it has simply continued on an informal basis since May 2021 but is yet to be formally extended, and is in fact likely to be lifted. Without the debt moratorium, says the applicant, Sunrise would be commercially insolvent, although the applicant admits that, with the moratorium in place Sunrise is able to service its operational debts as and when they fall due and payable. Although the financial statements of Sunrise are prepared on a 'going concern basis', the applicant states that is solely dependent on the debt moratorium and continued support of shareholders, which, if discontinued, would create material uncertainty and significant doubt on the company's ability to continue as a going concern.

[26] Regarding the financial position of Sunrise, the applicant states that Sunrise has been factually insolvent within the contemplation of section 128(1)(f)(ii) of the Act since 2018. In this regard, the applicant has undertaken an analysis of financial performance for the period January 2017 to October 2022, relying on annual financial statements and management accounts. Its conclusion is that Sunrise has shown a declining gross profit of approximately 67%, and significant losses as a result of finance costs. Furthermore, the senior debt has increased by 41% as a result of drawdowns and capitalization of unpaid interest into the value of debt.

[27] The just and equitable grounds relate to alleged poor management and reckless borrowing which has led Sunrise to a position where its liabilities well exceed its assets. The complaints regarding the poor management are attributed firstly to Sunrise's executive chairperson, Ms Albertinah Kekana, a non-executive director and an Executive Director of RBH; and secondly, MOGS' representatives on the Board who similarly lack effectiveness. The applicant claims that there are conflicts of interest between MOGS' representatives and Sunrise on the one hand; and between the interests of Sunrise and RBH**,** being the party that will provide refinancing in terms of the debt restructuring plan, and may likely use that position to its benefit and to the detriment of the applicant.

[28] The complaints regarding poor management are coupled, in large measure, with allegations that many management decisions, including the agreement to enter into the Vita Gas Agreement, were taken despite vociferous protest by, and to the exclusion of, the applicant and Mr Harmse. In this regard, the applicant alleges that MOGS' commercial teams and Board members deliberately and intentionally hid all activities and documents and intentionally excluded the applicant from meetings related to the Vita Gas Agreement. A further just and equitable ground relied upon for the business rescue is that it will allow the applicant's shareholding to be maintained and its investment protected

and the further reduction in its share value curtailed if not reversed.

[29] In support for its case that there are reasonable prospects for rescue of Sunrise, the applicant set out three possible scenarios in its founding affidavit. In the first scenario the Vita Gas Agreement would be left unchanged; in the second, an aggregator additional to Vita Gas would be introduced to operate the Terminal; and in the third, the Vita Gas Agreement would be entirely suspended and new aggregators, not including Vita Gas would be introduced. In essence, the applicant's solution was the suspension of the Vita Gas Agreement with a simultaneous replacement of Vita Gas with alternate aggregators for an interim period of 6 months and a further two years.

E. THE RESPONDENTS' CASE

[30] Apart from the point *in limine* based on the subordination agreement, the respondents state that, since the Vita Gas Agreement was the main basis for the applicant's application and has subsequently been terminated, the application should fall away. In any event, Sunrise states that it had already taken steps to deal with the very concerns raised by the applicant in these proceedings regarding the Vita Gas Agreement, through the litigation already referred to, and that business rescue is not the appropriate mechanism to address those concerns but is rather likely to aggravate them.

[31] Sunrise also denies that the processes used to secure customers was flawed at the time of concluding the Vita Gas Agreement, or that the applicant was excluded, deliberately or intentionally, from discussions with Vita Gas in relation to the agreement, or that the Vita Gas Agreement was concluded outside the parameters of the Board's mandate. It explains that the Vita Gas Agreement was concluded at a time when it was under considerable pressure to commence its operations and generate income from the Terminal, after having incurred

considerable debt, in the region of R1 billion, to build it. Thus, apart from causing the demise of Sunrise, business rescue will result in wasteful expenditure. It was only a few years after concluding the Vita Gas Agreement that the problems relating to it became apparent.

[32] As regards the alleged financial distress, the respondents state that the applicant has failed to establish it. They point to the applicant's founding affidavit in which it is admitted that Sunrise is able to pay its operational expenses as and when they fall due, stating that this is not an indication of financial distress but rather shows the opposite. Sunrise has also attached its management accounts for December 2022 which indicate a year-to-date cumulative EBITDA of R62.9 million and cash balance of R24.6 million, showing that it is not financially distressed.

[33] Sunrise further points to the latest annual financial statements for the year ended 31 December 2021 in which it is stated that its status as a going concern is dependent on the conclusion of debt restructuring as well as the continued support of its shareholders. In this regard, it confirmed in the answering affidavit that firstly, its debt restructuring was underway, and set out an overview of the debt restructuring plan. However, since the cancellation of the Vita Gas Agreement, Sunrise explains in its supplementary affidavit that it subsequently initiated a comprehensive review of its financial models to assess the impact of the termination on its immediate liquidity and financial performance, and to determine strategies to mitigate any adverse effects, and continues to do so.

[34] As regards the debt moratorium, the respondents dispute the applicant's claim that it may be lifted, stating that it persists to date, and there has been no indication or intimation by either PIC or the IDC (*"the lenders")* that they intend to revoke it. In fact, according to the respondents, both lenders have expressed their continued support for Sunrise's continued operation. And, according to

them, the debt moratorium has continued while the parties are in debt restructuring discussions, with term sheets already signed. It is otherwise denied that the first respondent is commercially insolvent and the first respondent states that there is no reason to believe that this will change in the next 6 months.

[35] Furthermore, the respondents state that the applicant has failed to formulate a business rescue plan which provides for sufficient post-commencement finance following the suspension or cancellation of the Vita Gas Agreement, which was the main subject of a business rescue plan suggested by the applicant. In this regard, the IDC points to clause 3.2.14 of the Subordination Agreement which provides that the shareholders of Sunrise shall not vote to approve or oppose a proposed business rescue plan if such a vote would reduce the amounts payable to Sunrise's lenders. The IDC points out that all indications are that a business rescue plan would require the shareholders of Sunrise, which are also its senior lenders, to finance it. In other words, that a business rescue plan would reduce the amounts payable to Sunrise's senior lenders. There is therefore no prospect, says the IDC, that Sunrise's shareholders would agree to the proposed business plan and without such approval, the business rescue plan has no reasonable prospect of success.

[36] Sunrise also states that the applicant has, through the launching of these proceedings, attempted to cause negative financial consequences for it, and in particular to engineer a situation in which its principal or future funders withdraw their support. One such example is the perfection of a general notarial bond by Bowwood against Sunrise which followed the launching of these proceedings. Bowwood had guaranteed Sunrise's obligations to the IDC and PIC, and in turn, Sunrise had caused a general notarial bond to be registered in favour of Bowwood over its movable assets. Within two weeks of the institution of these proceedings, Bowwood instituted an urgent application to perfect the bond and to ensure that Bowwood is secured in the event that Sunrise is placed

in business rescue. As a result, the assets of Sunrise have been placed under judicial attachment pursuant to a perfection order although Sunrise continues to have full use and utility of its movable assets.

[37] The respondents deny the conflicts of interest alleged by the applicant, stating that the IDC and MOGS would be in no better position than the applicant should Sunrise be unable to carry on business. Rather, the respondents state that the application has been brought in bad faith by an aggrieved 9% minority shareholder, whose shareholders' loan is in any event subordinated. And, according to Sunrise, the applicant is aggrieved because it does not agree with the decisions taken by its majority Board and shareholders, and only seeks to force its will on the majority to the detriment of Sunrise.

[38] Sunrise also points to the higher consequences to be faced by it should it enter into business rescue, which include possible cancellation of the Terminal Operator Agreement or substantial loss of income followed by the cancellation of that agreement. Without the Terminal Operator Agreement, the first respondent states that it cannot operate the Terminal and that would be the end of its business.

F. THE APPLICABLE LAW

[39] Section 131(4) of the Companies Act provides that a court may make an order placing a company under supervision and commencing business rescue proceedings if it is satisfied that:

> "(i) the company is financially distressed;
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> (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to

employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company;"

[40] In terms of section 128(1)(f) of the Companies Act, 'financially distressed', m reference to a particular company at any particular time, means 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'.

[41] It has been stated [1] that the essence of financial distress is a liquidity problem or an inability to meet current debts and liabilities; and that balance sheet insolvency, in the sense of a deficiency of assets to liabilities, is logically not conclusive by itself of financial distress. The second leg of the definition of 'financially distressed' is less certain. The term 'insolvent' is not defined and could mean either commercial insolvency (i.e., an inability to pay debts as they are due) or factual insolvency (a situation in which a company's liabilities exceeds its assets). The authorities suggest that factual insolvency alone is not necessarily conclusive of financial distress.[2]

[42] Whether a company is in financial distress is a question of fact to be determined from a consideration of the company's financial position as a whole,

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[1] Cassim *et al, Contemporary Company Law,* 3rd Edition, 2021, p1185.
[2] *Cassim supra,* p 1186; Aee also Delport *et al, Henochsberg on the Companies Act 71 of 2008,* November 2022 - SI 30, p 459.

having regard to commercial realities. Regard should be had not only to the cash resources immediately available to the company, but also to resources which the company may realize by borrowing funds or selling assets or by financial support from a related entity - or, in the case of a state- owned company, from the government shareholder. Agreements with creditors for an extension of their terms of trade may also be taken into account.'[3]

[43] Circumstances that are taken into account include whether the debt of creditors is or can be subordinated, whether creditors are willing to extend their credit and whether there is additional funding available, externally (debt) or internally (share capital)."[4]

[44] The Supreme Court of Appeal has held[5] that a company which is commercially insolvent, though factually solvent (or in other words, unable to pay debts which are due, despite its assets exceeding its liabilities), is in financial distress for the purpose of s 131(4)(a)(i).

[45] A reasonable prospect of rescuing the company has been interpreted to be a lesser requirement than reasonable probability, but more than a mere *prima facie* case, an arguable possibility or a mere suggestion. It must be a prospect (expectation) based on a ground or grounds that are objectively reasonable.[6] Mere speculative suggestions will not suffice. An applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.[7]

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[3] *Cassim supra,* p 1185.
[4] *Henochsberg supra,* page 458 - 458(1).
[5] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) para [7].
[6] *Oakdene supra* para [29].
[7] *Oakdene* paras [30)-(31); *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para [17]; *ABSA Bank Limited v Newcity Group (Pty) Ltd and another related matter* [2013] 3 All SA 146 (GSJ) para 20.3.

[46] The onus to satisfy the requirements for busJness rescue rests on the applicant, who must discharge it in accordance with the rules of motion proceedings in its founding papers.[8] In the event of factual disputes, the application can only be decided on the respondent's version of the disputed facts, unless that version is so far-fetched or clearly untenable that it can justifiably be rejected merely on the papers.[9]

[47] Even if the requirements of section 131(4) of the Companies Act are considered to have been satisfied, the court retains a discretion to refuse to grant an order to place the company under supervision.[10] Business rescue proceedings must not be used for strategic or ulterior purposes.[11]

G. DISCUSSION

[48] There is no doubt, when reading the papers, that the main basis for this application was what was referred to by the applicant as the suffocating effect of the Vita Gas Agreement. According to the founding affidavit, the reasons for the factual insolvency of Sunrise are linked to the Vita Gas Agreement, and according to the replying affidavit, the Vita Gas Agreement and the operation of Sunrise by MOGS and the Board is in fact, the root problem for Sunrise's financial position.

[49] And a business rescue practitioner, according to the applicant, would be entitled to suspend the Vita Gas Agreement in terms of section 136(2)(a) of the

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[8] *Oakdene* para [29].
[9] *Oakdene supra* para [3].
[10] *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 (5) SA 422 (GNP) para [37]; *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)* 2017 (3) SA 74 (WCC) para [76].
[11] *Cassim supra,* p 1205-6; *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) para [3]; *Molyneux and Another v Patel and Others* (14618/2014) [2014] ZAWCHC 191 para [25]; *ABSA Bank Limited v Newcity Group supra* para [28].

Act, and renegotiate an alternative agreement with either Vita Gas or alternative aggregators, which would allow for multiple aggregators to utilize the Terminal, based on market-related fees, sufficient to meet all of Sunrise's debt commitments. This would allow Sunrise to increase its revenue substantially thus allowing it to operate on a commercially viable basis, free from the exclusivity and oppressive fee structure contained in the Vita Gas Agreement. This, according to the applicant, could have the effect of immediately increasing Sunrise's revenue by at least 30 to 45%.

[50] As it turned out, that is what happened. As the applicant was advised in letters dated June 2023, not only had the agreement been summarily terminated by Vita Gas, but Sunrise was now generating an additional R9.1 million per month in terms of the interim contract with EML Energy, and this was to endure at least until the end of December 2023. None of this is disputed by the applicant. Nor was it disputed that EML Energy now delivers LPG on throughput charges which are significantly higher than those which were paid by Vita Gas. It will be remembered that this is one of the items the applicant sought as a better alternative to the Vita Gas Agreement.

[51] Thus, to the extent that the Vita Gas Agreement was affecting Sunrise's debt capacity and ability to service its debts, this new arrangement was to have a positive impact, similar in extent to, if not more than, what the applicant predicted would be the case if the agreement were to be terminated. In other words, for the immediately ensuing six months following cancellation of the Vita Gas Agreement, there is no basis for the applicant's contention that Sunrise will not be in a position to meet its financial obligations as and when they arise or that it will become insolvent in the next six months as a result of not being able to make payments to its senior lenders. There is no evidence before this Court to establish that, following the termination of the Vita Gas Agreement, Sunrise will not be able to meet its financial obligations as and when they arise in the

immediately ensuing 6 months. If anything, the common cause evidence relating alone from the cashflow position following cancellation of the agreement, Sunrise is even further away from being susceptible to business rescue.

[52] In terms of section 128 of the Companies Act a company is not financially distressed if it is likely to be able to pay all of its debts as they become due and payable within the immediately ensuing 6 months or if it is not likely to become insolvent within the immediately ensuing 6 months. As at the time of hearing this matter, there was accordingly no evidence to suggest that the company was in financial distress as defined in section 128 of the Companies Act.

[53] At best for the applicant on this score, the cancellation of the Vita Gas Agreement brought about a fresh review of the financial performance of Sunrise. Of this it was advised in one of the letters dated June 2023, that, following the cancellation, Sunrise had initiated a comprehensive review of its financial models to assess the impact of the tem1ination on its immediate liquidity and financial performance, and to determine strategies to mitigate any adverse effects. It would be inappropriate and premature in those circumstances to grant the relief sought by the applicant.

[54] However, the applicant now states that the cancellation of the Vita Gas Agreement was merely the first step contemplated by the business rescue application and was not the aim of the application which was to rescue a company in financial distress. It states that the cancellation of the Vita Gas Agreement has not cured the underlying causes for the financial distress caused by the mismanagement of Sunrise. While the alleged mismanagement is discussed below, there is no getting away from the fact that, upon a reading of the founding papers, the Vita Gas Agreement was the central basis for the application. The result of that approach was all three scenarios proferred by the applicant as reasonable prospects for business rescue entailed some

consideration of the role of Vita Gas Agreement.

[55] But, even before termination of the Vita Gas Agreement, the applicant had conceded in its founding papers that Sunrise was able to meet its debts as and when they became due and payable. And the facts supported that concession because Sunrise continued to operate as it had done after the urgent launching of these proceedings on 23 November 2022, until the hearing resumed some I0 months later on 4 September 2023.

[56] Another concession made by the applicant when the proceedings were launched was that Sunrise was not commercially insolvent. However, this was said to be attributed only to the debt moratorium and the support of the shareholders, both of which could be imminently revoked. However, the respondents dispute both assertions as unfounded speculation.

[57] Regarding the support of the Sunrise lenders and shareholders, it is not gainsaid that Sunrise continues, even after the cancellation of the Vita Gas Agreement, to enjoy the support of its majority shareholders and lenders, and that they do not agree that it should be placed into business rescue. Needless to say, this is evidenced by the fact that the JDC has joined these proceedings as a party and continues to oppose the relief sought by the applicant.

[58] I take note of the perfection of Bowwood's notorial bond in terms of a court order dated 8 December 2022. It is clear from the contents of that application - which was handed up in Court - that these business rescue proceedings were a precipitating factor for the launching of those proceedings. This is expressly stated in the founding affidavit in which Bowwood explained that the business rescue application had rendered its position against the applicant precarious and that it needed to secure its financial position that was protected by the notarial bond. This was also as a result of the possible domino

effect of other litigation against Sunrise, resulting again from the launching of these proceedings. The fact that these proceedings precipitated the launching of that application is also explained by its urgent nature and timing which was within less than a week after the parties in this case agreed to postpone the matter to May 2023.

[59] Although there is mention made in Bowwood's application of the applicant's outstanding debt to the IDC and the PIC, the founding affidavit only made mention of a demand made by the PIC for payment of the outstanding debt in June and October 2018. There is no evidence of a similar demand by the JDC. There is also no evidence of what occurred between October 2018 and November 2022 when the applicant launched these proceedings, or between October 2018 and December 2022 when Bowwood launched its application. The respondents did not file answering papers in Bowwood's application in response to those allegations, which, significantly, were contained in Part A of those proceedings. In any event, it is relevant that, despite the alleged demand by the PIC for payment of the debt in 2018, both the JDC and the PIC have actively continued to support the business of Sunrise since then, and the JDC opposes the current proceedings. I am accordingly not persuaded that the launching of those proceedings establishes financial distress or factual insolvency, or that it is sufficient basis to order the relief sought by the applicant.

[60] As regards the alleged revocation of the debt moratorium, the issue continues to be in dispute between the parties, with the respondents explaining that the *status quo,* which involves the continuation of an informal moratorium, continues to prevail. In its replying affidavit to the IDC's answering affidavit, the applicant attached a letter dated 21 July 2022 from the PIC to the CEO of Sunrise, in which it is stated that Sunrise's request for a moratorium, and for facilities for phase two expansion of the Terminal was declined. The applicant states that the PIC, as principal lender has effectively foreclosed on Sunrise and

withdrawn its support, and that the meaning of the letter is that the PIC requires that the amounts loaned to Sunrise be repaid.

[61] Given that the PIC is not party to these proceedings, the extensive meaning of the letter given by the applicant, namely that the PIC required that the amounts loaned to Sunrise be repaid, is not established by the letter and the facts do not support such a construction. Those are not the express terms of the letter. However, it cannot be denied that in terms of the letter Sunrise's request for a moratorium was declined. Nor, however, is the respondents' version that the moratorium continues to apply, though on an informal basis.

[62] I do not consider the respondents' version to be far-fetched in this regard in light of the fact that on 6 September 2022, a few months after the date of the letter refusing the extend the moratorium, the majority shareholders made an in-principle decision to approve the debt restructuring proposal in respect of Sunrise. Rather than an indication of foreclosure and revocation, this indicates the contrary. Furthermore, on the applicant's own version, it is the debt moratorium that enabled Sunrise to continue meeting its financial obligations to date, and to pay its operational debts as and when they arose. There is simply not enough evidence on this issue to conclude it in favour of the applicant - that there is no longer a debt moratorium in place. Not only is it disputed by one of the major shareholders, the IDC, but the PIC is not a party to these proceedings to explain its stance.

[63] Another issue that is vociferously criticized by the applicant in its replying affidavits concerns the debt restructuring plan. The criticisms in this regard are many and varied. The respondents point out, however, that following the cancellation of the Vita Gas Agreement, the debt restructuring plan embarked upon in September 2022 had to be significantly augmented, and a comprehensive review and remodelling of Sunrise's finances was embarked

upon. As I have indicated, this was communicated to the applicant in the letters of June 2023. As a result, the debt restructuring plan is no longer relevant. It is accordingly not necessary to dwell on the applicant's extensive criticism of it. However, the applicant has, in its replying papers proposed an alternative restructuring plan. The respondents point out that the applicant's plan assumes that the IDC and PIC will write off R252 million of their senior debt, and that R260 million of their debt will be subordinated. There is no evidence of support for such a plan from either lender.

[64] Then, in its replying affidavit to the IDC the applicant has undertaken a financial analysis to show that Sunrise remains factually insolvent despite the cancellation of the Vita Gas Agreement. This is said to be due to the oppressive debt position which remains firmly in place as well as the applicant's exclusion from providing input in decision making. In this regard, the applicant has set out its projected cash flow of Sunrise for the period 2023 to 2032 which it says have been extracted from Sunrise's audit and risk committee report dated 30 June 2023, and which it says shows that Sunrise cannot service existing debt levels until 2032.

[65] There are also calculations allegedly comparing the net present value of discounted future cash flows according to the respondents' business rescue plan versus the discounted future cash flows according to Sunrise's restructuring plan. The calculations in this regard resumed by means of a written note handed up during oral reply by counsel. Upon enquiry from the Court regarding whether the calculations were based on evidence contained in the papers, the applicant's counsel promised to clarify the issue and to provide references in writing. Even at that stage the respondents objected to the calculations, which they said arose for the first time during the reply by means of a written note.

[66] Nevertheless, the Court granted the applicant opportunity to clarify the

issue. When the written clarity was delivered on 8 September 2023, the respondents complained that it not only introduced new arguments, but also sought to make further allegations which are not supported by the record. There were also complaints that the applicant sought to rely on annexures or portions contained therein, which were not previously referred to. The applicant again sought to reply to the respondents' submissions, which opportunity was granted, and further note in reply was delivered on 11 October 2023.

[67] I have considered all of the applicant's submissions in this regard, which are not necessary to outline in detail, and it is clear that the applicant is now seeking to mount a new case for its allegations of factual insolvency, relying on new submissions and calculations, and seeking to introduce new evidence, including by submitting a business rescue plan in reply, something it failed to do in its founding papers and which the respondents had pointed out from the answering affidavits. This is manifestly impermissible and is unfair to the respondents who were called to meet the case based on the founding papers of the applicant.[12]

[68] I do observe that in effect, the applicant seeks to deal with the fact the Vita Gas Agreement, upon which it initially relied for these proceedings, has fallen away. In this regard the applicant states that it is entitled to 'refocus its approach' after the termination of the Vita Gas Agreement, the termination of the moratoriums and the perfection of the notarial bond by Bowwood. As the respondents point out, the applicant did not deliver an affidavit to deal with some of these events, and when it did, it was in replying affidavits to the IDC's answering affidavit. It is clear from the many submissions that, in effect, the applicant sought to belatedly make its case in the written submissions, which, as I have said, is impermissible. One of the reasons for the impermissibility is that

[12] *Swissborough Diamond Mines Pty Ltd & others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323H - 324C; *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at para 177.

the calculations involve comparison and analysis of information contained in annexures which were not expressly identified or relied upon in the affidavits.[13] This is admitted in the applicant's replying note of 11 October 2023.

[69] But in any event, insofar as these calculations seek to criticize the debt restructuring plan mentioned in the answering affidavit, they are not helpful as they have been overtaken by undisputed events, namely that the cancellation of the Vita Gas Agreement has required a comprehensive review of the financial affairs of Sunrise.

[70] Lastly on this issue, when regard is had to the tenor and extent of the applicant's criticisms against the respondents' debt restructuring plan which includes alternative ideas for the financing of the Phase 2 development, it becomes evident that this is once more an aspect which is not appropriate for this Court to determine by way of business rescue proceedings, and is better suited for discussion and resolution at Board or shareholder level. For all these reasons, I do not deem it appropriate to take the calculations into account.

[71] I now tum to deal with the just and equitable grounds relied upon by the applicant. In this regard, the applicant's papers are replete with allegations of not only mismanagement, but Mr Harmse's alienation by the management of Sunrise, which includes MOGS' representatives. The allegations are extensive and include allegations of failure to communicate with, and to provide documents to Mr Harmse regarding important issues, including the decision to enter into the Vita Gas Agreement. There are also allegations regarding conflicts of interest, to which I have already made reference.

[72] Apart from the fact that these allegations are disputed and not established on the evidence, I am not satisfied, without more, that they amount to financial

[13] *Van Zyl & others v Government of the Republic of South Africa & others* 2008 (3) SA 294 (SCA) para 40.

reasons for business rescue as contemplated in section 131(4)(a)(iii). Rather, the overall picture which emerges from the papers is that, since the majority shareholders became involved with the business of Sunrise, the applicant and specifically Mr Harmse has had very little influence in the decision-making, and does not always agree with the decisions taken. I do not consider it appropriate to order business rescue for the purposes of resolving shareholders' and directors' conflicts and disagreement regarding the direction that the company should take. As the respondents state, the Companies Act provides remedies for a minority shareholder or disaffected director who is truly aggrieved by decisions of the majority shareholders or the rest of the Board, including section 163 of the Act.

[73] Rather, it is clear that the application was brought in order to bring about the applicant's wishes on how Sunrise should be operated. Even in the replying affidavit the applicant states that, in contrast to Sunrise's debt restructuring plan it (the applicant) has *"suggested through the business rescue, a neat mechanism to address the Vita Gas Agreement in a manner that will generate adequate income by the Terminal organically". In addition, funding required for the expansion of the Terminal could be sourced on a far more commercial and less draconian basis than that currently offered by RMB".* There are many other instances displaying the applicant's similar attitude in this regard. In effect, the impression gained from reading the applicant's papers is that the business rescue proceedings are being used to execute the applicant's preferred method of operating the business, rather than the plan adopted by the majority.

[74] It is one of the well-trodden fundamental principles of company law that, by becoming a shareholder in a company, a person undertakes to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where

they adversely affect his or her own rights as a shareholder.[14] That principle of the supremacy of the majority is essential to the proper functioning of companies. The applicant, being a 9% minority shareholder and Mr Harmse a single director on the company's Board of directors, are required to abide by those principles. It has not been shown that the interests of the applicant as a shareholder can only be safeguarded through a formal business rescue process in the circumstances of this case.

[75] I also take into account that the allegations of mismanagement and conflicts of interest involving MOGS representatives require the Court to reach serious adverse findings against individuals and entities which are not joined as parties to these proceedings and which have not been granted opportunity to address the allegations directly made against them. The fact that they may have knowledge of these proceedings but did not intervene is not sufficient, in the circumstances of this case, to entitle this Court to deal with the issues and serious allegations raised by the applicant.[15] They clearly have a direct and substantial interest in the issues alleged about them. I consider it inappropriate to grant the order on these grounds.

[76] The same applies in respect of the applicant's alternative relief, which is sought in reply, for an order in terms of section 163 of the Companies Act forcing Sunrise or its majority shareholder to buy out its shares. The majority shareholder is not cited as a party in these proceedings. Nor was this the basis on which the applicant approached this Court. Furthermore, no amendment was sought to include such relief, and the relief sought in terms of the notice of motion remains relief in terms of section 131(4) of the Companies Act.

[77] As regards the prospects of business rescue, I take into account the fact that the majority shareholders have made it clear that they will not inject any

[14] *Sammet v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) 678H.
[15] See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

money into Sunrise should an order be granted for its business rescue, and none of the majority shareholders support business rescue. It is in this respect that clause 3.2.14 of the subordination agreement is relevant, and it provides that the shareholders of Sunrise shall not vote to approve a proposed business rescue plan if such a vote would reduce the amounts payable to Sunrise's lenders. Even on the applicant's version, the evidence indicates that a business rescue plan would entail significant reduction of the amounts payable to Sunrise's senior lenders, and that its senior lenders would be required to expend more money to finance it. There is very little prospect of Sunrise's shareholders agreeing to any such proposed business plan, and without such approval, the business rescue plan has no reasonable prospects of success.

[78] Furthermore, it is common cause that placing Sunrise under supervision would constitute a breach of the Terminal Operator Agreement concluded between it and the TNPA. That is in terms of clause 40 of the Terminal Operator Agreement which entitles the TNPA to terminate the agreement if Sunrise is placed under business rescue. It is also not in dispute that that would automatically bring an end to the business of Sunrise and entitle the TNPA to take possession of the Terminal. This 1s a severe consequence, especially in circumstances where the applicant has failed to establish the financial distress relied upon.

[79] There is also to consider the common cause fact that Sunrise has, to a large extent been funded by public funds, which would be placed in jeopardy if it were placed under supervision and the prospect of recovery of the funds would likely diminish. Based on the evidence, it is in the interest of the public to allow Sunrise to continue to engage additional aggregators, and to devise and implement a plan to resolve any financial difficulties encountered which it has already started to do.

[80] I also observe that, insofar as the application relied upon the Vita Gas Agreement, the lodging of these proceedings was in any event superfluous because the applicant relies on similar arguments as those raised in the arbitration and Competition Tribunal matters. This is evident from the Board's resolution which summarized the alleged contraventions by Vita Gas as the contraventions of the provisions of the NERSA licence and of the Terminal Operator Agreement, and the applicant relies on those arguments in these proceedings. Both of those sets of litigation were pending when these proceedings were launched, which shows Sunrise was already dealing with the complaints relating to the Vita Gas Agreement. The applicant and Mr Harmse were also party to those proceedings, and were also party to the Board's resolution, in which receipt oflegal advice forming the legal basis for the launching of both sets of litigation was noted.

[81] Although the applicant is not precluded from relying on the same arguments regarding the Vita Gas Agreement here, it does indicate that, a few months before the launching of the proceedings, the applicant was of the view that the issues relating to Vita Gas could be resolved by taking the steps approved by the Board. There is no discernible explanation from the papers for why the applicant deemed business rescue the more appropriate route to follow a mere few months after the Board's resolution at the time that the applicant chose to approach this Court.

[82] What Mr Harmse does state is that, as a precursor to these proceedings he addressed a letter to the Board stating that the Vita Gas Agreement must be addressed urgently as that is the key to Sunrise's survival from its terrible financial position. He states that the letter was discussed at a special meeting of the Board where he was accused of breaching his fiduciary duties and he was excused from the meeting for more than 45 minutes for discussion on the matter to ensue. It was soon after that date that he brought these proceedings, once it became clear that the only manner in which to address the Vita Gas Agreement was through an application for supervision proceedings. This shows clearly, in my view, that the reason Mr

Harmse approached this Court is that he lost a debate in the boardroom.

[83] It is now convenient to deal with the applicant's application to strike certain matter from Sunrise's supplementary affidavit.

H. THE APPLICATION TO STRIKE

[84] The applicant seeks an order that paragraph 21 of Sunrise's supplementary answering affidavit be struck with costs on a scale between attorney and client. In the said paragraph, Sunrise refers to a *'without prejudice'* letter sent by the applicant's attorneys on 29 June 2023, in response to a letter from Sunrise's attorneys in which the applicant was requested to withdraw this application and tender costs.

[85] In paragraph 21 of the supplementary answering affidavit, Sunrise states that the 'without prejudice' letter of 29 June 2023 did not amount to a genuine attempt to settle the dispute between the parties, and continues that: *"It has become evident that [the applicant] is attempting to use the business rescue application as leverage in a misguided attempt to extract a favorable settlement for itself."* This is the subject of the striking out application.

[86] The applicant objects to what it terms *"an inappropriate conclusion"* at paragraph 21, which it says also constitutes a breach of the applicant's privilege. In support of its objection the applicant states that the averments are nonsensical and counterintuitive because, if it has no prospects of success in the business rescue application then there is no leverage to speak of - it can only have leverage if the business rescue has merit, in which case the applicant states the Sunrise effectively admits that the applicant's application has merit. Secondly, the applicant states that this is not the type of matter where an amount of money is being sought that can be settled by one party putting pressure on the other to pay. The applicant points out

that it is a shareholder of Sunrise and wants to ensure that its investment is maximized rather than eroded.

[87] I have found no merit in the striking application, and in particular, in the allegation that the applicant's privilege has been breached. Sunrise has not attached the 'without prejudice' letter referred to in its supplementary affidavit. Neither has it divulged the contents of the letter or of the settlement offer referred to. It has not been established how the applicant is prejudiced by the averments made in the paragraph, although I accept that they are disputed. To my mind, they are similar in nature to the allegation that the applicant and Mr Harmse seek to exact their preferences upon the majority shareholders by launching and continuing with this litigation. I have found no cogent basis for the application to strike paragraph 21.

[88] For all these reasons, I have found no basis to grant the relief sought by the applicant or to exercise a discretion to come to its aid. The requirements for supervision and business rescue have not been established.

I. COSTS

[89] There is no reason why costs should not follow the result. From its inception, the application had little merit as it failed to satisfy any requirements for business rescue in terms of the Act. And the prospects of success were significantly reduced after the cancellation of the Vita Gas Agreement, which was the main basis on which the applicant brought these proceedings.

[90] While the applicant did not file a supplementary affidavit dealing with the cancellation of the Vita Gas Agreement, it delivered the submissions containing the belated calculations and arguments that I have discussed, which I have also concluded were impermissible. Although the Court granted the applicant's counsel opportunity to clarify its calculations by providing references, the submissions

went beyond providing references, venturing into new, detailed mathematical arguments. It is no wonder that the respondents complain that they have had to incur unnecessary costs of having to consider the belated calculations, which were in any event irrelevant, and to file further submissions references.

[91] As regards Part A of the proceedings, no grounds for urgency were established. The Vita Gas Agreement, which was initially at the heart of the applicant's complaint, has been in existence and operation since 16 March 2018. At the time of launching these proceedings, concerns regarding the Vita Gas Agreement were the subject of pending arbitration proceedings and proceedings before the Competition Tribunal. As for the involvement of MOGS 's representatives in Sunrise, that has been the position since January 2016. And the alleged factual insolvency of Sunrise commenced, according to the applicant, in 2018.

[92] Given these timeframes, I would have expected the applicant to provide reasons for why business rescue was required so urgently in November 2022. No such reasons were provided. Although business rescue applications may enjoy some measure of urgency, there is no reason why this matter could not have been launched and placed on the semi-urgent roll, with permission of the (Acting) Judge President, per the usual practice in this Division. [16]

J. **ORDER**

[93] In all the circumstances, the following order is granted:

a. The applicant is to pay the costs occasioned by the first respondent's attendances in respect of Part A.

[16] See, for example, *Du Toit v Azari Wind* 2022 (2) SA 51O (WCC) para [23] at p 515F.

b. The relief sought in Part B is dismissed with costs.

c. In respect of Part B, the applicant is ordered to pay the costs of first and third respondents, the costs of first respondent to include costs of two counsel, where so employed.

N. MANGCU-LOCKWOOD
Judge of the High Court