

SOUTH AFRICA / JUDGMENT

Schipper v Tirisano Property Group (Pty) Ltd and Others (22983/23; 16033/2023; 18657/2023; 3973/2024) [2024] ZAWCHC 125 (8 May 2024)

[2024] ZAWCHC 125

COURT

Western Cape High Court, Cape Town

BEFORE

Blumberg

CASE / FILE NUMBER

22983/23; 16033/2023; 18657/2023; 3973/2024

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

In the matter between:

Case No: 22983/23

ARNO SCHIPPER

Applicant

and

TIRISANO PROPERTY GROUP (PTY) LTD

First Respondent

Registration number: 2013/136691/07

Registered address: [...] P[...] K[...] Avenue

Platteklouf

Parow

EMALAHLENI LOCAL MUNICIPALITY

First Intervening Creditor

COURTHIEL HOLDINGS (PTY) LTD

Second Intervening Creditor

AQUARELLA INVESTMENTS 266 (PTY) LTD

Third Intervening Creditor

AND

In the matter between:

Case No: 16033/2023

EMALAHLENI LOCAL MUNICIPALITY

Applicant

TIRISANO PROPERTY GROUP (PTY) LTD

Respondent

COURTHIEL HOLDINGS (PTY) LTD First Applicant for intervention

AQUARELLA INVESTMENTS 266 Second Applicant for intervention
(PTY) LTD

In the matter between:

Case No.: 18657/2023

AQUARELLA INVESTMENTS (PTY) LTD

First Applicant

EMALAHLENI LOCAL MUNICIPALITY

Second Applicant

TIRISANO PROPERTY GROUP (PTY) LTD

Respondent

In the matter between

Case no.: 3973/2024

COURTHIEL HOLDINGS (PTY) LTD

Applicant for intervention

under case no. 16033/2023

EMALAHLENI LOCAL MUNICIPALITY

First respondent

TIRISANO PROPERTY GROUP (PTY) LTD Second respondent

Hearing: 18 March 2024

JUDGMENT DELIVERED ELECTRONICALLY ON 8 MAY 2024

BLUMBERG AJ

- [1] Tirisano Property Group (Pty) Ltd ('Tirisano') is a property-owning company. It derives its income from a mixed-use property located in Emalahleni (previously Witbank), Mpumalanga.
- [2] This property, which comprises five erven, is referred to in the papers as 'the Witbank property' and I do the same in this judgment.
- [3] At the end of 2023, Tirisano was in arrears on its municipal account in respect of the Witbank property in the admitted amount of R11.156 million.
- [4] Tirisano's ongoing failure to settle its arrears prompted the local authority in question, the Emalahleni Local Municipality ('Emalahleni'), to launch proceedings in this court for Tirisano's winding-up. This Emalahleni did on 18 September 2023.[1] I refer to this as 'the Emalahleni winding-up application'.
- [5] A slew of applications followed, all launched out of this court. I set these out in chronological order below.

The Aquarella application

- [6] On 20 October 2023, Aquarella Investment 266 (Pty) Ltd ('Aquarella'), which was unaware of the pending Emalahleni winding-up application, launched its own application for the winding-up of Tirisano ('the Aquarella winding-up application').[2]
- [7] Aquarella based its standing on claims arising from its sale of a property rental enterprise (known as 'the Umdoni Centre', in KZN) to Tirisano in terms of a sale agreement concluded between them on 25 August 2022.
- [8] On learning of the Emalahleni winding-up application, Aquarella applied for leave to intervene therein ('the Aquarella intervention application').
- [9] Tirisano, disputing Aquarella's standing as a creditor, opposed the Aquarella winding-up application, as well as the Aquarella intervention application.
- [10] Emalahleni for its part sought and obtained leave to intervene in the Aquarella application.

The business rescue application

[11] On 14 December 2023, Mr Arno Schipper, a shareholder and co-director of Tirisano, launched an application for an order placing Tirisano in business rescue in terms of section 131(4) of the Companies Act 71 of 2008 ('the Companies Act') ('the business rescue application').[3]

[12] Each of Emalahleni, Aquarella and Courthiel Holdings (Pty) Ltd ('Courthiel') were granted leave to participate in the business rescue application, which they oppose.

The Courthiel intervention application

[13] On 27 February 2024, Courthiel launched an application for leave to intervene in the Emalahleni winding-up application ('the Courthiel intervention application').[4]

[14] Courthiel's standing as creditor of Tirisano is not in dispute. It acquired claims against Tirisano, by cession, that have their origin in Tirisano's 2013 purchase of the Witbank property (the seller thereof having ceded its claims against Tirisano to Courthiel in 2016).

[15] The Courthiel intervention application is unopposed.

[16] So too is the Emalahleni winding-up application.

matters for determination

[17] In light of what is set out above, the following matters are before me (all of which were argued on 18 March 2024):

17.1. the business rescue application;

17.2. the Emalahleni winding-up application;

17.3. the Courthiel intervention application; and

17.4. the Aquarella winding-up application and Aquarella intervention application.

[18] Each of the parties referred to above – viz. Tirisano, Mr Schipper, Emalahleni, Courthiel and Aquarella – was represented at the hearing by its own team of attorneys and counsel.

[19] The parties were ad idem that the following was the appropriate approach to the various matters before court, and it is the course that I intend to follow in this judgment:

19.1. The business rescue application should be decided first.[5]

19.2. Were the business rescue application to be granted, there would be no need to decide the other applications, as these would then be struck by the general moratorium on legal proceedings against a company in business rescue, in terms of section 133 of the Companies Act.

[104] At the hearing, there was no dispute amongst the parties in relation to these principles.

application to the facts

A reasonable prospect of restoring Tirisano to solvency?

- [105] I have set out Mr Schipper's respective proposals – in his founding affidavit and in reply – for restoring Tirisano to a position of solvency. I will overlook the change of tack in reply, and consider both proposed options.
- [106] The difficulty facing Tirisano in the business rescue application is that – owing to the magnitude of the debt to Courthiel (R239.5 million) – a return to solvency would require either (i) refinancing the Witbank property (i.e. raising what Mr Schipper refers to as “alternative funding” by way of a mortgage loan over that property, in order to settle Courthiel's debt), or (ii) selling the Witbank property.
- [107] But Tirisano's ongoing attempts, over a period of years, to raise alternative mortgage finance over the Witbank property have failed. The evidence shows that, contrary to what is alleged by Mr Schipper, the difficulties encountered in raising alternative finance are by no means “temporary in nature”. On the contrary, they appear to be chronic, if not terminal.
- [108] As I have mentioned, these difficulties are attributed to Tirisano's “inability to procure formal, bankable leases” from the relevant tertiary institutions. It was submitted on behalf of Mr Schipper that the business rescue practitioner
- would be well-placed to engage with TUT and Nkangala to negotiate and formalise lease agreements, and that the business rescue practitioner could be expected to achieve success in doing so, where Mr Schipper has failed.
- [109] But that is mere speculation; it amounts to no more than an unsubstantiated “hope that the practitioner will provide the panacea to [the company's] problems” (see above); and it falls short of establishing a “reasonable prospect for rescuing the company”.
- [110] What I have set out above holds too for the allegedly temporary and easily resolvable difficulties encountered in extracting payment of arrears from the tertiary institutions.
- [111] As to the case in reply (which centred around selling the Witbank property), the starting submission was that the market value of the Witbank property was in the order of R365 million; and accordingly that the sale thereof in business rescue would comfortably allow for the settlement of all of Tirisano's debts. This alleged market value was based on a July 2021 valuation report attached to the founding affidavit.
- [112] As was accepted by counsel for Mr Schipper in oral argument, however, this valuation report cannot be taken as a reliable indicator of market value. In the first place, it is nearly three years out of date. In the second, it is premised on the assumption that there are formal leases in place in respect of the student accommodation component of the Witbank property (Khayaletu) – when, on Mr Schipper's own case, there are not. It matters not whether this assumption held true at the time that the valuation report was prepared (in July 2021). Because even if it did, it no longer does. Again, counsel for

Mr Schipper fairly accepted this.

- [113] The alternative valuation proposed – not on the papers, but in oral argument – was R160 million. This was based on the combined value of the mortgage bonds registered over the property in favour of Courthiel.
- [114] It is by no means clear to me that a sale of the Witbank property for that amount – even combined with the hoped-for recovery of arrear rentals owed by TUT and Nkangala – would suffice to pay Tirisano's debts. But I put that aside.
- [115] The more fundamental difficulty is that there is no evidence – in the form of a valuation report or otherwise – to support this alternative valuation, which is in the circumstances speculative.[56] I do not see why the combined value of the mortgage bonds registered over the Witbank property (the most recent of which was in 2017) can be taken as a reliable indicator of present market value, particularly not in circumstances where the post-mortgage performance of the rental enterprise conducted on the Witbank property has proved so lacking (more on this below).
- [116] Counsel's pivot, in oral argument, from a valuation of R365 million to a 'fallback' value of R160 million (some R215 million less) calls to mind the SCA's note of caution in *Boschpoort*, concerning the "notoriously elastic and often highly subjective" nature of asset-valuations:
- "That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets. Were the test for solvency and liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a practical and therefore effective legal environment for the adjudication of the liquidation of companies..."[57]*
- [117] There is moreover no indication on the evidence that anyone has expressed any interest in purchasing the Witbank property. To contend, as Mr Schipper does, that this commercial property can be sold for R160 million – in circumstances where (i) there are no formal lease agreements in place, and (ii) the rental enterprise conducted thereon has over time proved incapable of generating sufficient cash even to keep the lights turned on – amounts in my view to pure speculation.
- [118] To conclude: Mr Schipper's case for business rescue rested heavily on the contention that Tirisano is factually solvent. It was suggested that this is common cause, but this is not so. [58] The contention that Tirisano is factually solvent is in the end premised on a value being placed on the Witbank property that is unsupported by the evidence, and that is arbitrary and speculative.

A reasonable prospect of a better return?

[119] As I have mentioned, the alternative case advanced for business rescue is that even if Tirisano cannot be restored to a solvent going concern, business rescue proceedings will result in a better return for its creditors and shareholders than would result from its immediate liquidation.

[120] Mr Schipper alleges in this regard that a business rescue practitioner would be in a position to sell Tirisano's assets "at a much better return" than would a liquidator. The allegation is however made without elaboration or substantiation; and it is insufficient for purposes of establishing "a reasonable prospect for rescuing the company".[59]

[121] I accordingly find that the existence of a "reasonable prospect for rescuing" Tirisano, as contemplated by section 131(4), has not been established.

the appropriate remedy

[122] On the facts of this case, I am in any event of the view that business rescue would not be an appropriate remedy. My reasons are the following:

122.1. The majority creditor, Courthiel, has stated that it will not support any business rescue plan along the lines proposed. Mr Schipper

criticises this stance as being callous and in bad faith. I do not agree. In Mr Schipper's own words, Courthiel has shown leniency and extreme patience in its dealings, over the years, with Tirisano's ongoing default. And in circumstances

where, when the shoe pinched, Mr Schipper was quick to jettison his professed desire to ensure that Tirisano's employees would remain in its employ,[60] it does not lie in his mouth to criticise Courthiel for being insensitive to the position of Tirisano's employees.

Courthiel's stance is a genuine and legitimate obstacle to the success of business rescue proceedings that I must take into account. See the authorities cited above.

122.2. The proposal that Mr Schipper settled on in reply involved the sale of the Witbank property – by far Tirisano's most valuable asset, its only income-producing one, and the locus of most if not all of its employees. This proposal, if implemented, would leave Tirisano in a position where it is unable "to continue normal trading".[61] This has shades of an informal winding-up.[62]

122.3. Mr Schipper has delayed extensively in bringing proceedings to place Tirisano in business rescue. On his own showing, Tirisano has been a candidate for business rescue – in the sense at least of being financially distressed – since 2020. The delay is inimical to the purpose of the remedy; and in my view the following dictum in *Forty Squares* finds application on the present facts:

"In my view, an application for business rescue was thus warranted earlier during 2022...Yet the directors did not follow that

avenue then. They rather set about continuing to trade in contravention of the Companies Act (thereby preferring such creditors with whom they traded) and also went about attempting to reach comprises with a limited number of other creditors.”[63]

122.4. On the uncontested evidence before me, I cannot but agree with the contention on behalf of the three applicant creditors that Tirisano

has been mismanaged – and indeed conducted with reckless disregard for the interest of its creditors. This has ramifications. First, I have real difficulty with the proposition that Tirisano should simply be permitted, post-business rescue, to continue in business under the stewardship of its current controllers. Second, the applicant creditors have – for these reasons – established a case for the winding-up of Tirisano on just and equitable grounds.[64] To my mind, the legislative preference for business rescue (as referred to above) does not extend to companies in these circumstances. Third, I agree with the submission on behalf of Courthiel that, particularly given the mismanagement of Tirisano, the powers of a liquidator are indicated. Besides anything else, action should be instituted, without delay, to recover the

significant arrear rentals owed by TUT and Nkangala (portions of which may already be at risk of prescribing). In my view, the considerations mentioned in this paragraph strongly favour liquidation as the preferred remedy.

122.5. It was suggested in argument on behalf of Mr Schipper that the allegations of mismanagement can be left for the business rescue

practitioner to investigate (and hence left out of the reckoning for purposes of adjudicating the business rescue application). I disagree. In deciding a business rescue application, the court is tasked with considering and determining, on the evidence before it, the appropriateness of business rescue proceedings. That duty is not to be abdicated to the business rescue practitioner. [65]

122.6. In summary, I am of the view that Tirisano’s chronic financial distress, and its ongoing mismanagement (on the evidence before me), place it outside the category of viable companies that were intended by the legislature to be candidates for rehabilitation under the business rescue regime.

contenDed abuse and costs

[123] I have mentioned that, apart from the merits of the business rescue application, it was also contended that the application fell to be dismissed as an abuse of process (in that it was brought with an ulterior and improper purpose).[66] In light of the conclusions that I have reached on the merits, I need not decide this.

[124] Punitive costs were sought by Emalahleni and Aquarella. I am not persuaded that this is warranted.

conclusion and order

[125] I conclude that the business rescue application must fail. It follows, for the reasons given in the introductory part of this judgment, that Tirisano falls to be wound up at the instance of Emalahleni, and I intend to make a provisional order (as sought by counsel in oral argument). There is no dispute that the relevant formal requirements have been satisfied.

[126] In the premises, I make the following order:

126.1. The business rescue application under case number 22983/ 2023 is dismissed with costs, such to include the cost of two counsel where so employed.

126.2. In the application under case number 16033/2023 (the Emalahleni winding-up application):

126.2.1. The respondent, Tirisano Property Group (Pty) Ltd, is placed under provisional liquidation;

126.2.2. A rule nisi is issued calling upon the respondent and all interested parties to show cause, if any, to this court on 20 June 2024 as to why:

126.2.2.1. the respondent should not be placed in final liquidation; and

126.2.2.2. the costs of this application should not be costs in the liquidation;

126.2.3. Service of this order shall be effected:

126.2.3.1. by publication in one edition each of The Cape Times and Die Burger newspapers;

126.2.3.2. on the respondent at its registered address;

126.2.3.3. on the respondent's employees;

126.2.3.4. on any trade union which the Sheriff may establish represents any employees of the respondent, in terms of section 346(A)(1)(a) of the Companies Act 61 of 1973;

126.2.3.5. on the South African Revenue Services at 2[...] H[...] S[...] Street, Cape Town;

126.3. In (i) the application under case number 3973/2024 (the Courthiel intervention application), (ii) the application under case number 18657/2023 (the Aquarella winding-up application), and (iii) the application by Aquarella Investments (Pty) Ltd to intervene in case number 16033/2023 (the Aquarella intervention application):

126.3.1. The applications are postponed pending the return day in paragraph 126.2.2 above;

126.3.2. Costs are to stand over for later

determination.

M BLUMBERG

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For Mr Arno Schipper: A Newton instructed by Lombard & Kriek For Tirisano Property Group (Pty) Ltd: R Engela instructed by Cliffe Dekker Hofmeyr Inc. For the Emalahleni Local Municipality: M Cajee instructed by Ka-Mbonana Cooper For Courthiel Holdings (Pty) Ltd: B J Manca SC and AA Brink instructed by Pohl & Stuhlinger For Aquarella Investments (Pty) Ltd: H N de Wet instructed by Werksmans Attorneys

[1] Case number 16033/2023.

[2] Case number 18657/2023.

[3] Case number 22983/2023.

[4] Case number 3973/2024.

[5] This is logical in light of section 131(6) of the Companies Act, which provides that if liquidation proceedings have already being commenced against the company in question at the time an application is made for business rescue in terms of section 131(1), the liquidation proceedings are suspended until the court has adjudicated upon the business rescue application, or the business

rescue proceedings end (i.e. if the court makes the order applied for).

[6] See annexure 'J' to Courthiel's answering affidavit in the business rescue application.

[7] On 8 February 2021, Mr Schipper signed an acknowledgment of debt, on behalf of Tirisano (at the time known as Southern Storm Properties 223 (Pty) Ltd) and in favour of Courthiel, in the amount of R200 809 680. There have been no capital repayments since then, and interest has accrued.

[8] Unless otherwise indicated, what follows is a summary of undisputed allegations in Mr Schipper's founding affidavit.

[9] I mention that there is at present no guesthouse "business" nor is such a business planned. Tirisano's intention, according to Mr Schipper, is to develop a boutique hotel on the guesthouse properties. Whether, and how, erf 2426 features in those plans is not clear from the papers. But nothing turns on this.

[10] See for example para 138 of the founding affidavit.

[11] In his papers, Mr Schipper also refers to a substantial amount allegedly owing by Sefako Makagatho Health Science University

in Ga-Rankuwa, Gauteng – referred to in the papers as 'SMU'. This apparently arises from SMU's breach of an agreement with Tirisano. There is reference in para 129 of the founding affidavit to an agreement reached with SMU as to the amount of this debt and how it would be paid by SMU. The alleged agreement is however neither particularised nor attached to the papers. Mr Schipper's counsel placed no reliance on this alleged debt in written or oral argument, and I shall not refer to it any further.

- [12] The amount of R22.9 million in respect of trade creditors includes a debt of R9.53 million to Emalahleni. As pointed out in Emalahleni's heads of argument, however, the admitted debt owed by Tirisano to Emalahleni is in fact R11.16 million – R6.78 million in respect of consumption charges (electricity, water and sewerage) plus R4.38 million in respect of rates. For present purposes though, nothing turns on this discrepancy.
- [13] These are set out as being R1.6 million monthly interest owed to Courthiel; R1.8 million of monthly operating expenses; and R240 000 per month in respect of other loan instalments.
- [14] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA) par 16.
- [15] “financially distressed” is defined in section 128(1)(f) to mean “in reference to a particular company at any particular time, ... that – (i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or (ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;”
- [15] “financially distressed” is defined in section 128(1)(f) to mean “in reference to a particular company at any particular time, ... that –
- (i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
- (ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;”
- [16] Founding affidavit para 36.
- [17] See section 128(1)(a)(i). Mr Schipper has a loan account claim against Tirisano.
- [18] Section 131(4)(a)(i).
- [19] The concluding phrase of section 131(4)(a).
- [20] Together with any further necessary and appropriate order, including an order placing the company in liquidation – see section 131(4)(b).
- [21] *Oakdene Square Properties (Pty) Ltd and Others v Farm Botesfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) par 23.
- [22] Founding affidavit paras 153 and 158.
- [23] Founding affidavit paras 117 and 204.
- [24] Founding affidavit para 117.
- [25] Founding affidavit paras 110, 114 and 120.
- [26] For whom Mr Schipper expresses concern in paras 22 and 28.3 of his founding affidavit, the latter reading as follows: “[Tirisano]

has 33 employees. Their and their families' fate depend on the success of [Tirisano] being placed in business rescue as soon as possible to enable [Tirisano] to turn itself around and which will then statutorily lead to the employees remaining in employment with [Tirisano] whilst in business rescue."

[27] See para 72 of Mr Schipper's answering affidavit, on behalf of Tirisano, in the Aquarella winding-up application.

[28] Founding affidavit para 84.

[29] Replying affidavit para 5.3.

[30] Founding affidavit para 21.2.

[31] See in particular Emalahleni answering affidavit para 25 and following.

[32] Replying affidavit para 3.3.1.

[33] Replying affidavit para 5.7.

[34] Section 344(f) of the Companies Act 61 of 1973.

[35] Section 344(h) of the Companies Act 61 of 1973.

[36] See for example para 85 of the founding affidavit in the Emalahleni winding-up application.

[37] Whether or not that remains the position is not squarely addressed in the papers. In certain of his later correspondence – for example his letter to Courthiel on 30 July 2021, to which I refer below – Mr Schipper referred to the "new BEE partners". But how this partnership is or was structured in relation to Tirisano is not clear from the papers.

[38] A similar point is made in the final sentence of para 14.13 of Courthiel's answering affidavit.

[39] Certain of the facts recounted below appear from the papers in the first winding-up application (which Emalahleni relied on as part of its opposition to the business rescue application).

[40] 'FA6' to the founding affidavit in the first winding-up application.

[41] A transcript of what was said at the meeting forms part of the papers in the first winding-up application.

[42] I mention that the debt acknowledged on 30 June 2021 had been denied in correspondence from Tirisano's attorneys on 26 May 2021.

[43] Oakdene 553 A-B.

[44] See Van Staden N.O. and Others v Pro-Wiz Group (Pty) Ltd 2019 (4) SA 532 (SCA) par 22; Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Another [2012] 4 All SA 103 (WCC) par 34, Gamble J there citing the judgment of Rogers AJ (as he then was) in Cape Point Vineyards v Pinnacle Point Group 2011

- (5) SA 600 (WCC) par 6.
- [45] Forty Squares v Noris Fresh Produce (Pty) Ltd t/a Golden Harvest & Others 2023 (5) SA 249 (WCC) par 34.
- [46] Meskin Henochsberg on the Companies Act 71 of 2008 456.
- [47] Par 29.
- [48] Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another 2013 (1) SA 542 (FB) par 11, cited with approval by the SCA in Oakdene par 30 and 31.
- [49] Oakdene 551J; Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd and Another
- [2012] 4 All SA 590 (WCC) par 47.
- [50] Nedbank v Bestvest par 41; Zoneska par 48.
- [51] See the first instance decision in Oakdene (2012 (3) SA 273 (GSJ)) par 49; and the SCA decision in Oakdene (which upheld the judgment a quo) par 35 to 39.
- [52] PFC Properties (Pty) Ltd v CSARS [2023] JOL 60041 (SCA) par 26.
- [53] Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) par 21; Oakdene a quo par 18; Nedbank v Bestvest par 34.
- [54] Oakdene par 38; Zoneska par 67; Forty Squares par 23 to 26.
- [55] Oakdene par 33.
- [56] Compare Propspec par 24.
- [57] Par 17.
- [58] On the contrary, in Emalahleni and Aquarella's founding papers in their respective winding-up applications – both of which were incorporated into the papers in the business rescue proceedings – it is alleged in terms that Tirisano is factually insolvent. In any event, factual solvency, even if established, is not in itself determinative of a business rescue application: Oakdene 556A/B.
- [59] See Oakdene 554A-B; Oakdene a quo par 48; Propspec par 24; and Nedbank v Bestvest par 53 and 58.
- [60] Mr Schipper's counsel confirmed in argument that Tirisano would not retain its staff if it sold the Witbank property – which is what was proposed in reply.
- [61] In the liquidation context, see FirstRand Bank Ltd v Shabalala 2023 JDR 2095 (GJ) par 29 and 55.

-
- [62] Compare the facts in PFC Properties par 39;Forty Squares par 37 and 38; Oakdene a quo 287H/I and 288H to 289A; Oakdene par 39; Nedbank v Bestvest par 60.3.
- [63] Par 42.
- [64] Section 344(h) of the Companies Act 61 of 1973. As to the standing of a creditor to seek winding-up on just and equitable grounds, see Blackman et al Commentary on the Companies Act 14-104.
- [65] Southern Palace par 18.
- [66] Which would, if established, constitute an independent ground for dismissal – see PFC Properties par 28 and 29.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2024/125.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/schipper-v-tirisano-property-group-pty-ltd-and-others-unknown-topic-awchc-2024--6a3ea5143b1caa912980b627>

Prepared on 13 October 2026 · Esheria