

SOUTH AFRICA / JUDGMENT

EBM Project (Pty) Ltd and Another v Barak Fund SPC Ltd In re: The Holland Insurance Company Ltd v The Master of the High Court and Others (2021/18884) [2021] ZAGPJHC 384 (14 June 2021) [2021] ZAGPJHC 384

COURT

South Gauteng High Court, Johannesburg

BEFORE

I Opperman

CASE / FILE NUMBER

2021/18884

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

REPORTABLE:

No

OF

INTEREST TO OTHER JUDGES: No

REVISED.

14/06/2021

CASE

NO.: 2021/18884

In

the ex parte application
of:

EBM
PROJECT (PROPRIETARY) LIMITED
(IN
BUSINESS RESCUE)
First Applicant
VENTER,
KENNETH COLIN N.O
Second Applicant
and
BARAK
FUND SPC LIMITED
First Intervening party/ Respondent
In

re:

THE
HOLLARD INSURANCE COMPANY LIMITED
Applicant/2nd
Intervening Party
The
Master of the High
Court
First
Respondent
The
Companies and Intellectual Property Commission
Second
Respondent
All
Affected Parties listed in Annexure 'X'
Further
Respondents
EBM
Project (Pty)
Limited
Respondent
(In
business rescue)
This

judgment was handed down electronically by circulation to the
parties' legal representatives by email. The date and time
for
hand-down is deemed to be 10h00 on 14 June 2021

JUDGMENT

INGRID OPPERMAN J

Introduction

- [1] There are two competing applications before this Court. The first applicant EBM Project (Pty) Ltd ('EBM'), and its business rescue practitioner, the second applicant, ('Mr Venter') applied, ex parte, for an order, as contemplated in section 141(2)(a)(ii) of the Companies Act, 2008 ('the New Companies Act') discontinuing the business rescue of EBM and placing it in provisional liquidation coupled with an order bestowing certain powers on the provisional liquidator, including the appointment of Mr Venter as the provisional liquidator's consultant ('the Venter Application').
- [2] Section 141 of the New Companies Act is prescriptive in its terms, both in relation to the procedure which must be followed by a business rescue practitioner and the party or person that has locus standi to invoke the provisions of section 141. So, although, EBM is cited as an applicant, the only party, entitled to seek the relief, is Mr Venter, in his capacity as EBM's business rescue practitioner. Accordingly, the true applicant in these proceedings is Mr Venter.
- [3] The Hollard Insurance Company Limited ('Hollard') applies for an order placing EBM in final liquidation ('the Second Hollard Application').
- [4] Barak Fund SPC Ltd ('Barak') opposes the Venter Application on the grounds that Mr Venter acted unlawfully in approaching the Court ex parte in circumstances where he failed to follow the mandatory requirements of both section 141(2)(a) and section 145, each of which, although somewhat differently worded, have the same requirement of notice to affected persons in relation to the prospects of business rescue succeeding and/or any other relevant event concerning business rescue proceedings and the right of creditors to participate in any court proceedings arising during the business proceedings.
- [5] The basis for the application and the urgency was that the appointment of a provisional liquidator was required as a matter of urgency and that EBM was required to be traded in liquidation. It was for this reason that Mr Venter required that a provisional liquidator who was appointed in that capacity would have the extended powers as provided for in the notice of motion and permission for the liquidator to trade and incur credit. The criticism to this is that
- no legal basis for this relief to be granted exists.
- [6] Barak also takes issue with Mr Venter for failing to join parties that have a direct and substantial interest in the outcome of the Venter Application. These included, at the very least, the parties to the earlier litigation before this Court. The failure to join interested parties is raised by Barak as a separate and discreet

issue, apart from the failure to comply with the requirements of section 141 and 145 of the New Companies Act. In short Barak argues that Mr Venter knew of the existence of the current proceedings before me in which judgment had been reserved and that the order sought by Mr Venter, if granted, would have rendered those proceedings nugatory; that Mr Venter knew further that the effect of the order sought by him ex parte would also effectively put paid to the course of action that had been proposed by Barak in the event of business rescue proceedings and the resolution passed being set aside; that Mr Venter knew that the relief, if granted, would effectively have resulted in EBM continuing to trade, incurring credit presumably at the instance of a provisional liquidator, who would be granted powers which did not fall within the scope or competency of the Court and would incur liabilities which might or might not be recoverable applying ordinary principles of insolvency law; that Mr Venter knew that part of the relief sought, ex parte, involved his appointment in a different guise as ‘consultant’ to the liquidator to be appointed; that Mr Venter knew, that in the circumstances, had he given notice of intention to apply for the relief sought, it would have been opposed by Barak. They further argue that, not only have the assertions made by Barak in this regard not been challenged, it accords with common sense and the constant tension between Barak and Mr Venter in relation to his competence, integrity and efficiency; that the relief sought would have been final in effect; that Mr Venter had failed to make proper disclosure with the degree of frankness and openness that is required in ex parte applications and that Mr Venter’s four affidavits are substantially misleading.

- [7] Barak’s position at the hearing was that, in the event that the Venter Application is dismissed, the Second Hollard Application save for paragraph 7 of its notice of motion is not opposed. Each of Barak and Hollard have reserved their rights in relation to certain issues raised in the Second Hollard Application. Those issues will be dealt with in the course of the EBM liquidation proceedings and I am not to concern myself with this.

Proceedings pending

- [8] There are two applications pending before this court (heard previously). The first is the application under case no. 44548/20 brought by Hollard in terms of section 131 of the New Companies Act for an order placing Insure Group Managers Ltd (‘IGM’) under supervision and commencing business rescue proceedings.[1] Barak opposed the application. This application is referred to as ‘the First Hollard Application’. [2]
- [9] The second application is brought under case no. 02092/21 by Barak in terms of section 130 of the New Companies Act to set aside the business rescue proceedings which commenced on 17 December 2020 when the board of EBM resolved to place EBM under supervision and in business rescue.[3] It is referred to as ‘the Barak Application’.

- [10] The First Hollard Application and the Barak Application are linked in that IGM and EBM are companies in the same group with IGM historically being EBM's principal financier and EBM being IGM's principal future source of revenue. Barak claims rights against IGM that flow from rights it claims against EBM. The companies' financial affairs are inextricably linked and it was accepted that they had to be dealt with as a unit, this approach was supported by all concerned.
- [11] It was not disputed that both IGM and EBM were in financial distress. The dispute was rather whether there appeared to be reasonable prospects of rescuing both the companies and, specifically with reference to the First Hollard Application, whether it would otherwise be just and equitable to place IGM under supervision and to commence business rescue proceedings.
- [12] Barak brought a formal intervention application in the First Hollard Application. Barak's entitlement to participate stood undisputed. IGM did not oppose the intervention application and joinder of Barak to the First Hollard Application.
- [13] Lebonix (Pty) Ltd ('Lebonix') sought leave to intervene in the Barak Application as an affected person in its professed capacity as the 100% registered shareholder and creditor on loan account of EBM. This application for leave to intervene was opposed by Barak.
- [14] The First Hollard Application and the Barak Application were heard from 15 to 17 March 2021. Hollard (supported by Mr Venter in his capacity as the business rescue practitioner) opposed the Barak Application and contended that there existed reasonable prospects to rescue EBM (and thus also IGM). Judgment was reserved. At the hearing I directed Mr Venter, in his capacity as the business rescue practitioner of EBM, to prepare a report on the impact on the employees of EBM in the following scenarios: i) if the business rescue proceedings were to continue; ii) if the business rescue proceedings were terminated; iii) if EBM were placed into liquidation. On 29 March 2021, Mr Venter filed this report ('the Venter Report'). On 1 April 2021 Barak filed its response to the Venter Report.

The Venter Application – the current application

- [15] On 15 April 2021, this ex parte application was instituted by EBM and Mr Venter in his capacity as the business rescue practitioner in which they sought to convert the business rescue proceedings of EBM to provisional liquidation.
- [16] The Venter Application was enrolled in the urgent court before Madam Justice Kathree-Setiloane on 21 April 2021. Barak, fortuitously[4], became aware of Mr Venter's Application and appeared at court before Madam Justice Kathree-Setiloane on 21 and 22 April 2021 to prevent an order as sought by Mr Venter being granted. The matter was ultimately removed from the roll and the costs were reserved.

- [17] On 23 April 2021, the applicants approached the Deputy Judge President of this division with a request that this application be allocated a date for hearing as early as possible in May 2021.
- [18] On 28 April 2021 Barak through its attorneys and in a letter to the Deputy Judge President, responded to this in some detail, summarised their defences and opposition to the relief but in the end supported the request for a case management judge to be appointed.
- [19] On 29 April 2021, the Deputy Judge President directed that I were to case manage the Venter Application.
- [20] I convened a case management meeting for 30 April 2021 and refrained from reading the papers in the Venter Application prior to such case management meeting, other than the correspondence which had been sent to me, as I wanted to establish whether there was any prohibition to me hearing the matter (the Venter Application having been brought ex parte and before another Judge) and if not, whether I should have regard to the Venter Application in adjudicating the two pending applications in which I had reserved judgment. Mr Fine SC, representing Barak contended that I should not have regard to it whereas, Mr Van der Merwe, representing both EBM and Mr Venter in his representative capacity, said I should. It was accordingly suggested and ultimately agreed that this issue be debated at the hearing on 7 and 8 June 2021 and that I would not deliver judgment in the pending

applications until this feature had been argued.

- [21] A further case management meeting was convened at short notice for Friday, 28 May 2021 to deal with the filing of affidavits in the Second Hollard Application at which Mr Louw SC was present representing Hollard and at which he expressed his surprise for not having been included in the case management meeting of 30 April 2021[5]. He stated that Hollard had only learnt that the judgments had been reserved to after the hearing of the Venter Application, when the minutes of the meeting of 30 April 2021 were received which had occurred on 15 May 2021.
- [22] Hollard applied for leave to intervene and for substantive relief in the Venter Application on 19 May 2021.

Developments post the Second Hollard Application

- [23] On 4 June 2021, Hollard filed a practice note recording that Barak no longer opposed Hollard's intervention application in the Venter Application nor the liquidation of EBM and that it had been agreed that a final winding up order would follow.
- [24] Mr Louw suggested in short heads of argument filed that, given that all the parties are agreed that EBM should be liquidated, the Hollard liquidation be determined at the outset, that EBM be placed under final liquidation, whereafter Barak and Mr Venter could prosecute their disputes, which relate only to costs, without Hollard being a party to such debates.

- [25] Barak opposed this approach arguing that it was fundamentally flawed as a matter of procedure and substantive law. Barak contended that the Venter Application was first to be disposed of and, should it fail, that Hollard would be entitled to a final liquidation order. Mr van der Merwe argued that Hollard did not have locus standi to approach the Court for a liquidation order on the basis of section 141 of the New Companies Act, it was only the business rescue practitioner who had approached the court for an order for liquidation and if such application were dismissed, that would be the end of the matter as there would be no application left in which to intervene.

Correct approach to applications serving before this court

- [26] The facts giving rise to the Venter Application are: On 15 April 2021 Mr Venter launched an application in terms of section 141 of the New Companies Act. Mr Venter's locus standi derives from section 141 of the New Companies Act and, in order to succeed in the application, Mr Venter had to comply with the requirements of sections 141 and 145 of the New Companies Act and those provisions dealing with business rescue. On 17 May 2021 Barak delivered its answering affidavit. Hollard considered that Venter's Application was unlikely to succeed. Accordingly, Hollard launched a substantive application of its own on 19 May 2021 (the Second Hollard Application).
- [27] The basis for the Second Hollard Application is a totally different statutory regime, unrelated to the requirements relating to the Venter Application.
- [28] Hollard seeks the Court's consent to institute these proceedings and then leave of the Court to intervene, one assumes, as an applicant in Venter's Application, on the basis that it is a creditor of EBM and accordingly relies on section 346(1)(b) of the Companies Act, 1973 ('the Old Companies Act') as its ground for locus standi for relief as contemplated in section 344 read with section 345 of the Old Companies Act. Hollard has addressed the formalities of the Old Companies Act. Hollard does not join Mr Venter as a co applicant.
- [29] The Second Hollard Application is a stand alone application dependent upon the outcome of the Venter Application. If the Venter Application succeeds, the Second Hollard Application falls away. Only if the Venter Application fails, can Hollard move for the relief sought in its application.
- [30] The essence of the proposition advanced by Hollard is that, even in the absence of Venter's Application being withdrawn or dismissed, it is proper for its application to be moved by consent. This is incorrect. The Second Hollard Application is a self standing application brought on the basis that it is to be moved in the event of Venter's Application not succeeding. Each of the Venter Application and the Second Hollard Application are premised on different statutory provisions and there is accordingly a different lis.
- [31] Venter's Application is based on the provisions of section 141 of the New Companies Act and creates a lis between Mr Venter and Barak.

- [32] The Second Hollard Application is based on the provisions of sections 344, 345 and 346 of the Old Companies Act. Hollard does not bring its application to support the lis created by the Venter Application, nor does it "intervene" as an applicant in the Venter Application.
- [33] The departure point is that this Court is confronted with two competing applications, brought under different statutory regimes and each crystallising creditor's rights at a different date. The underlying rationale for each application differs materially.
- [34] Ex facie Mr Venter's Application, EBM is cited as the first applicant while Mr Venter, nomine officio, is cited as the second applicant. Barak has intervened as a respondent.
- [35] There is no application before this Court where EBM is cited as a respondent thus affording Hollard the opportunity to "step in" as the liquidating creditor. This necessarily means that the prayer for "intervention" must fail.
- [36] Hollard is in the same position as ABSA in FirstRand Bank.[6] ABSA sought leave to intervene on the basis that FirstRand's claim for liquidation was bad.[7] It turns out that FirstRand's claim was good. It matters not as it remains authority for the principle at issue here. Until the Court has dismissed the Venter Application, the Second Hollard Application does not arise. Put differently, if the Venter Application is granted, the Second Hollard Application is moot. Hollard approaches this Court on the basis that, if Mr Venter's case qua business rescue practitioner is bad, then it brings its own case qua creditor. Hollard's case cannot be determined, therefore, until the Venter Application is dismissed. In that event, the Second Hollard Application is moot or academic.
- [37] Barak's position was therefore that the Venter Application must first be disposed of and, should it fail, that Hollard would be entitled to an order in terms of paragraph 5 of its notice of motion.
- [38] Mr Louw, during argument, conceded that Barak's exposition of the legal principles as set out herein in relation to this issue is correct.
- [39] For the reasons advanced herein, I disagree with Mr van der Merwe's construction of the law to the facts of this case being that if the Venter Application is dismissed, there is nothing before the court. Hollard will be granted leave to seek relief as envisaged in terms of section 133(1)(b) of the New Companies Act being the winding up of

EBM as a creditor of EBM.

- [40] I accordingly turn to the Venter Application.

The Venter Application

Notice to and joinder of, affected persons

[41] Upon appointment of a business rescue practitioner, Section 141 of the New Companies Act requires that the newly appointed business rescue practitioner to take certain steps. These are:

‘(1) As soon as practicable after being appointed, a practitioner must investigate the company’s affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.

(2) 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;

(b) there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and-

(i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or

(ii) otherwise, file a notice of termination of the business rescue proceedings; or

(c) there is evidence, in the dealings of the company before the business rescue proceedings began, of-

(i) voidable transactions, or the failure by the company or any director to perform any material obligation relating to the company, the practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps.

(ii) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must-

(aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

(bb) direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.

(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.’

- [42] The section obliges a business rescue practitioner to investigate the affairs of the company in business rescue, consider whether the company is financially distressed and, if so, whether it can be rescued.
- [43] Relevant to the Venter Application is what happens when a business rescue practitioner decides that a financially distressed company cannot be rescued. Subsection 2(a) is prescriptive. It requires a business rescue practitioner to take certain steps. Section 145 is equally prescriptive in its terms. Both sections require notice of each court proceeding or relevant event concerning business rescue proceedings to affected persons. Barak is admittedly an affected person.
- [44] Notice and informing the Court and affected persons is a jurisdictional fact which must be satisfied in order to invoke section 141 and its provisions. First, it is to give notice to various parties. As an officer of the Court, the business rescue practitioner is required to give notice to the Court, the financially distressed company and affected persons (as defined in section 128(1)(a) of the New Companies Act). Second, and having given notice to the identified parties, to apply to court for an order discontinuing the business rescue and placing the financially distressed company in liquidation.
- [45] The issue of notice is a distinct and separate issue but is to some extent interrelated to the question of the joinder of parties who have a real and substantial interest in the outcome of the proceedings. It follows that if a party is entitled to notice, it has a real and substantial interest in the outcome of the proceedings under consideration and in respect of which notice should be furnished.
- [46] This raises the question whether a business rescue practitioner may elect not to give notice to the parties identified in sections 141 and 145 of the New Companies Act and whether a business rescue practitioner may approach a court *ex parte* for this relief.
- [47] Section 145(1) provides:
- ‘(1) Each creditor is entitled to-
- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings;
 - (c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and
 - (d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.’

- [48] A creditor is an affected person. The New Companies Act therefore affords the right to participate in “any court proceedings arising during the business rescue proceedings”. This necessarily includes any application for the conversion of business rescue proceedings. Accordingly, any conduct that has the effect of preventing participation of affected persons in any litigation is contrary to the legislative arrangement and unlawful. This is because such conduct defeats express statutory rights afforded to, inter alia, affected persons.
- [49] The effect of this conclusion is that it is impermissible for a business rescue practitioner to approach a court ex parte and without having followed the prescripts of sections 141 and 145; to take it upon himself to deprive affected persons/creditors to not give them the notice that the New Companies Act requires; to approach a Court ex parte and without joining parties who have a real and substantial interest in the outcome of those proceedings.
- [50] This interpretation is supported by various decisions emanating from the Supreme Court of Appeal[8] and this Division. The notice requirement was expressly considered by the Supreme Court of Appeal in Timasani.[9] Timasani is definitive of the business rescue practitioner’s obligation to give notice as envisaged in section 141 of the New Companies Act. Schippers JA said, after quoting section 145, that:

“[17] Two points are required to be made. First, s 145(1) sets out in some detail the rights and obligations of creditors when participating in business rescue proceedings as a whole, in addition to the rights conferred on creditors as ‘affected persons’ by specific provisions of Chapter 6 of the Act. Subsection 1(a) is a general notification requirement to creditors of court proceedings, decisions and meetings concerning the business rescue. It has nothing to do with the joinder of creditors in legal proceedings involving a company in business rescue. Having regard to the language, context and purpose of s 145, this is underscored by ss 145(2) and 145(3). Subsection (2) provides that in addition to the rights in subsection (1), each creditor has the right to vote to amend, approve or reject a proposed business rescue plan and if that plan is rejected, to propose an alternative plan or make an offer for the interests of other creditors. In terms of subsection (3), creditors are entitled to form a committee to be consulted by a business rescue practitioner in the development of a business plan.

- [18] Second, and consistent with the text, context and purpose of s 145, subsection (1)(b) confers on creditors a statutory right to participate in any legal proceedings that arise during the business rescue proceedings of a company. In this respect s 145(1)(b) stands on an equal footing with s 131(3) of the Act, in terms of which each affected person has a right to participate in an application to place a company in business rescue. In both cases the leave of the court to intervene in the proceedings is not required, but the court may need to regulate the procedure to be followed if the affected person or creditor wishes to file affidavits.
- [19] Inasmuch as a company in business rescue must be cited in legal proceedings against it, the duty to give notice to creditors in terms of s 145(1)(a) rests on the business rescue practitioner. Being a general notification requirement, the purpose of s 145(1)(a) is to inform creditors of court proceedings brought during business rescue: it does not require the joinder of every creditor in such proceedings. This is hardly surprising as the business

rescue practitioner has full management control of the company during business rescue proceedings; is obliged under the Act to keep creditors abreast of developments in the business rescue, and knows who the creditors are and which of them may wish to participate in the relevant legal proceedings. Two cases were cited in support of the submission that s 145(1)(a) required the joinder of all creditors in any legal proceedings involving the company in business rescue. However, both these cases

involved the fate of the business rescue plan and contentions that directly affected the financial interests of creditors. They were not authority for the submission advanced.” (Emphasis added)

[51] In *Engen Petroleum*[10] Boruchowitz J dealt with the notification requirements in section 131(2) of the New Companies Act. The court found that the use by the applicants of the short form notice of motion constituted an irregularity[11]

[52] Section 141(2)(a)(ii) uses the exact same wording, being to ‘apply to court,’ as the wording used and analysed in section 131(2) in the *Engen* matter. Mr Fine argued that the reasoning of Boruchowitz J has equal application to section 141(2)(a)(ii).

[53] In my view, the notice requirements of both sections 141 and 145 are quite clear. All affected persons are entitled to notice[12] and the requirement of giving notice rests with the business rescue practitioner. It is a jurisdictional pre-requisite. On this ground alone, the application must fail.

Mr Venter not entitled to relief and court not entitled to grant

[54] The relief sought by Mr Venter, which is fundamental to the outcome and success of his application do not fall within the power and competence of this Court[13]. The powers of a liquidator are carefully and clearly prescribed in terms of sections 386 and 387 of the Old Companies Act. So too the manner and method in which these powers are conferred upon a liquidator. There is a carefully structured regime which must be followed and it is only after the steps prescribed in the Old Companies Act have been exhausted, that there is recourse to the courts.

[55] Mr Venter asked for the business rescue proceedings of EBM that commenced on 17 December 2020 to be converted to a provisional liquidation with the return date being determined by the Court, at which date all persons and/or parties interested could show cause why EBM should not be placed under final liquidation. He also requested that the powers of the liquidators be extended and that the provisional liquidators be granted the power to trade and to appoint him as a consultant.

[56] This relief was not competent. This is so because until a concursus is created, the assets of the company vest in the company under the control of the directors and the court has no power to override contractual bargains between the parties.

- [57] Only once liquidation has ensued does the regime in the Old Companies Act and the Insolvency Act come into play. The strict application of the Old Companies Act in relation to the powers of liquidators and the competence and ability of the court to intervene and grant powers outside the scope of the act is endorsed in Gainsford.[14]
- [58] EBM is a company in business rescue. It is a financially distressed company as contemplated in section 128(1)(f) of the New Companies Act. Once a company enters business rescue, either by the passing of a resolution in terms of section 129, or by order of Court in terms of section 131, a business rescue practitioner is appointed to the financially distressed company. Upon appointment, the business rescue practitioner has the powers and duties set out in section 140 of the New Companies Act. This means, therefore, that the New Companies Act is the source of a business rescue practitioner's powers when appointed to supervise a financially distressed company. Put differently, if the New Companies Act does not afford a particular power to a business rescue practitioner, the business rescue practitioner does not, as a matter of law, have such a power.
- [59] Nothing in Chapter 6 of the New Companies Act imports the powers of a liquidator winding up a company under Chapter 14 of the Old Companies Act on a business rescue practitioner with the result that the business rescue practitioner is not in a position to apply for extended powers under the Old Companies Act.
- [60] Conversely, the powers of a liquidator are prescribed and circumscribed in the Old Companies Act.
- [61] Mr Venter presented an application that, but for Barak's fortuitous intervention, may have resulted in the Court being induced to grant an order that was not only entirely incompetent but was most certainly not provisional in nature. Mr Venter failed to appreciate that immediately upon EBM being placed in provisional liquidation the business rescue process would come to an end. This means, naturally, that on any hypothetical return date the question before the Court would not be one which concerned whether EBM should remain in business rescue but rather whether a final liquidation order should be made. The relief was final in effect the business rescue proceedings would no longer continue, the regime of liquidation would immediately take effect creating an impossible and untenable situation.
- [62] It is not open to a person such as a business rescue practitioner in advance and in anticipation of the appointment of an unnamed unspecified provisional liquidator applying for an extension of those powers, particularly in circumstances where the views and opinions of creditors are unknown and in particular where it is not known in the first instance whether or not the Master has decided to limit the powers granted to a provisional liquidator.
- [63] The application falls to be dismissed on this basis too.

Duty of disclosure in ex parte proceedings

[64] The reason for moving the application ex parte was formulated as follows by Mr Venter:

3. In line with the nature of business rescue proceedings and the

transparency with which these proceedings are conducted all creditors are aware of the pending application to set aside the business rescue proceedings dealt with hereinbelow and all affected parties will have the right to participate in these proceedings having regard to the relief being provisional with a return date to allow for proper notice to affected parties.

4. I therefore confirm that it will serve no purpose to incur costs

pertaining to formal service on creditors and that the granting of an ex parte order with a return date on which all affected parties can give reason why the order should not be made final, represents the proper manner with which to continue.

[65] Although section 130(5) of the New Companies Act provides that a court when considering the setting aside of a business rescue resolution may place the company under liquidation, the case argued on behalf of EBM and Hollard in the Barak Application was novel and unprecedented as nobody, including Hollard, Barak, EBM and Mr Venter had requested the liquidation of EBM as an alternative to business rescue. It was either that the resolution was to be set aside or that the business rescue was to be continued. All made it perfectly clear that liquidation was not on the table. An order liquidating EBM under such circumstances (where nobody had applied for this relief) would thus have been unprecedented and would have required some judicial creativity.

[66] The Venter Report was requested for particular reasons and directed at particular arguments advanced by Lebonix being that EBM remaining in business rescue would have a better result for EBM's employees than it going into liquidation or being taken out of business rescue but was also requested to deal with the argument of Mr Louw, representing EBM at the time (now being Mr van der Merwe), that a court must weigh up the interests of 3 sets of rights being the employee, shareholder and creditor's rights before it can determine that it is just and equitable to place the company in business rescue (or take it out). Paragraph 64 of Mr Louw's heads of argument (representing both Hollard and EBM at that stage) submitted: 'We consequently submit that as neither party has sought the liquidation of IGM, the court should not entertain liquidation at least without further evidence and argument.'

[67] In Mr Venter's founding affidavit he stated that during the preparation of his report he came to a realisation that 'the Barak Application, will in all probability not bring finalisation to the matter. I am therefore duty bound to proceed with this application in the best interests of all affected parties.' But then Mr Venter approached another court (not the court seized with the Barak Application) and he did not notify the affected persons or the court as undertaken in his report. This is a most extraordinary state of affairs. Mr Venter did not apply to the court seized with the matter, but launched an independent, fresh application and notified no-one. This despite saying in his report that 'I do not yet give such notice or proceed to seek the

liquidation of EBM...’ as he would await the outcome of the Barak Application. But when he then does so, two weeks later, he does not give anyone notice, not even the court charged with deciding the Barak Application.

[68] In *Powell NO and Others v Van der Merwe NO and Others*[15], Southwood AJA held the following:

“... These factors also illustrate the necessity for the rules relating to proper disclosure of material facts in ex parte applications to be strictly and rigorously applied.

[73] In *National Director of Public Prosecutions v Basson* 2001 (2) SACR 712 (SCA) (2002 (1) SA 419) in para [21] this Court expressly approved of the rules as they are set out in *Schlesinger v Schlesinger* 1979

(4) SA 342 (W) at 348E-349B, concluding with the following three propositions.

‘(1) In ex parte applications all material facts must be disclosed which might influence a court in coming to a decision;

(2) The non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission;

(3) The Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.’

[74] In *Schlesinger Le Roux J* also considered when a court will exercise its discretion in favour of a party who has been remiss in its duty to

disclose rather to set aside the order obtained by it on incomplete facts. He concluded (at 350B-C):

‘It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained in a subsequent application by the same applicant.’

[75] In my view, this approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out in the application for the order (cf *Hall and Another v Heyns and Others* 1991 (1) SA 381 see at 397B-C) or, as in this case, because they have been insufficiently investigated. And it should be rigorously applied where a right in the Bill of Rights has been violated. That is the only way the courts can ensure that the right to privacy is vindicated after the event.” (emphasis provided)

[69] More recently, the principle of disclosure in ex parte proceedings was re-affirmed in *Recycling and Economic Development Initiative of South Africa NPC*[16].

[70] Mr Fine pointed to a host of facts which had not been disclosed in the founding affidavit and which are material and might have influenced a court deciding the application. These include: Mr Venter did not explain why he only annexed and referred to his report when he knew, that Barak had responded to that report, why he referred only to Mr West's affidavit in the knowledge that there were material facts which had been placed in issue by Barak both in its founding and replying affidavit and why, to circumvent the requirement of full disclosure he referred to the affidavits being made available to the Court, in the event the Court so required it. It was only in the Second Hollard Application that Barak came to learn of the fact that Hollard had, allegedly, provided funds to EBM, in the form of post commencement finance, which although in dispute, need not

be resolved in these proceedings. None of these facts were disclosed by Mr Venter in his founding or supplementary affidavits in the Venter Application.

[71] Mr Venter was obliged to disclose these facts and provide an explanation why, suddenly, this funding had dried up. It was necessary for him to do so given the thesis upon which the approach to the Court was made: that being the inevitable environmental disaster that would shortly befall EBM.

[72] Mr Venter also did not explain clearly in his founding affidavit that it was not only Barak that did not seek the liquidation of EBM in the event of the resolution being set aside, but that all other stakeholders too who participated in the hearing before me. As explained earlier, it was suggested that I could do so of my own accord even though there was no application for the liquidation of EBM which served before me. (Mr Fine argued that such an order of liquidation under such circumstances would not be competent.) The point though is this: a request for the liquidation of EBM had been made. This ought to have featured in the founding affidavit as the relief sought was to an extent, pending.

[73] Court orders should only be granted behind a litigant's back in exceptional circumstances. In *South African Airways SOC v BDFM Publishers (Pty) Ltd and others*, 2016 (2) SA 561 (GJ) at para

[22] Sutherland J summarised this principle as follows:

"The principle of audi alteram partem is sacrosanct in the South Africa legal system. Although, like all other constitutional values, it is not absolute, and must be flexible enough to prevent inadvertent harm, the only times that a Court shall consider a matter behind a litigant's back are in exceptional circumstances. The phrase 'exceptional circumstances' has regrettably through overuse, and the habits of hyperbole, lost much of its impact. To do that phrase justice, it must mean very rarely, only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established."

[74] More fundamentally, section 34 of the Constitution guarantees a right to a fair hearing, which right has been formulated as follows by Yacoob J in the unanimous judgment of *De Beer NO v North- Central Local Council Etc*, [2001] ZACC 9; 2002 (1) SA 429 (CC) at para [11]:

‘This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity van usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected’.

[75] One would have expected Mr Venter to bring the Venter Application to me and with notice to all affected persons. It is inconceivable for Mr Venter to have formed the view ‘that it will serve no purpose to incur costs pertaining to formal service on creditors’. Asked during argument why I had not been approached, no explanation was proffered.

[76] The true reason for proceeding ex parte is revealed in paragraph 14 of the supplementary short heads of argument filed on behalf of Mr Venter on 7 June 2021 on the eve of the hearing. It records:

‘The full extent of Barak’s opposition to the conversion application represents their attack on the BRP. This approach has prolonged the finalisation of the application and the granting of a liquidation order extensively, all at the cost of EBM and its affected parties. This was one of the reasons why the BRP proceeded with the conversion application on an ex parte basis. It is submitted that the BRP’s fears in this regard proved to be well-founded.’

[77] The final liquidation order would, of course, be operative from the date of presentation of the application to the Court ie when it was lodged with the Registrar of the Court – this is so by operation of law[17]. The anticipation of opposition and the delay in getting the papers ripe for hearing can therefore not be a consideration in proceeding with the liquidation application ex parte.

Costs

[78] Mr Venter's application was ill conceived. His conduct in so doing was unlawful and at odds with the fiduciary position that he held. His conduct would warrant attorney/client costs. The question is whether costs de bonis propriis is warranted as sought by Barak?

[79] The Supreme Court of Appeal has stated that a ‘business rescue practitioner is to be held to a high professional and ethical standard.’[18]

[80] In CSARS v Louis Pasteur Investments (Pty) Ltd[19], Mudau J summarised the principles in relation to costs de bonis propriis succinctly as follows:

[50] It is trite that costs de bonis propriis should only be awarded in exceptional circumstances. This kind of cost order is granted against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities, and where they acted inappropriately

and in an egregious manner. The assessment of the gravity of the conduct is objective and lies within the discretion of the court.

[51] This court is called upon to mulct Mr Naude with a punitive costs order de bonis propriis given his conduct as the BRP. As an officer of the court, it is an inflexible requirement that a business rescue practitioner execute his or her duties in good faith, bearing in mind that the benefit of earning fees should never outweigh the duty to act in good faith. Good faith implies that the business rescue practitioner is obligated to execute his/her duties with the utmost trust, confidence and loyalty to the benefit of all stakeholders in the business rescue process. By virtue of their role, business rescue practitioners are therefore held to a higher professional and ethical standard.'

[81] There exist no exceptional circumstances that would have entitled Mr Venter not to give notice to the affected persons. His failure to have done so constitutes a total infringement of the affected persons' rights to a fair hearing. Mr Venter knew that Barak was critical of his conduct. Barak criticized him for, amongst other reasons, not being independent. This is why he did not give anyone notice.

[82] In Ex Parte Klopper[20] the Court said:

"The general rule in these cases seems to be that a person in a fiduciary position such as a provisional liquidator should not be ordered to pay the costs of unsuccessful litigation de bonis propriis unless it appears that there was a want of bona fides on his part, or that he acted negligently or unreasonably; et. In re Estate Potgieter, 1908 T.S. 982; Grobbelaar v Grobbelaar, 1959 (4) SA 719 (AD)" (Emphasis added)

[83] At best for Mr Venter, his conduct was negligent at worst mala fide. It is well documented that Mr Venter refused to conduct himself in a reasonable and appropriate manner. Correspondence has not been answered and reasonable requests for information have been refused.

[84] Barak's professed purpose was to exercise its contractual rights under its securities being the rights to step into the shoes of Lebonix as EBM's sole shareholder, replace the board of EBM, recapitalise it and lead it out of the financial difficulties it currently faces. Barak made it clear that it did not seek the liquidation of EBM.

[85] Mr Venter suggested that his hands were tied by Barak exercising its contractual rights in circumstances where information pertinent to any decision on a bail out was deliberately withheld from it.

[86] Mr Venter does not accept that Barak was exercising its rights. As explained by the Supreme Court of Appeal in *Oakdene*,^[21]

‘[38] 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 s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In these circumstances I do not believe that the court *a quo* can be criticised for having regard to the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants.’ (Emphasis added)

[87] Mr Venter approached the Court on the basis that EBM's assets were under grave threat; the Eskom power supply had been cut off on account of non payment of its account and it was only by virtue of a relationship between EBM and the security company providing services to EBM that any security services were on going at EBM's property. Mr Venter blamed this entirely on Barak. Mr Venter suggested that Barak had set about to sabotage the prospects of any rescue in EBM. Specific reliance was placed on the NanOreTech project that would have brought substantial income into the business.

[88] However, in the Venter Report he explained that any income that EBM may earn from the NanOreTech project has been ceded, in *securitatem debiti*, to Barak. He conceded that EBM has no contractual right to receive or use these funds. Further, and absent those funds, salaries could not be paid at the end of March 2021. It is also apparent from the Venter Report that the NanOreTech project cannot get off the ground because of unresolved regulatory issues. Barak was at pains to point this out to this Court in its response to the Venter Report. Mr Venter did not disclose Barak's response to his report in his founding papers.

[89] A further indictment of Mr Venter is his conduct in relation to Lebonix where he solicited the aid of Mr Bezuidenhout, a director of Lebonix to a resolution dated 16 April 2021, in circumstances where both knew that Lebonix's claim had been ceded to Barak and subordinated. This resolution was passed on the same date upon which Barak gave notice of its intention to exercise its rights under the pledge to it. There has been no attempt made by Mr Venter to deal with this serious allegation.

[90] The circumstances relating to the passing of the resolution and the calling in aid of Lebonix, resonates bad faith. This is the same date upon which the correspondence referred to below was generated.

[91] In the knowledge of what transpired on 16 April 2021 (and being the date after the launch of his ex parte application) Mr Venter wrote to Eskom. He said:

‘As you may recall, a key part of the rescue plan for EBM to cover its operating costs in the short term, while the broader plan is being implemented, the management have achieved this by letting the plant to Nanoretech /Glencore for a period of 10 months.

In order for EBM to begin processing the Glencore product the addition of the Ion Exchange plant and regulatory approval from the National Nuclear Regulator (NNR) was required.

The plant build is now complete (at a cost R30 m to Glencore).

NNR approval is expected today or early next week, after which processing will commence and cash flow is expected by 30 April 2021.

The outstanding amount for April 2021 of R1 565 423 80 will accordingly be paid 30 April 2021.

We are aware that this is putting strain on your own cash flow, but appreciate your understanding and support through this difficult time.’ (Emphasis added)

[92] There also appeared to be a complete shift in the basis for business rescue. The basis for business rescue as supported by Mr Venter was that EBM could be restored to solvency and that it needed three to six months to become operational so as to be in a position to secure a sale of the asset which would be valueless if it was not operational. That was the view persisted in by EBM and Mr Venter throughout the business rescue proceedings.

[93] It was not simply a case that EBM required funding for its operational expenses and that absent those funds, business rescue could not succeed. It appears to be incorrect to suggest that business rescue proceedings cannot continue on the simple basis that there are no further funds to finance the day to day operations of EBM. The tension between these two positions required explanation.

[94] Mr Venter is an officer of this Court and represented by attorneys and counsel. There is simply no reasonable explanation for conduct of this sort. This is a case where a *de bonis propriis* costs order is appropriate.

[95] There is no reason why EBM and its creditors, which include Barak as a substantial creditor, should be saddled with the consequences of Mr Venter's ineptitude and the costs of the Venter Application. As has already been pointed out, the true litigant in the Venter Application is Mr Venter by reason of the provisions of section 141 of the New Companies Act, upon which he relies for the relief sought.

[96] I have a discretion in regard to costs which I exercise in favour of EBM and its creditors. Having regard to all the facts and circumstances of this matter I am driven to conclude that it is only appropriate in the circumstances that Mr Venter be directed to pay the costs of the Venter Application *de bonis propriis*, on the scale as between attorney and client and to include the costs consequent on the employment of two counsel where so employed.

[97] I haven't disregarded the fact that after Hollard intervened, Barak conceded to the relief sought by Mr Venter in final form. This position was clear after Barak had filed its answering affidavit in the Second Hollard Application. Mr Venter ought to have thrown in the towel at that stage. Instead, he continued to justify the Venter Application. To his credit he did not persist with the provisional relief or the extended powers of the liquidator and acquiesced to the final winding up of EBM. This belated shift did not, unfortunately, obviate the need for the argument on 8 June 2021.

The Second Hollard Application

[98] There exists no dispute that the Second Hollard Application entitles it to a final winding up order of EBM. All formality requirements have been met, including the setting of security and notice to other creditors. All representatives present at the hearing on 8 June 2021 confirmed that there was no impediment against the granting of the final winding up order based on the Second Hollard Application. I am satisfied that such an order is competent.

Order

[99] I accordingly grant the following order:

1. Barak Fund SPC Limited ('Barak') is granted leave to intervene as a respondent in the application under case number 21/18884 where EBM Project (Pty) Ltd (in business rescue) ('EBM') and Mr Venter seek the winding up of EBM in terms of section 141 of the Companies Act, 71 of 2008 ('the Venter Application');
2. The Venter Application is dismissed with costs, as between attorney and client, including the costs consequent upon the employment of two counsel, *de boniis propriis* as against the second applicant, Mr Venter, including the costs reserved on 22 April 2021.
3. The Hollard Insurance Company Limited ('Hollard') is authorised to institute proceedings under case number 21/18884 as an applicant (*qua creditor*) to seek relief against EBM in accordance with the provisions of section 133(1)(b) of the Companies Act, 71 of 2008.
4. It is declared that the business rescue proceedings commenced by EBM on or about 17 December 2020 has come to an end.
5. EBM is finally wound up in the hands of the Master of the High Court.
6. The costs of the liquidation application brought by Hollard, are costs in the liquidation of EBM.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Counsel for the applicants in the Venter Application: Adv LK van der Merwe

Instructed by: Cawood Attorneys Inc

Counsel for the respondent (first intervening party) in the Venter Application: Adv DM Fine SC and Adv AW Pullinger

Instructed by: Webber Wentzel

Counsel for the second intervening party (Hollard): Adv PF Louw SC and Adv D Vetten

Instructed by: Edward S Classen & Kaka

Date of hearing: 8 June 2021

Date of Judgment: 14 June 2021

- [1] This application was launched on 22 December 2020.
- [2] The IGM Application includes an intervention application by Barak that IGM does not oppose: it is IGM's stance that Barak is entitled to participate in the proceedings by virtue of it being an affected person, as defined in the Act.
- [3] This application commenced with the service of the Notice of Motion on 20 January 2021.
- [4] Barak learnt of the Venter Application in the following manner: Naseeha Bham ('Ms Bham'), an associate in the employ of Webber Wentzel ('WW'), the attorneys for Barak, was checking the urgent court roll on 20 April 2021 to ascertain the number on the roll and judge to whom another matter in which she was involved with had been allocated. Ms Bham is a member of the team at WW working on the Barak matter. Ms Bham saw the names of Mr Venter and EBM on the roll and immediately alerted Damian Wright ('Mr Wright') one of the partners at WW dealing with the Barak matters. Mr Wright then initiated contact with Mr Venter's (new) attorneys Messrs Cawood Attorneys. Cawood Attorneys eventually gave WW and its counsel access to CaseLines in the course of the afternoon of 20 April 2021. Barak's junior counsel appeared before Madam Justice Kathree-Setiloane on 21 April 2021 and argued that Barak was entitled to leave to intervene in the Venter Application and a reasonable period of time in which to file an answering affidavit.

This was conceded.

- [5] There was some confusion as to whether Mr Louw SC was still in the matter as he previously (from 15 to 17 March 2021) had represented EBM in the Barak Application (instructed by Edward S Classen & Kaka attorneys). EBM was represented by Mr van der Merwe instructed by Cawood Attorneys Inc. in the Venter Application. Nothing turns on this other than to explain the delay in Hollard's application.
- [6] FirstRand Bank Limited v Wallace Pienaar Properties CC (Absa Bank Limited intervening) 2002 (2) SA 758 (W)
- [7] At 760 E

- [8] In re Body Corporate of Caroline Court [2002] 1 All SA 49 (A) at para [9] and pages 659 to 660
- [9] Timasani (Pty) Ltd (in business rescue) and another v Afrimat Iron Ore (Pty) Ltd
- [2021] ZASCA 43 (13 April 2021)
- [10] Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others, 2012 (5) SA 596 (GSJ)
- [11] paragraph [17]
- [12] Not being able to get hold of the creditors is quite another thing (which does not arise in this matter) – that can be dealt with in an application to court for substituted service as suggested by Boruchowitz J in Engen. But the notice requirement can not simply be dispensed with at the election of the business rescue practitioner.
- [13] Morar N. O v Akoo and Another, 2011 (6) SA 311 (SCA) at paras [19] and [20] – a court can only grant orders within its power and competence.
- [14] Gainsford & Others NNO v Tanzer Transport (Pty) Ltd 2013
- (4) SA 394 (GSJ) at [22], [23], [29] and [30]
- [15] 2005 (5) SA 62 (SCA) at 89A-G
- [16] Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs, 2019 (3) SA 251 (SCA) at paras [45] to [52]
- [17] Section 348
- [18] African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others, 2015 (5) SA 192 (SCA) at para [35]
- [19] (12194/17) [2021] ZAGPPHC 89 (4 March 2021)
- [20] Ex parte Klopper NO: in re Sogervim SA (Pty) Ltd (in liquidation) 1971 (3) SA 791 (T)
- [21] Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others 2013 (4) SA 539 (SCA)

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