REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE No: 13381/2024

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO THE JUDGES: YES/**NO**

(3) REVISED: YES/**NO**

SIGNATURE: Van Wyk ASL (AJ)

DATE: 2025/01/22

In the matter between:

CJ MINNAAR BEHEREND (PTY) LTD **FIRST APPLICANT**

[Registration Number: 1985/002461/07]

CORNELIUS JACOBUS MINNAAR N.O. **SECOND APPLICANT**

[Identity Number: 3[…]]

JACOBUS PETRUS MINNAAR N.O. **THIRD APPLICANT**

[Identity Number: 5[…]]

ESMELAU EIENDOMME (PTY) LTD **FOURTH APPLICANT**

[Registration Number: 1981/010520/07]

FONTAINEBLEAU LANDGOED (PTY) LTD **FIFTH APPLICANT**

[Registration Number: 1989/000895/07]

and

BARRY JOHN DU TOIT N.O.	**FIRST RESPONDENT**
SHELDRAKE GAME RANCH CC [Registration Number: 2005/166145/23]	**SECOND RESPONDENT**
EILEEN MINNAAR [Identity Number: 8[…])	**THIRD RESPONDENT**
THE COMPANY AND INTELLECTUAL PROPERTY COMMISSION	**FOURTH RESPONDENT**
THE AFFECTED PERSONS OF THE SECOND RESPONDENT AS DETAILED IN ANNEXURE 'X'	**FIFTH RESPONDENT**

JUDGMENT

VAN WYK ASL {AJ) :

INTRODUCTION:

[1] This is an opposed urgent application in terms of which the applicants seeks relief in the following terms :

> *"2 That it be declared that the resolution passed by the third respondent placing the second respondent in business rescue has lapsed and is a nullity.*
>
> *3 In the alternative to prayer 2, that the resolution passed by the third respondent placing the second respondent in business rescue be set aside in terms of section 130(1)(a)(i) and (iii) of the Companies Act 71 of 2008.*
>
> *4 That the second and Third Respondents, together with any respondents opposing the application, be ordered to pay the costs of the*

application as on a scale between Attorney and Client, jointly and severally, the one paying the other to be absolved."

[2] The First to Third Respondents opposes the application and seeks a dismissal thereof with costs on a punitive scale as between attorney and client on scale C. In addition, thereto, the Respondents raised certain points *in limine*, namely:

[2.1] lack of urgency

[2.2] the Applicants are not "affected parties" and lack locus standi in terms of Section 128 of the Companies Act, 2008 effectively disputing that the Applicants are creditors of the Second Respondent.

[2.3] the Second and Third Applicants are not authorised to act as trustees by the Koos Minnaar Trust.

[2.4] there exists material factual disputes relating to the grounds advanced for any alleged entitlements as creditors or as owners of game on a private game reserve...

[3] The parties informed me at the commencement of their respective arguments that Collis J granted an *ex parte* order in accordance with Section 129(5)(b) of the Companies Act, 2008 in the High Court, Gauteng Division, Pretoria on 11 December 2024.

[4] In my view the proceedings and its result referred to in paragraph 3 *supra* were not before me and did not form part of the extensive affidavits filed in this application. I was therefore not tasked to decide whether the court order granted by Collis J on 11 December 2024 is valid or invalid. During argument I referred the parties to the matter of *STS Tyres (Pty) Ltd v Bamboo Rock Plant (Pty) Ltd*[1] in support of my view.

[1] Case number 2024-012285) [2024] ZAGPPHC 490 at para 19 to 22.

URGENCY

[5] A litigant that approaches the court for relief on an urgent basis must comply with Uniform rule 6(12)(b). The rule reads;

> *'In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course'.*

[6] The rule requires two legs to be present before urgency can properly be founded, namely, first the urgency should not be self-created and secondly, it must provide reasons why substantial relief or redress cannot be achieved in due course. The importance of these provisions is that the procedure set out in rule 6(12) is not there for the mere taking.

[7] It is trite that the correct and true test to be applied in urgent applications is whether an applicant will be afforded substantial redress at a hearing in due course. Notshe AJ in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*[2] in essence said that if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If the applicant cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. It means that if there is some delay in the institution of the proceedings, an applicant must explain the reasons for the delay and why notwithstanding the delay the applicant claims that it cannot be afforded substantial redress at a hearing in due course.

[8] In *Koen & Another v Wedgewood Village Golf and Country Estate (Pty) Ltd*[3] Binns-Ward J said the following:

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[2] [2011] ZAGPJHC 196.
[3] 2012 (2) SA 378 (WCC)

"It is axiomatic that business rescue proceedings, by their very nature, must be conducted with maximum possible expedition".

[9] Considering that business rescue proceedings by their very nature must be conducted within the strict and "*urgent- my emphasis*" timelines provided for in the Act, I am of the view that all proceedings within and flowing from business rescue proceedings and process are regarded as inherently urgent. Even if regarded as "inherently urgent", urgency must still be founded on a properly pleaded case for urgency as in matters relating to spoliation and contempt of court proceedings.

[10] On an analysis of the applicant's founding affidavit the following is clear:

10.1 On 11 November 2024 the respondents were requested to confirm whether the second respondent was placed under business rescue.

10.2 On 13 November 2024 the applicant's attorney became aware of the first respondent's appointment as business rescue practitioner and requested all documentation in relation thereto. No response was provided by either the first respondent, second or third respondents and a further letter was addressed by the applicant's attorney on 19 November 2024, essentially repeating requests for documentation.

10.3 On 25 November 2024 the first to third Respondents attorneys provided a response, essentially denying that the applicants are "*affected persons*" as envisaged by Section 28 of the Companies Act 71 of 2008.

10.4 The application was issued on the 29th of November 2024 and set down for hearing in the week of 10 December 2024.

10.5 The applicants shall not be afforded substantial redress at a hearing in due course if the matter is to be heard likely during the fourth term of 2025.

[11] I agree that business rescue proceedings, statutorily expressed, are temporary mechanisms which are intended to endure for a period of three months

subject to the terms of an adopted business rescue plan, if any. I further agree that fundamental public interests exist within such proceedings which materially affects the rights and interests of third parties to enforce their rights against the subject company – the second respondent- my emphasis.

[12] I am of the view that even if there was some delays caused to institute these proceedings, specifically between the periods 29 October 2024 to 13 November 2024 on the one hand and 13 November 2024 to 29 November 2024 on the other, the applicants have passed the requisite threshold to found the jurisdictional fact of absence of substantial redress at a hearing in due course. This is so if the truncated timelines for business rescue processes and proceedings embodied within the Act are considered holistically.

[13] I am furthermore of the view that the respondents did not seriously or convincingly challenge the issue urgency in this matter and suffered no apparent prejudice by the abridgment of the time periods provided.

[14] Accordingly, I find that the matter is urgent.

LOCUS STANDI

[15] The respondents challenged the applicant's *locus standi* to institute these proceedings premised thereon that the applicants are not affected persons as defined in section 128 of the Companies Act 71, 2008. It is the respondent's argument that the applicants are not creditors of the second respondent.

[16] Affected person(s), as defined in section 128 of the Act are as follows:

> *"in relation to a company, means –*
>
> *(i) A shareholder or creditor of the company.*
>
> *(ii) Any registered trade union representing employees of the company; and*

(iii) If any of the employees of the company are not presented by a registered trade union, each of those employees or their respective representatives".

[17] During argument, Mr Smit representing the respondents submitted that the applicants are not creditors of the second respondent if consideration is given to the ordinary meaning of "*creditor*"[4]. It seems to be common cause between the parties that "*creditor*" is not defined in the Act. Mr Smit further argued that a contingent creditor is excluded from the ordinary meaning of creditor as defined and should be a creditor with an existing legal obligation and if the enforcement of a claim is not liquidated it remains conditional or contingent.

[18] It was submitted on behalf of the respondents that the applicants claim for payment arising from an action instituted in this court under case number 9206/2024 relates to a peculiar claim for payment in essence disqualifying them to be cloaked as creditors within the meaning as defined. The further reasons are essentially that the funds generated from a game auction are not held or possessed by the second respondent. My understanding is that there are disputes which relate to ownership over the game and the applicants claim includes payment for 50% of the funds generated from the game auction sale.

[19] During argument, Mr Els representing the applicants submitted that the applicants are affected parties as envisaged in the Act, more specifically they are creditors of the second respondent. It was submitted that the applicants instituted legal proceedings against the second respondent for payment exceeding R 900 000-00 under case number 9206/2024 for 50% payment from the game sale auction. Further, invoices were issued by the Fourth and Fifth respondents to the Second applicant ostensibly for occupational usage.

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[4] Henochsberg on the Companies Act, 71 of 2008, commentary on section 128.

[20] In *Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) Ltd and Others*[5] van der Schyff J was confronted with facts similar to the matter at hand. The main question for determination was whether Rogal, an affected creditor, had *locus standi* to institute proceedings in accordance with Section 130(1) of the Act. VTP argued that Rogal's claim was premised on unliquidated damages and as such could not be deemed a creditor in business rescue proceedings. The court accepted that Rogal's claim was unliquidated and the Companies' Act failure to define "creditor". Van der Schyff J, after considering a host of authorities, held that Rogal is a creditor of VTP.

[21] Trengrove J in *Gillis-Mason Construction Co (Pty) Ltd*[6] found that a person (or entity) that has a claim for unliquidated damages for breach of contract can be regarded as a creditor for purposes of Section 113 of the Companies Act 46 of 1926 (repealed). He said:

> *"The mere fact that the claim may still be unliquidated, at the time of the filing of the winding up petition, should not in itself disqualify such an applicant from petitioning for winding up".*

[22] Wilson J in *Wescoal Mining (Pty) Ltd and Another v Mkhombo NO and Others*[7] stated the following:

> *"There are several indications of this in the text of statute. The first is the definition of "affected persons" in section 128. By rolling creditors into a broader category of "affected persons", it seems to me that the Act means to refer to creditors who have an interest in the business rescue process that is meaningfully comparable to those other "affected persons": unions, employees and shareholders. These are persons who are "affected" by the commencement of the business rescue process itself"*

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[5] [2022] ZAGPPHC 167 (28 March 2022).
[6] 1971 (1) SA 524 (T).
[7] (2023-079991) [2023] ZAGPJHC 1097; 2024 (2) SA 563 (GJ).

[23] In this matter, whether peculiar or not, the applicants instituted claim for inter alia liquidated payment (R 911 970-00) against the respondents. Further, invoices were issued by the Fourth and Fifth respondents to the Second applicant ostensibly for occupational usage. The fact that these funds are kept on trust by an attorney pending litigation against *inter alia* the second respondent has no relevance to the question whether the applicants are creditors of the second respondent. It is not for this court to decide whether the claim for payment is valid or not or whether the applicants are entitled to payment premised on ownership, usage, or otherwise. The only relevant issue is whether the applicants are affected persons and creditors of the second respondent within the context of business rescue proceedings. The point is a long unfortunate history of family disagreements and litigation exists with various payment demands and/or claims made, some of which is *sub-judice.*

[24] The Act does not draw a distinction between creditors and contingent creditors and considering the authorities listed herein supra, the question remains whether the applicants are affected parties as creditors within its ordinary meaning, context and within the purpose of the Act. I am satisfied that the applicants will be affected by the commencement of business rescue and its proceedings and consequently I am of the view that they are affected parties, i.e. creditors of the Second Respondent.

NON-JOINDER OF TRUSTEE, MRS LAURETTE MINNAAR. AUTHORITY. AND LOCUS STANDI

[25] It is trite that if authority to institute legal proceedings are challenged it is the institution and the prosecution thereof which must be authorized and not the deposition to an affidavit as such. My understanding is that uniform Rule 7 provides for such a procedure which may be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant[8]. On the conspectus of the facts before me, this is not the challenge raised by the respondents.

[8] Ganes and Another v Telecom Namibia Ltd 2004(3) SA 615 (SCA).

[26] My understanding is that the respondents qualms are twofold; In the first instance it translates to the non-joinder of the *curatrix ad litem*, Advocate Maryke van Rooyen', appointed on behalf of 'erstwhile' trustee Mrs Laurette Minnaar. It is the respondent's argument that the *curatrix ad litem* has a direct and material interest in these proceedings. Secondly, the Second and Third Respondents are not authorized to institute legal proceedings on behalf of the trust.

[27] In my view neither of the points raised by the respondents are factually and/or legally sustainable. Firstly, paragraph 4.2.1 of the trust deed provides as follows:

> *" Die trustees van die trust sal nie minder as twee en nie meer as vyf persone wees nie. Enige vakature wat onstaan sat so spoedig moontlik gevul word by wyse van kooptering deur die oorblywende trustees onderhewig aan 4.2.2 hierna."*

[28] Secondly, paragraph 5 of the trust deed provides the following:

> *"Die amp van 'n trustee sal ipso facto beeindig en vakant wees: 5.2: ashy geestelik versteurd of swaksinnig raak. 5.3: indien hy onbevoeg of onbekwaam is om as trustee of the tree."*

[29] In accordance with the trust deed and the paragraphs referred to herein *supra*, I am of the view that Mrs Laurette Minnaar' office as trustee and capacity to act as such terminated *ipso facto* at the time when she became incapacitated or incompetent to act as trustee, but at the latest on the date when the *curatrix ad litem* was appointed on her behalf. In consequence the *curatrix ad litem*, Adv Maryke van Rooyen has no direct, substantial, material or legal interest in this application. The issue of 'non-joinder of the *curatrix ad litem* is accordingly dismissed.

[30] In accordance with the trust deed with specific reference to paragraph 4.2.1 thereof, a *quorum* is established to represent the trust. On 29 November 2024, the second and third respondents in their respective capacities as trustees of the Koos Minnaar Trust resolved that

"1. The trustees waived any applicable time periods required for notice of this meeting, if applicable."

"2. It is noted that Mr CJ Minnaar and Mr JP Minnaar are the only two serving trustees at this time. Clause 4.2.1 of the Trust Deed requires a minimum of 2 (two) trustees to serve on behalf of The Koos Minnaar Trust."

"3. It be resolved that the Koos Minnaar Trust is an affected party pertaining to the business rescue proceedings of She/drake Ranch CC.

"4. It be resolved that the Koos Minnaar Trust must institute legal proceedings in terms of the attached copy of the Notice of Motion marked "A".

[31] The principles in *Thorpe and Others v Trittenwein and Another*[9] are trite. The supreme court of appeal endorsed that unless the trust deed provides otherwise the trustees must act jointly if the trust is to be bound by their acts.

[32] Considering the matter at hand and the respondents challenge the second and third applicants' authority to institute legal proceedings on behalf of the trust and/or act on behalf of the trust, I am satisfied that the second and third applicants are the only two remaining and/or existing trustees of the Koos Minnaar trust and as such duly resolved to institute these legal proceedings. Accordingly, I find that the second and third respondents were duly authorized to institute these proceedings and to act on behalf of the trust. Further, considering the affidavits filed on record I am not persuaded that 'LEDET' (Limpopo Department : Economic Development Environment and Tourism) has any material, legal, or substantial interest in these proceedings and it matters not whether the Boabab Nature Reserve is declared a protected area or whether the applicants and/or the respondents are owners of the farms forming part of the protected area(s). The point *in limine* raised herein is accordingly dismissed.

MERITS

[9] 2007 (2) SA 172 (SCA)

[33] It was argued on behalf of the applicants that the first and second respondents failed to comply with the peremptory provisions of section 129 of the Act and that the business rescue proceedings were initiated with ulterior purposes by preserving the assets of the second respondent. On 29 October 2024, the third respondent filed a resolution to commence business rescue proceedings in accordance with section 129 of the Act.

[34] Section 128(1)(b) of the Act defines the terms 'business rescue' as follows:

> *means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-*
>
> *(i) the temporary supervision of the company, and of the management of its affairs, business and property.*
>
> *(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
>
> *(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."*

[35] The notice procedure commencing business rescue proceedings is encapsulated in Section 129 of the Act.

[36] Section 129 of the Act provides as follows:

> *"(1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the*

company under supervision, if the board has reasonable grounds to believe that-

(a) the company is financially distressed[10]; and

(b) there appears to be a reasonable prospect of rescuing the company.

(2) A resolution contemplated in subsection (1) –

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the commission, on application by the company, may allow, the company must-

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)(b), a company must-

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[10] Financially distressed is defined as follows: *'financially distressed'*, in reference to a particular company at any particular time, means that- (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months'

(a) file a notice of appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of appointment to each affected person within five business days after the notice was filed."

[37] When considering an application for business rescue a court must consider whether the company is financially distressed, whether the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract and whether it is otherwise just and equitable to do so for financial reasons and that there is a reasonable prospect of rescuing the company.

[38] I am satisfied that the question whether a company is financially distressed is a matter or question of fact which relates to the specific circumstances of the case. In *Oakdean Square Properties (Pty) Ltd & Others v Farms Bothasfontein (Kyalami) (Pty) Ltd & Others*[11] in determining whether there are reasonable prospects for rescuing a company it was held that a court has a wide or lose discretion, not a discretion in the strict sense and the exercise of which involves a value judgment.

[39] In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd*[12] it was held that "... If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available ..."

[40] In the matter of *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others*[13] Boruchowitz J held that:

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[11] 2013 (3) ALL SA 303 SCA. It was held further: "*A mere speculative suggestion is not enough. Moreover because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking require that it must do so in its founding papers*."

[12] 2012 (2) SA 423 wee. See Nedbank Limited v Bestvest 153 (Pty) Ltd; ESSA & Another v Bestvest 153 (Pty) Ltd 2012 JOL 29185 (WCC) wherein the court endorsed the principles followed in the Southern Palace matter. The court in Nedbank v Bestvest said, "*the application must set out sufficient facts, if necessary augmented by documentary evidence, from which a court would be able to assess the prospects of success before exercising its discretion*."

[13] 2012 (5) SA 596 SG

"An applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant ... At the very least it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered".

[41] In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*[14] it was held that "...*In my view, it is implicit in ss 131(2)(b) and 131(3), that reasonable notice must be given to affected persons... Service of a copy of the application on the Commission, and notification of each affected person, are not merely procedural steps. They are substantive requirements, compliance with which an integral part of the making of an application for an order in terms of Section 131(1) of the Act*".

[42] The applicants are affected parties and in consequence were entitled to receive notice of the business rescue proceedings as envisaged in Section 129(3) of the Act. On a proper conspectus of the papers, it cannot be said that there was compliance, or even substantial compliance with the Section 129(3) notification and publication requirement articulated in the Act and Regulations.

[43] I could not find any evidence that the affected persons or parties were provided with a resolution or a sworn statement which articulates the facts in support of the business rescue of the second respondent and the resolution adopted as such. I am satisfied that the respondents failed to comply with the peremptory provisions of section 129(3) and (4) of the Act.

[44] I already said that the proceedings before Collis J on 10 December 2024 in the High Court of South Africa, Pretoria was not before me, and I cannot interfere with the order she granted in accordance with Section 129(5)(b) of the Act. However, I considered that the respondents took further steps in accordance with the Act which in my view, at least insofar as this matter is concerned, through their conduct

[14] 2013 (6) 141 (KZP)

conceded that they failed to comply with the peremptory provisions of section 129(3) and (4) of the Act.

[44] I analyzed and dissected the affidavits filed on record. I am of the view that the respondents failed to meet the requirements for providing sufficient or substantial factual and supporting evidence that the second respondent is financially distressed. The allegations made, at best for the respondents, translate to be speculative in nature. I considered the facts in support of the peremptory statutory non-compliance by the First Respondent. I am persuaded that the First Respondent failed to provide any or sufficient facts which enabled him to conclude that the second respondent is financially distressed specifically considering that he was not aware of any creditors or affected persons, he did not consider the bank statements or financial statements of the second respondent, and in unaware of the second respondents income.

[45] As a result I am of the view that the respondents failed to comply with the peremptory statutory provisions articulated by sections 129(3) and (4) of the Act and failed to demonstrate that the second respondent, on a factual and supportive basis, are financially distressed.

[46] During argument, Mr Smit appearing for the respondents said that the applicants relief is fatally flawed in the absence of declaratory relief claiming that the second respondents business rescue is terminated. This proposition and argument were underscored with reference to *Panamo Properties (Pty) Ltd and Another v Ne/ and Others NNO*[15]. I disagree with this argument.

[47] I am of the view that if this court or any court sets aside a resolution commencing business rescue proceedings based on the invalidity thereof that invalidity operates retrospectively[16], and the business rescue proceedings terminate automatically as a result. It is consequently not necessary for this court to declare that the business rescue proceedings of the second respondent are terminated when setting aside a resolution commencing business rescue proceedings.

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[15] 2015 (5) SA 63 (SCA)

[16] National Energy Regulator of SA & Another v PG Group (Pty) Ltd 2020(1) SA 450 (CC) at para 91 vn 46.

[48] In motion proceedings disputes of fact must be dealt with in accordance with the principles laid down in *Plascon - Evans Paints v Van Riebeeck Paints (Pty) Ltd*[17] (the **Plascon Evans** - rule). This rule is to the effect that, where there is a dispute as to the facts, a final relief should only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order. Where facts are clear, though not formally admitted, cannot be denied, they must be regarded as admitted. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as raising a real, genuine or *bona fide* dispute of fact.[18] Vague and unsubstantiated allegations are insufficient to raise real and genuine disputes of fact.[19] A bare denial of the applicant's allegations will generally be insufficient to generate a genuine or real dispute of fact.[20]

[49] As a general rule decisions of fact cannot properly be founded on a consideration of the probabilities, unless the Court is satisfied that there is no real dispute on the facts in question, or that the one party's allegations are so far - fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits.[21]

[50] The following was stated in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[22]:

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement*

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[17] 1984 (3) SA 623 (A)
[18] Room Hire Co" (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163
[19] King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA) 2002 (4) SA 152 (E) at 1561- J
[20] National Director of Public Prosecutions v Zuma 2009 (2) SA 227 (SCA) at 290F
[21] Administrator, Transvaal v Theletsane 1991 (2) SA 192 (A) at 197A - B; Malan v Law Society, Northern Provinces 2009 (1) SA 216 (SCA} at 222B [23]
[22] 2008 (3) 371 (SCA) at para [13]

because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

[51] I am of the view that there exists no real or genuine factual dispute in the matter before me. The facts relating to pending litigation do not form part of this matter and are irrelevant to these proceedings. The only questions remain whether there was substantial compliance with the peremptory provisions of section 129(3) and (4) of the Act and whether the second respondent is financially distressed considering the material and substantial facts presented in the affidavits. I found that the respondents failed to demonstrate compliance with the peremptory provisions of the Act and that the second respondent is financially distressed. It follows that the respondent's version, wherever it conflicts with the applicants' version, is so clearly untenable or palpably implausible it ought to be rejected on the papers.

[52] Considering all the facts and evidence on record I am of the view that it is just and equitable to set aside the resolution dated 29 October 2024 for the reasons mentioned herein supra. The reasons provided herein elsewhere persuaded me to order punitive costs against opposing parties, i.e. the first to third respondents.

ORDER

[53] In the circumstances I accordingly make the following order:

1. That the Rules relating to forms and service are dispensed with and this application is heard as one of urgency in terms of Uniform Rule 6(12).

2. The First to Third Respondents *points in limine* based on urgency, non-joinder and *locus standi* are dismissed.

3. The resolution dated 29 October 2024 passed by the Third Respondent placing the Second Respondent in business rescue is set aside in terms of section 130(1)(i) and (iii) of the Companies Act.

4. The First to Third Respondents are ordered to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

VAN WYK ASL (AJ)
Acting Judge of the High Court
Limpopo Division, Polokwane

HEARD ON : **13 DECEMBER 2024**

JUDGMENT DELIVERED ON : **22 JANUARY 2025**. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand- down of the judgment is deemed to be 22 JANUARY 2025 at **10:00**

APPEARANCES

FOR THE APPLICANT :ADV APJ ELS (SC) with him ADV AA SASSON

INSTRUCTED BY :KRONE & ASSOCIATES

FOR THE RESPONDENT :ADV JAN G SMIT

INSTRUCTED BY :CHRISTO RHEEDERS ATTORNEYS