

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023/028612

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>15 June 2023</u>	<u>Wrightley</u>
DATE	SIGNATURE

In the matter between:

MARK MORRIS FARBER

First Applicant

10 FIFE AVENUE BERA (PTY) LIMITED

Second Applicant

28 ESSELEN STREET HILBROW CC

Third Applicant

39 VAN DER MERWE STREET HILLBROW CC

Fourth Applicant

HILLBROW CONSOLIDATED INVESTMENTS CC

Fifth Applicant

and

TUMISANG KGABOESELE N.O.

(cited in his capacity as the Business Rescue
Practitioner of 266 Bree Street (Pty) Ltd)

First Respondent

266 BREE STREET JOHANNESBURG (PTY) LTD
(In business rescue)

Second Respondent

TUHF LIMITED

Third Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Fourth Respondent

Case Number: 2023/032790

In the matter between:

TUHF LIMITED

Applicant

and

**266 BREE STREET JOHANNESBURG (PTY) LTD
(In business rescue)**

First Respondent

**TUMISANG KGABOESELE N.O.
(cited in his capacity as the Business Rescue
Practitioner of 266 Bree Street (Pty) Ltd)**

Second Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Third Respondent

Business rescue – application to remove practitioner – counterapplication under s 141(2) of Companies Act 71 of 2008 to discontinue business rescue and place company into liquidation – powers of court under s 141(3) - whether court may extend business rescue plan after execution thereof has failed – held discretion to grant appropriate order under s 141(3) does not permit court to impose extension of business rescue contrary to wishes of creditors – company placed into final liquidation.

JUDGMENT

KEIGHTLEY, J

Introduction

- [1] This judgment encompasses two applications (with counterapplications) involving many, although not all, of the same parties. They have an established track record of litigation between them, some of which was dealt with through the Commercial Court of this Division, presided over by Senyatsi J. The issues and facts raised in the present two applications are intertwined.
- [2] The initial, and main protagonist, is Mr Farber. He is the first applicant under case number 2023/028612 (the Farber application) and is the sole

member/shareholder/director and controlling mind of the remaining applicants in that case. For purposes of this judgment, it is necessary only to highlight Hillbrow Consolidated Investments CC (HCI) as his co-applicant, the remaining co-applicants being surplus to narrative requirements. Mr Farber has two main adversaries in the litigation: Mr Kgaboesele N.O., the appointed business rescue practitioner of a company, 266 Bree Street Johannesburg (Pty) Ltd (266 Bree), and TUHF Limited (TUHF), 266 Bree's main creditor.

- [3] 266 Bree is a property holding company. It owns immovable property in the inner city of Johannesburg known as Metro Centre. The property has residential and commercial tenants, although it is common cause that it is currently operating at a 40% occupancy rate. Under a property management agreement (the PMA) entered into between Mr Farber (representing 266 Bree) and HCI (represented by Mr Farber), HCI became the managing agent responsible for securing leases, maintaining the building and the collection of rentals.
- [4] Mr Kgaboesele is the third business rescue practitioner to have been appointed following 266 Bree being placed in business rescue by Mr Farber, the sole director, on 27 July 2022. The two previous business rescue practitioners resigned without achieving anything by way of a business rescue plan. In contrast, Mr Kgaboesele tabled a business rescue plan which was adopted with the support of TUHF. I will say more about the business rescue plan later, suffice to say for present purposes that it involved the sale of 266 Bree's immovable property within a specified period of time, and the termination of the PMA with HCI. Until very recently, Mr Farber and HCI opposed any interference with the PMA and with HCI's status as managing agent of Metro Centre.
- [5] Mr Kgaboesele details the obstacles he has faced in obtaining Mr Farber's co-operation in the business rescue process. He suggests that Mr Farber's conduct is in some respects fraudulent, particularly in the way he has controlled the finances of his different entities, including 266 Bree and HCI. Mr Farber, in turn, accuses Mr Kgaboesele of colluding with TUHF to cause the business rescue plan to fail and to force 266 Bree into liquidation. I do not have to make any findings as regards whether Mr Farber is guilty of fraudulent conduct. Suffice

to say, however, that there is evidence of his lack of transparency, particularly on financial information, and obstructive conduct in the business rescue proceedings.

- [6] The allegations of collusion formed the basis of the Farber application. The applicants sought, initially by way of urgent relief: an interdict prohibiting Mr Kgaboesele from: (1) acting as the business rescue practitioner; (2) taking any steps to implement the business rescue plan; (3) selling 266 Bree's immovable property; or (4) enforcing a suspension or cancellation of the PMA. The application was opposed by both Mr Kgaboesele and TUHF, and both filed counterapplications.
- [7] In his counterapplication Mr Kgaboesele seeks an order discontinuing the business rescue proceedings and placing 266 Bree in provisional liquidation in terms of section 141(2)(a)(ii) of the Companies Act 71 of 2008 (the Act). TUHF's counterapplication (the TUHF counterapplication) is for an order holding Mr Farber and HCI in contempt of two court orders granted by Senyatsi J. In addition, it seeks an interim order, pending the liquidation and appointment of a liquidator, essentially prohibiting Mr Farber and HCI from taking steps to collect rentals from the tenants of 266 Bree or from interfering in any way in the exercise by TUHF of its rights.
- [8] The application under case number 2023/032790 (the TUHF liquidation application) was instituted as an adjunct to the Farber application. It is a 'belts and braces' application intended to cover any shortfall that may occur in the BRP liquidation counterapplication. It seeks the same end as Mr Kgaboesele's application, save that TUHF contends for a final, rather than a provisional order of liquidation. Although not cited as parties in the TUHF liquidation application, Mr Farber and his co-applicants in the Farber application sought leave to intervene and filed answering affidavits opposing the relief sought. TUHF took no issue with Mr Farber's intervention as an affected party, being the sole shareholder of 266 Bree.

[9] Had it not been for events that occurred when the hearing commenced, this judgment would have been longer and more detailed. Surprisingly, on the day of the hearing the Farber applicants filed new heads of argument in reply to those filed by the respondents. In them, and as counsel for the Farber applicants confirmed in his oral submissions to court, the Farber applicants accepted that: “in light of the professed intention of Mr Kgaboesele to seek the liquidation of 266 Bree Street and to not continue to implement the Business Rescue Plan ... the relief sought by the Applicants is for all intents and purposes moot”. Mr Kgaboesele’s intentions were made perfectly clear in his answering affidavit and counterapplication, which were filed on 5 April 2023. The Farber applicants did not explain why it had taken them five weeks to come to the realisation that their relief was moot. I say no more on their conduct at present but will revisit the issue when I consider an appropriate costs order.

[10] I should add that the about-turn by the Farber applicants on their application renders it unnecessary for me to make a finding on whether Mr Kgaboesele colluded with TUHF and thus failed to carry out his duties as business rescue practitioner. Nonetheless, I find it necessary to record that the allegations of collusion are singularly unconvincing. The fact of the matter is that TUHF holds by far the majority of the voting rights in the business rescue proceedings. As such, it has the power to determine the vote on any business rescue plan. Mr Kgaboesele can hardly be accused of acting in an unprofessional manner by heeding TUHF’s response to the proposed business rescue plan and incorporating certain consequential amendments before putting the plan to the vote.

[11] Despite recognising that their original relief had become moot, the Farber applicants did not abandon their opposition to the liquidation applications. Instead, they shifted the focus of their opposition to s 141(3) of the Act, which gives the court a discretion to make an “appropriate” order (other than placing the company concerned into liquidation) in an application for the discontinuation of business rescue proceedings. The Farber applicants’ contention is that it would be appropriate in this case, instead of liquidating 266 Bree, to extend the business rescue plan and allow for a further attempt to sell the immovable

property. They contend that this would garner a greater return for creditors than if the property were to be sold by a liquidator. They also propose the appointment of a new business rescue practitioner.

[12] The effect of the Farber applicants' about-turn means that the issues before me have become relatively simple:

12.1 Should the business rescue proceedings be discontinued under s 141(2) of the Act and 266 Bree be placed in either provisional or final liquidation, or have the Farber applicants established a case for me to exercise my discretion under s 141(3) and to grant the alternative "appropriate" relief they contend for?

12.2 Has TUHF made out a proper case for the interim interdict sought in their counterapplication?

12.3 Regarding the counterapplication for a declaration of contempt, TUHF advised the court that they would seek, instead, a declarator that Mr Farber and HCI had breached the two Senyatsi J orders. Are they entitled to this relief?

12.4 Finally, the issue of costs.

Should 266 Bree be placed into liquidation?

[13] Section 141(2)(a) provides that:

"If, at any time during business rescue proceedings, the practitioner concludes that—

- (a) there is no reasonable prospect for the company to be rescued, the practitioner must—
 - (i) so inform the court, the company, and all affected persons in the prescribed manner; and
 - (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation."

[14] Mr Kgaboesele's counterapplication is premised on his duties as business rescue practitioner under this section. It is a peremptory provision. Failure to act in its terms or to resign as business rescue practitioner would constitute a breach

of his duties.¹ For this reason, Mr Kgaboesele stated his position plainly in his affidavit. He is of the view that the business rescue plan has failed and can no longer be implemented; there is no reasonable prospect of rescuing 266 Bree; and he has no intention to continue to conduct himself as business rescue practitioner once his obligations under s 141(2)(a) are fulfilled.

[15] The Farber applicants' response to Mr Kgaboesele relies on s 141(3) and, in particular, on that portion underlined below:

“(3) A court to which an application has been made in terms of subsection (2)(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances.” (Emphasis added.)

[16] It is common cause that 266 Bree is at least commercially insolvent. I should add that on the evidence before me there is every indication that it is also factually insolvent. It is also common cause that TUHF is its largest, and only secured creditor. The debt to TUHF arises out of a loan in the amount of R19 070 035 advanced to 266 Bree for the acquisition and refurbishment of Metro Centre. The loan is secured by a mortgage bond registered over the property as well as suretyship agreements entered into by Mr Farber and his associated entities.

[17] In 2020 TUHF instituted an action against 266 Bree for the recovery of the amount advanced under the loan agreement, together with interest. The action was opposed by Mr Farber and the other sureties, who disputed 266 Bree's, and hence their indebtedness. 266 Bree initially defended the action but after it was placed under business rescue Mr Kgaboesele decided to abide the decision of the court. On 21 April 2023 Senyatsi J made an order in favour of TUHF directing 266 Bree to pay it an amount of R34 331 854, being the outstanding capital, interest and penalties due and payable to TUHF. The sureties have sought leave to appeal the order of Senyatsi J. For purposes of the present applications, they accept that 266 Bree is indebted for at least the capital amount of R19 070 035.

¹ *The Commissioner for the South African Revenue Services v Louis Pasteur Investments (Pty) Ltd* 2021 JDR 0346 (GP) at para 53.

- [18] 266 Bree is also indebted to other entities in the Farber group: R1,7 million to 10 Fife Avenue; R6,4 million to 28 Esselen Street; and R2 million to 39 Van der Merwe Street. Further creditors include Egoli gas (approximately R26 000) and City of Johannesburg (R3,2 million). According to Mr Kgaboesele, the amount owed to TUHF constitutes 70,59% of the total debt. The Farber-associated creditors hold only 22.58% of voting rights between them.
- [19] As I indicated earlier, neither of the first two business rescue practitioners devised a business rescue plan. On 9 January, Mr Kgaboesele presented a draft plan to creditors. TUHF indicated that it would not support the adoption of the plan, raising several concerns. Given TUHF's indication that it would not support the plan, it was not put to the vote.
- [20] On 23 January 2023 Mr Kgaboesele presented a revised business rescue plan. He indicated that he foresaw no reasonable prospect of rescuing 266 Bree. Instead, the plan proposed an orderly disposal of the assets of 266 Bree which would result in a better return to creditors and a more favourable outcome than what would transpire from a liquidation. The value placed on the property by an independent valuer was R19,4 million. TUHF voted in favour of the plan but only after proposing certain amendments. These included that Metro Centre had to be sold for the highest attainable value within 60 calendar days of acceptance of the plan, subject to the approval of TUHF. Further, that registration of the transfer of the immovable property be completed within 120 calendar days of acceptance of the plan. It was also conditional on the termination of the PMA with HCI. The plan was adopted on 2 February 2023, subject to the amendments.
- [21] The deadline for the sale of Metro Centre in terms of the conditions incorporated into the plan as amended was 3 April 2023. It is common cause that no sale was concluded by this date, a factor crucial to Mr Kgaboesele's counterapplication. He and TUHF contend that the failure to secure the sale of the property as directed under the plan means that the plan has failed. Consequently, business rescue proceedings must be ended and 266 Bree placed into liquidation.

- [22] Despite the obvious logic and common sense of Mr Kgaboesele and TUHF's position, Mr Farber and his associated applicants disagree. They submit that in terms of the provisions of section 141(3) of the Companies Act the court can grant any order that is appropriate other than placing a company in liquidation. This includes an order to extend an existing business rescue plan and to appoint a new business rescue practitioner. They contend that this can be done by order of court, without the consent of creditors.
- [23] To this end, in his affidavit filed in reply and in answer to the business rescue counterapplication, Mr Farber introduced a report obtained from one Mr Klopper who, he says, is an independent and experienced business rescue practitioner. According to Mr Farber, Mr Klopper's assessment of the situation is that 266 Bree can be rescued. This could be achieved, it is argued, if Mr Klopper were to be appointed as the new business rescue practitioner and given an opportunity to prepare and publish a new plan based on his report.
- [24] In the alternative, Mr Farber suggested that the present plan could be extended, with additional time granted to market the Metro Centre more extensively to obtain a better sale price than would be obtained on liquidation. Shortly before the hearing, Mr Farber filed a supplementary affidavit the purpose of which, among other things, was to provide an additional valuation of Metro Centre from one Mr Sacks of Stonebloc Auctions. According to Mr Farber, Mr Sacks is an experienced property broker with many years of experience involving properties in the Johannesburg CBD. Mr Farber says that the value placed on Metro Centre by Mr Sacks, as at 30 April 2023, was between R29 million and R32 million.
- [25] Despite Mr Farber's confidence in Mr Sack's acumen as a property broker, his report holds no weight as an expert opinion as to the property value of Metro Centre. The document attached to the supplementary affidavit is not a valuation in the proper sense. It is, instead, a "Proposal to Auction" and a "Market Estimate". Mr Sacks concludes that: "[w]e are confident that we would be able to achieve between R29 000 000 and R32 000 000 at auction." It is quite obviously a report prepared for purposes of persuading Mr Farber to give Mr Sack's company the business of marketing the property. Mr Sacks is not

qualified as an expert property valuer, nor is his report, such as it is, made under oath. The Supreme Court of Appeal very recently reminded us that in business rescue matters a property valuation must be provided by a qualified expert under oath. Estimates such as that provided by Mr Sacks are inadmissible.² So much for Mr Farber's optimism that the property could be sold for up to R32 million if marketed by Mr Sacks. In fact, Mr Farber himself attempted to sell Metro Centre a year ago. The only bids he secured were "ghost" bids, and the highest of these was R25 million. There is no realistic prospect of the property being sold for substantially more if 266 Bree were to be left in business rescue for a further six months. In any event, a liquidator will have resources at her disposal to obtain the best possible selling price.

[26] There is an additional difficulty underpinning the Farber applicants' contention that this court can extend the existing business rescue plan. The question arises whether it is permissible for a court using its discretion under s 141(3) to make an order extending a business rescue plan that has already failed in its implementation? And if so, can the court so order without the matter being put to the vote by creditors, as the Farber applicants contend? Finally, if this is permissible, would such an order be appropriate on the particular facts of this case? These questions appear not to have enjoyed any attention from courts thus far, as none of the parties referred me to any case law on the issues raised.

[27] The underlying purpose of s 141(2) would seem to me to be that once it is clear to the business rescue practitioner that business rescue has failed, steps must be taken to bring the process to an end. The proposition that the discretion under s 141(3) permits a court to grant an appropriate order in the form of an extension of a business rescue plan that has failed in its execution is contrary to this underlying purpose as well as the general scheme of business rescue under the Act.

[28] The statutory scheme lays down strict time and procedural constraints for the business rescue process. Meetings of creditors must be conducted speedily, as

² *Commissioner for the South African Revenue Service v Nyhonyha and Others* [2023] ZASCA 69.

must the compilation and publication of a business rescue plan.³ Critically, the fate of a business rescue plan, and indeed, of business rescue proceedings, hangs on the vote by creditors. Under s 152(2), a vote of support by the holders of more than 75% of the creditors' voting interest is sufficient for the plan's approval.⁴ Once adopted, the plan is binding on the company and on all creditors.⁵ On the contrary, if it is not so approved, it is rejected, "and may be considered further only in terms of s 153". The latter section permits the preparation and publication of a revised rejected plan only if the holders of voting interests approve. Alternatively, the company may apply to set aside the result of the vote on the basis that it was inappropriate.⁶ Unless action is taken to revise a plan, or to apply to court to set aside the vote that it be rejected, the practitioner "must promptly file a notice of the termination of the business rescue proceedings".⁷

[29] What these sections highlight is that the statutory scheme aims to bring finality to the fate of the company, and its creditors, one way or another, as speedily as reasonably possible. If the plan is adopted, the company's fate, and those of the creditors, upon whom it is binding, will be decided by the plan. If it is rejected, and resort is not had to the remedies under s 153(1)(a), that is the end of the business rescue process.

[30] Also apparent from these sections is that there is no express procedure in terms of which an approved plan, which has failed in its execution, may be extended under the hand of a new practitioner. To read into s 141(3) an implied power of the court to permit using its discretion ignores the importance of finality, which runs through the sections I have referred to. Even more importantly, it ignores the rights of the creditors to decide the fate of the plan, and the binding nature of

³ See, for example, s 147 (first meeting of creditors within 10 days of appointment of practitioner) and s 150(5) (business rescue plan must be published within 25 days of appointment of practitioner).

⁴ Additional requirements must be met if the plan alters the rights of holders of any class of the company's securities. See s 152(3)(c)(i)-(ii).

⁵ Section 152(4).

⁶ Section 153(1)(a)(ii).

⁷ Section 153(5).

the plan once approved. In *Kransfontein Beleggings*,⁸ albeit stated in a different context, the SCA held that:

“A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of s 152 of the Companies Act. The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting.”

[31] By parity of reasoning, the court has no power to foist onto the majority of creditors an extension of a business rescue plan, that, while initially supported, has now failed in its implementation. The plan is now lifeless, and the court simply does not have the power to breathe life back into it. This is particularly so where, it is common cause, TUHF holds sufficient voting rights to determine the approval or rejection of any business rescue plan. Even if it were possible, in principle, of being put to the vote again, TUHF has made it clear in its affidavits that it will not vote in favour of an extension or a new plan. It cannot be that under its power to make an “appropriate” order, this court can impose on TUHF the extension of business rescue proceedings which have no hope of succeeding without TUHF’s support. This is consistent with what was stated in *Oakdene*,⁹ albeit, once again, that the court there was not addressing precisely the same question as arises in this case. The court emphasised the principle that business rescue proceedings require the support of the majority of creditors:

“As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or *mala fide*. By virtue of section 132(2)(c)(i) read with section 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings.”

[32] In this case, it cannot be said that in signaling its intent not to support any further attempt at business rescue TUHF is acting unreasonably or *mala fide*. One only need consider the proposals in Mr Klopper’s report to understand that TUHF’s position is entirely reasonable. He accepts that the debt level in respect of

⁸ *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* [2017] ZASCA 131 at para 18. See also *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & Another* 2017 (4) SA 51(WCC) at paras 66-7 in which it was held that a business rescue practitioner has no power to amend an adopted plan after it has been adopted as this would undermine the statutory scheme and the rights of creditors.

⁹ *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] ZASCA 68; 2013 (4) SA 539 (SCA) at para 38.

TUHF's debt alone "is quite simply unaffordable even if the company is able to fill its vacant lettable space in the short term". He also accepts that "the secured creditor (TUHF) would need to compromise its total debt by somewhere around R10 million" and that the new principal debt would need to be negotiated over a new long-term loan "repayable over a period of 10 to 15 years". It is quite understandable why TUHF is not willing to accept these fundamental elements of a second attempt at business rescue. In addition, it is simply fanciful to consider that a fourth business rescue practitioner would produce the magic wand necessary to succeed where three others have failed before him. There is also the cost of extending business rescue proceedings in circumstances where the creditors effectively have borne the costs of three practitioners already.

[33] While Mr Farber denies that the first two business rescue practitioners resigned because of his obstructive conduct, it is difficult to give credence to his denial. Neither of the first two practitioners were willing to file affidavits but annexed to Mr Kgaboesele's affidavit are letters from them indicting that this is precisely why they resigned. Mr Kgaboesele's affidavit is replete with chapter and verse on the difficulties Mr Farber and HCI caused for him. TUHF also details the lengths to which they went to undermine the orders previously granted by Senyatsi J on an interim basis. The Farber applicants belatedly suggested if business rescue did not succeed within a limited extended period of 6 months, they would not oppose 266 Bree's liquidation thereafter. Unfortunately, the history of the acrimonious litigation between the parties to date offers no real guarantee that this would put an end to litigation.

[34] The most important consideration of course is that, quite simply, business rescue has failed. There is no realistic prospect of rescue even if, as Mr Klopper suggests in the alternative, the property was to be marketed again for an extended period of 6 months. I have already dealt with the so-called valuation by Mr Sacks.

[35] In the absence of support from TUHF, the liquidation of 266 Bree is inevitable. There is no reason to delay that inevitability any longer. An additional reason to liquidate the company is that on Mr Farber's own admission, historically

266 Bree's finances have not been separated from those of his other entities. Mr Farber has exercised control over the bank accounts. HCI has accrued most of the income every month through the PMA, leaving an insufficient balance to pay its other running costs. Mr Kgaboesele has had trouble in securing Mr Farber's co-operation to interrogate 266 Bree's finances. A liquidator will have broader powers to examine and inquire into the company's financial position, *vis-a-vis* the other Farber entities.

[36] I accordingly find that the business rescue in respect of 266 Bree must be ended and the company placed under liquidation.

[37] The remaining question is whether the order of liquidation should be provisional or final. While Mr Kgaboesele's application was premised on a provisional order of liquidation, he indicated at the hearing that if the court was satisfied, as contended by TUHF, that a case for final liquidation had been established, then he would have no complaint with the grant of a final order. The requirements for a final order are indeed satisfied. It is common cause that TUHF is the only secured creditor and it is also common cause that the amount of its claim is at least R19 million. It has an order in its favour for substantially more, albeit subject to an application for leave to appeal. 266 Bree has no employees, and all its creditors, and the extent of their claims are known. It only has one fixed asset, being Metro Centre. Even Mr Klopper accepted that 266 Bree does not have sufficient income to pay its running expenses monthly. I see no reason why the present scenario is likely to change materially between now and the confirmation of a provisional order. In a case like this, there does not appear to me to be any purpose served by granting provisional liquidation. My order makes provision for a final order of liquidation.

TUHF's interim interdict

[38] In its counterapplication TUHF sought interdictory relief pending the grant of a final winding-up order and the appointment of a liquidator with the necessary powers to take charge of the Metro Centre and to collect rental. TUHF wants to prohibit Mr Farber and HCI from accessing the property for purposes of collecting

rentals; interfering with TUHF in respect of the collection of rentals; contacting tenants of the Metro Centre; soliciting payment of rentals from tenants and interfering with TUHF's right to collect rentals from tenants in any manner whatsoever.

[39] The context of the counterapplication for interim relief involves the PMA entered into between Mr Farber and HCI in terms of which HCI was appointed as the managing agent for the Metro Centre, in return for which it was paid a fee of R80 000 per month. One of its tasks was to manage the leases and collect the rentals from tenants. Between August 2017 and October 2022, 266 Bree did not have its own bank account. The rentals were collected by HCI and paid into its bank account. Both companies are wholly owned and controlled by Mr Farber. He has a substantial loan account with HCI which, at least at one point, was in the region of some R11 million. HCI also acts as the managing agent of Mr Farber's other property-holding companies and its bank account also received payments from their tenants. TUHF was concerned that monies were being collected but nothing was being paid over to 266 Bree. Instead, it appeared that inter-company loans were established between the entities. One of the clauses of the mortgage bond held by TUHF over the Metro Centre was a cession by 266 Bree of all its rights, title and interest to any rents arising in respect of the property.

[40] Based on its concerns, TUHF applied for what the parties refer to as the preservation order. This order was granted by Senyatsi J in provisional form by agreement between the parties on 18 July 2022. On 31 August 2022 it was granted in final form. A variation was granted by Senyatsi J on 7 December 2022 to make provision for Mr Kgaboesele as the relevant business rescue practitioner. The first business rescue practitioner reported that he had not managed to obtain control over 266 Bree's bank account and its financial affairs. The second business rescue practitioner recorded in a letter that Mr Farber had also not provided him with basic financial information. The preservation order thus provided that pending the finalisation of TUHF's action against 266 Bree, Mr Farber and HCI were directed to pay the gross rental receipts into a designated attorney's trust account, alternatively into an account opened by the

practitioner in 266 Bree's name. Under paragraph 3.5 of the preservation order TUHF was granted right of access to Metro Centre "for purposes of inspection of the building and verification of the rent rolls and owners' statements ... at any time of day on 24-hours written notice" to Mr Farber and HCI. Mr Farber was also directed to provide unredacted bank statements to the business rescue practitioner. Despite the preservation order, only R3000 of the rent collected thereunder was preserved as at December 2022.

[41] On 9 September 2022 TUHF was granted further relief by Senyatsi J in the form of what the parties call the cession order. The purpose of the order was to give effect to TUHF's additional security under the mortgage bond agreement. The cession order provided that:

- "1. (TUHF) is with immediate effect authorized to take cession of any rental amounts payable by every tenant occupying the immovable property known as Metro Centre ...to 266 BREE STREET JOHANNESBURG PTY LTD ...
1. The Respondents sign all documents necessary to facilitate the cession in 1 above failing which the Sheriff is authorized to sign all documents necessary to give effect to the cession;
2. The Respondents furnish TUHF, within 15 days of this order, with the names and contact information of the Metro Centre tenants"

[42] In its contempt counterapplication TUHF averred that Mr Farber and HCI were in contempt of both the preservation order and the cession order. Although it no longer persists with the contempt counterapplication, save in varied form, the allegations of breach are relevant to the interim interdict sought in its counterapplication.

[43] TUHF bases its counterapplication on its clear right under the mortgage bond and under the cession order to the collection of rentals from tenants of the Metro Centre. Despite this, says TUHF, Mr Farber has failed to sign the documents necessary to facilitate the cession, and he and HCI have failed to provide the relevant details of the tenants under clause 3 of the cession order. TUHF is thus hamstrung in exercising its rights under the cession order. TUHF accepts that once a liquidator is appointed, she will have the power and duty to collect the rentals. However, until such time as the liquidation order is implemented and a liquidator is given those powers, TUHF wants to be able to

exercise its rights under the cession order without hindrance from Mr Farber and HCI.

[44] Mr Farber's position was that he and HCI could not comply with both the preservation order and the cession order at the same time, as the former order obliged them to collect rentals and pay them into the designated account. Mr Farber also suggested that he had confidence that the action would be finalised in his favour and that TUHF should thus await the outcome of the action before enforcing the cession order.

[45] Given the history of Mr Farber's obstructive conduct, as demonstrated in detail in the affidavits filed by Mr Kgaboesele and TUHF, it is difficult to accept the *bona fides* of this response. However, this is not something I have to weigh in on, given that TUHF no longer persists with its contempt application. What is relevant though, is whether TUHF has established a basis for an order confirming that it is entitled to collect the rentals, without interference from Mr Farber and HCI, pending the appointment of a liquidator.

[46] TUHF has a right under the cession order immediately to take cession of the rentals. The order cannot be read as being subject to finalisation of TUHF's action. Whatever Mr Farber and HCI's obligations were under the preservation order, clearly they cannot be used to avoid their obligations under the cession order. This would be an absurd situation. There is no real defence to TUHF's quest for the interim interdict it seeks. The order is subject to the condition that it falls away once a liquidator is appointed. However, until such time that this occurs, TUHF is entitled to the protection of its rights as outlined in its draft order.

A declaration of breach?

[47] As indicated earlier, TUHF initially sought an order holding HCI and Mr Farber in contempt of the preservation order and the cession order. In respect of the preservation order, TUHF averred that they had breached the order intentionally, deliberately and *mala fides* by refusing to permit TUHF access to Metro Centre for purposes of inspecting the building and verifying the rent rolls as provided for

in the order. In respect of the cession order, TUHF averred an intentional, deliberate and *mala fide* breach by HCI and Mr Farber because they had failed to take any steps to implement the cession as directed under the order, and despite demand by TUHF.

[48] The initial position of the Farber applicants was to seek to prevent Mr Kgaboesele from terminating the PMA with HCI. However, as I have already discussed, in their about-turn at the commencement of the hearing, they abandoned this relief and accepted that HCI would no longer have anything to do with Metro Centre. In addition, in their subsequent replying heads of argument, the Farber applicants tendered access to TUHF without the attendance of Mr Farber. This was contrary to the position they had held to that point. Their previous stance was that Mr Farber was entitled to be present when TUHF inspected the property and thus that any inspection was subject to being conducted on a date suitable not only to TUHF but also to Mr Farber.

[49] TUHF accepted at the hearing that this changed stance on the part of the Farber applicants meant that they had effectively purged their alleged contempt. However, TUHF nonetheless sought an order declaring that Mr Farber and HCI had breached the preservation and cession orders by their conduct. Breach of a court order is the first element of proving contempt. Consequently, all the facts necessary to establish a breach (if I reach that conclusion) are set out in the affidavits filed by the various parties. TUHF included a prayer for alternative relief in its notice of motion in the counterapplication. By seeking a declaration of breach TUHF is not going outside of the facts averred and the relief originally sought. All it is doing is seeking less than what it had originally asked the court to rule on. A ruling on breach may at least be relevant to the question of costs and it may provide certainty for the liquidator in her dealings with Mr Farber in the future. It will also provide certainty for TUHF for purposes of implementing the interim interdict. A ruling on breach is thus not academic.

[50] Mr Farber contended in the affidavits he deposed to that he believed that, correctly interpreted, the preservation order did not give TUHF access without him being present and that the date and time of inspection was subject to his

agreement. I no longer need to consider whether Mr Farber was *bona fide* in his belief that his interpretation was correct. The simple question is whether it was correct.

[51] Under the preservation order, TUHF and its representatives were “hereby granted right of access to Metro Centre at any time of day on 24 hours written notice” to Mr Farber and HCI. The expressed right of access was not conditional on Mr Farber or HCI agreeing to the time and date of the visit. On the contrary, the order includes the words “at any time” making it plain that any visit would be at a time and date suitable to TUHF and not to Mr Farber or HCI. Mr Farber was not entitled to refuse access because any suggested date or time did not suit him. In doing so, he acted in breach of the preservation order.

[52] As regards the cession order, it is common cause that Mr Farber and HCI have taken no steps to comply with their obligations to sign whatever documents are necessary to give effect to the order. Mr Farber says that he did not understand the order to be effective until Senyatsi J had handed down judgment in the action instituted by TUHF. Again, his *bona fides* are not in issue anymore, although quite how Mr Farber could genuinely have held this belief in the face of the plain terms of the order is questionable. The point is that whatever excuse there may have been for their inaction, Mr Farber and HCI failed to comply with the express terms of the order. They were clearly in breach.

Costs

[53] The issue of costs in this matter is complicated by the fact that there are two applications (one by the Farber applicants and one by TUHF) and two counterapplications in response to the Farber applicants’ application. In addition, there are two applications for the winding up of 266 Bree, which are complimentary rather than competitive in nature, which applications were opposed, not by the company facing liquidation, as is often the case, but by Mr Farber and his related entities.

[54] As far as the Farber application is concerned, the relief originally sought was largely abandoned at the eleventh hour, with all that remained being an

ill-conceived opposition to Mr Kgaboesele's s 141(2) application. The costs of the main application should follow the result: the Farber applicants must bear the costs of Mr Kgaboesele and TUHF. The question is the appropriate scale of costs. TUHF submitted that punitive costs were warranted. The Farber applicants disagree. In my view, and costs being a matter for the discretion of the court, a punitive scale is warranted. The Farber applicants' application was premised on egregious allegations against Mr Kgaboesele which were unwarranted. There was no merit at all in the allegation that he had colluded with TUHF and breached his professional responsibilities in doing so.

[55] What is more, Mr Kgaboesele had made it plain from the time that he filed his answering affidavit that his view was that he was duty bound to act in accordance with s 141 and that, once his duties in that regard were completed, he would no longer play any role as business rescue practitioner. Despite this early warning, the Farber applicants waited until the commencement of the hearing to announce that they no longer persisted with the relief sought in their application. This was on the ostensible basis that the relief would be moot given Mr Kgaboesele's stance. They have never proffered an explanation as to why they waited until the last moment to change their stance, and why they elected instead to file a replying affidavit and heads of argument disputing Mr Kgaboesele's and TUHF's denials of collusion. The censure of the court is warranted by the fact that it was not only Mr Kgaboesele and TUHF who were prejudiced by the late about-turn by the Farber applicants. The court was also prejudiced as it was required to prepare for hearing the matter, on a semi-urgent basis, on the premise that the main application would be persisted with. For all these reasons, I conclude that a punitive costs order is appropriate. The Farber application should be dismissed with costs, which costs should be borne on an attorney and client scale, including the costs of two counsel.

[56] Regarding TUHF's counterapplication, it has largely succeeded, albeit that TUHF no longer persisted with the full contempt of court relief. This too, however, was largely the result of a late change of stance by Mr Farber eventually accepting that HCI would fall out of the picture, and tendering access to TUHF without his involvement. The explanation by Mr Farber and HCI for their failure to abide by

and implement the cession order was singularly unconvincing from inception. The Farber applicants must pay TUHF's costs in the counterapplication. The only reason why I do not order that this be done on a punitive scale is because I accept that Mr Farber and HCI ought to have been entitled to oppose an application seeking criminal sanctions for the alleged contempt.

[57] Finally, the question arises as to what order of costs should be given in the two liquidation applications. The first point to note is that, as I mentioned earlier, it was not 266 Bree, but the Farber applicants who opposed the s 141 application and TUHF's separate application for the liquidation of the company. According to the authors of *Henochsberg*, usually, when a company opposes its own liquidation, the costs of the liquidation application are costs in the liquidation.¹⁰ However, there is authority supporting the view that a court should direct that the costs of an unsuccessful opposition to liquidation be costs in the winding up only where special circumstances exist. A court may refuse so to direct in circumstances where there was never a reasonable prospect of the opposition proving successful.¹¹

[58] On the issue of the two separate liquidation applications, TUHF agreed that priority should be given to Mr Kgaboesele's application. In other words, the order should be granted on the basis of his application. I agree. TUHF's application was instituted as a back-up in the event that the application under s 141 for some reason proved unsuccessful. In fact, in the Farber applicants' replying heads of argument, filed at the proverbial door of the court, the point was taken that Mr Kgaboesele's application was doomed to fail as he had not given notice as required under s 141(2)(a)(i). This point was only dropped by the Farber applicants in the oral reply after Mr Kgaboesele was given the opportunity to file additional heads of argument to address the issue. The complimentary application by TUHF for 266 Bree's winding up was thus not unreasonably instituted: it may well have been the application upon which winding up was

¹⁰ *Henochsberg on the Companies Act 61 of 1973* at p 731.

¹¹ See *Henochsberg*, above, *loc cit*.

granted at the end of the day. TUHF's intervention through its separate liquidation application was thus reasonable.

[59] The most appropriate means of dealing with the costs issue is for the Farber applicants to be directed to pay the costs of opposing both Mr Kgabosele's and TUHF's application. The winding up of 266 Bree was inevitable after the attempt at business rescue failed. Their opposition never had reasonable prospects of success. The balance of the costs in respect of both Mr Kgabosele's and TUHF's applications should be costs in the liquidation.

Order

[60] I make the following order:

1. The Applicants' application under case number 028612/23 is dismissed with costs, to be paid jointly and severally the one paying the others to be absolved, such costs to include those of two counsel, and to be paid on the attorney and client scale.
2. It is declared that:
 - 2.1 The First Applicant (Mark Morris Farber) and the Fifth Applicant (Hillbrow Consolidated Investments CC) were in breach of the court order handed down by Senyatsi J on 31 August 2022 and date stamped 1 September 2022 in failing to comply with paragraph 3.5 thereof;
 - 2.2 Mark Morris Farber and Hillbrow Consolidated Investments CC were in breach of the court order handed down by Senyatsi J and date stamped 9 September (the Cession Order) in the respects identified in paragraph 184 of the Third Respondent's Answering Affidavit.
- 3 Pending the appointment of a liquidator(s) and he/she/them, being afforded the necessary powers to take charge of the property of the Second Respondent ("266 Bree Street Johannesburg (Pty) Ltd") and collect rentals

pursuant to their appointment and unless and until such liquidator determines otherwise:

- 3.1 It is declared that the Third Respondent (TUHF) is entitled to act in accordance with the Cession Order;
 - 3.2 It is ordered that TUHF must account to the liquidator(s) for any rental so collected;
 - 3.3 Mark Morris Farber, and Hillbrow Consolidated Investments CC, or any of their employees, agents or representatives are interdicted and restrained from:
 - 3.3.1 Attending at and accessing Erf 1292 Johannesburg Township Registration Division I.R, the Province of Gauteng, with street address 266 Lilian Ngoyi Street, Johannesburg (Metro Centre) for purposes of collecting rentals at Metro Centre;
 - 3.3.2 Interfering with TUHF Limited, its employees, agents or representatives in respect of the collection of rentals at Metro Centre;
 - 3.3.3 Contacting tenants of Metro Centre;
 - 3.3.4 Soliciting payment of rentals from tenants at Metro Centre; and
 - 3.3.5 Interfering with TUHF's rights to collect rentals from the tenants of Metro Centre in any manner whatsoever.
- 4 The business rescue proceedings in respect of the Second Respondent, commenced in terms of Part A, Chapter 6 of the Companies Act 71 of 2008 (the Act) are hereby discontinued.

- 5 The Second Respondent is placed under final winding-up in the hands of the Master.
- 6 The Applicants in Case number 028612/23 are directed to pay the costs of TUHF's counterapplication jointly and severally the one paying the others to be absolved, such costs to include those of two counsel, and to be paid on a party and party scale.
- 7 The costs of the First Respondent's counterapplication for relief under s 141(2) of the Act, and of TUHF's application under case number 032790/23 (the TUHF application) are to be costs in the liquidation of the Second Respondent, save that the Applicants under case number 028612/23 are directed to pay the costs of their opposition to the aforesaid counterapplication and TUHF's application jointly and severally the one paying the others to be absolved, such costs to include those of two counsel, and to be paid on a party and party scale.



R M Keightley

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 10-11 May 2023

Date of Judgment: 15 June 2023

APPEARANCES

Case Number: 2023/028612

For the Applicants: R A Solomon SC
L Hollander

Instructed by: SWVG Inc Attorneys

For the First and Second Respondents: D Mahon
K Mitchell

Instructed by: Thomson Wilks Inc

For the Third Respondent: A C Botha SC
E Eksteen

Instructed by: Schindlers Attorneys

Case Number: 2023/032790

For the Applicants: A C Botha SC
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