**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**(1) REPORTABLE: NO**
**(2) OF INTEREST TO OTHER JUDGES: NO**
**(3) REVISED.**

**CASE NO:** 77799/2018
21/5/2019

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| **PATRICK KABEYA TSHIAKATUMBA** | APPLICANT |
| **Identity number: [….]** | |
| and | |
| **PAT ZOO ACCOMMODATION CC** | FIRST RESPONDENT |
| **(in final liquidation and under business rescue)** | |
| **REG NO. CK2005/048368/23** | |
| **DAWID MAARTENS N.O.** | SECOND RESPONDENT |
| **MAARTENS VAN RENSBURG ATTORNEYS** | THIRD RESPONDENT |
| **BUSINESS PARTNERS LTD** | FOURTH RESPONDENT |
| **REG NO. 1981/000918/06** | |
| **STANDARD BANK OF SOUTH AFRICA LTD** | FIFTH RESPONDENT |
| **REG NO. 1962/00738/06** | |
| **EMFULENI LOCAL MUNICIPALITY** | SIXTH RESPONDENT |
| **CONRAD ALEXANDER STARBUCK N.O.** | SEVENTH RESPONDENT |

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| **ROYNATH PARBHOO N.O.** | EIGHTH RESPONDENT |
| **SOUTH AFRICAN REVENUE SERVICE** | NINTH RESPONDENT |
| **RAAMA CONSULTING CC** | TENTH RESPONDENT |
| **REG NO. CK2004/032833/23** | |
| **THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION** | ELEVENTH RESPONDENT |
| **THE REGISTRAR OF DEEDS: JOHANNESBURG** | TWELFTH RESPONDENT |

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**REASONS FOR JUDGMENT**

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**AC BASSON, J**

[1] This is an application instituted on an urgent basis. The matter was initially enrolled and set-down for hearing in the urgent court on 27 November 2018. The application was removed from the roll by virtue of the number of pages involved in this matter.

[2] The applicant (Mr. Patrick Kabeya Tshiakatumba) is the sole member of the first respondent. The first respondent (Pat Zoo Accommodation CC) was placed in final liquidation but is currently under business rescue.

[3] The application is opposed by the first, second, third and fourth respondents. The fourth respondent (Business Partners Limited) is the main creditor of the first respondent.

[4] Urgency is no longer in issue. The respondents submitted that the matter should proceed as it is not in the best interests of the *concursus creditorum* to delay the matter any further.

[5] This application is preceded by various court orders since 2016. I will, where necessary, briefly refer to some of them.

The relief sought

[6] The Notice of Motion contains no less than 21 prayers. The relief broadly falls into three categories: Firstly, the setting aside of the liquidation order; secondly, the setting aside of the business rescue order and the

restoration of the applicant as director and thirdly, other relief. In main it appears that what the applicant seeks is an order that the business rescue practitioner be removed and that he be granted full sole control of the first respondent. The prayers include -

1. That leave be granted to the applicant to initiate this application, in accordance with the provisions of Section 133(1)(b) of the (new) Companies Act[1] (hereinafter referred to as "the 2008 Act");
2. That the respondents be interdicted and prohibited from "continuing" with the proposed sale which was scheduled for 31 October 2018, in respect of the two immovable properties which belonged to the first respondent;
3. That, in the event that the respondents sell or alienate the two immovable properties at the auction which was scheduled for 31 October 2018, the transfer of the two immovable properties be interdicted;
4. That the second respondent be "forthwith removed, interdicted and restrained from practicing as the business rescue practitioner of the first respondent and that the applicant is again granted full sole control of his company";
5. That the business rescue plan which was prepared by the second respondent and published on 4 December 2016, be set-aside;
6. That the second respondent be ordered to "give a full account of the financial affairs of the first respondent during his tenure as business rescue practitioner of the first respondent including funds received and paid on behalf of the first respondent by the second respondent;
7. That the second respondent be ordered to deliver all the books, journals, statements, records, vouchers and documents to the financial affairs of the first respondent;
8. That the order that was made by this court under case no. 5048/2016 by Baqwa, J dated 9 February 2017, under case no. 23919/2016, be set-aside in accordance with the provIsIons of section 354 of the (old)

[1] Act 71 of 2008.

Companies Act (hereinafter referred to as the "1973 Act").[2]

9. That the court order initiating business rescue proceedings of the first respondent be set-aside in accordance with the provisions of section 132(2)(a)(i) of the 2008 Act;

10. That the business rescue proceedings of the first respondent be terminated;

11. That the three royalty agreements which were entered into and concluded between the first respondent and the fourth respondent be set-aside and declared void *ab initio;*

12. That the fourth respondent be ordered to refund the applicant with all payments made by him and/or the first respondent to the fourth respondent pursuant to the conclusion of the three royalty agreements;

13. That the second, third and fourth respondents jointly and severally refund all business rescue fees together with interest thereon calculated from 6 December 2017 to date of final payment, including an amount of R325 000.00;

14. That the second, third and fourth respondents jointly and severally refund the applicant in the amount of R233 500.00;

15. That the second, third and fourth respondents be held liable jointly and severally for "all damages and losses suffered by the applicant and/or the first respondent as may be proved by them";

16. That the claim of the tenth respondent in the amount of R500 000.00 plus interest be declared valid and "forthwith reinstated";

17. That the sixth respondent be ordered to render, supply and maintain services including electrical power and water supply to the two immovable properties which belongs to the first respondent; and

18. That the second, third and fourth respondents be ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved.

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[2] Act 61 of 1973.

The liquidation

[7] Before I turn to a consideration of the issues before the court, and more in particular the relief sought pertaining to the setting aside of the liquidation order, a few remarks in respect of the context within which this application should be considered.

[8] In GCC *Engineering (Pty) Ltd and Others v Maroos and Others*[3] *("Maroos")*, Marcos was similarly placed in final liquidation in the hands of the Master of this court. The Supreme Court of Appeals considered the following three questions:

> (a) Whether the appointment and the powers of the duly appointed provisional joint liquidators are suspended in terms of s 131(6) of the 2008 Act;
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> (b) Whether the control and management of the property of a company already placed in liquidation by a court order, can validly and legally be re-vested in the director of that company;
>
> (c) Whether the Master has any role to play in business rescue proceedings.[4]

[9] With reference to section 131(6) of the 2008 Act, the Supreme Court of Appeal held that the status of the entity in liquidation does not change nor does it suspend the court order that placed the company under liquidation in the hands of the Master in terms of section 141(2)(a)(ii) of the 2008 Act:

> "[15] Section 131(6) of the Act does not change the status of the company in liquidation nor does it suspend the court order that placed the company under liquidation in the hands of the Master in terms of s 141(2)(a)(ii) of the Act. The appointed provisional joint liquidators must proceed with their duties and functions to protect the assets of the company for the benefit of all the creditors of the company.
>
> [16] Successful liquidation proceedings constitute a complete process by which a company is brought to an end and the liquidation process

[3] 2019 (2) SA 379 (SCA).

culminates in the dissolution of the company up to its deregistration *(See Richter* v *ABSA Bank* at 60D)."

[10] The Supreme Court of Appeal further confirmed that, in terms of section 131(6) of the 2008 Act, it is the liquidation proceedings, not the winding-up order, that is suspended:

"[17]...What is suspended is the process of continuing with the realization of the assets of the company in liquidation with the aim of ultimately distributing them to the various creditors. The winding-up order is still in place; and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors."

The office and powers of the provisional liquidators are therefore not terminated:

"[19] ...In s 131(6) the legislature used the word 'suspend' and which not mean termination of the office of the liquidator. In my view the term 'liquidation proceeding' refers only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation in order to bring about its dissolution. What is suspended is the process of winding-up and not the legal consequences of a winding-up order."

[11] Importantly, the Supreme Court of Appeal held, with reference to section 361(1) and (2)[5] of the 1973 Act, that the control and management of the entity which was already placed in winding-up by virtue of an order made

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[4] *Ibid* at para [9].

[5] Section 361(1) and (2) of the Act read as follows:

*"1. In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until* a *provisional liquidator has been appointed and has assumed office.*

*2. In any winding-up of any company, at all times while the office of the liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and*

by a court *does not* re-vest in the company's director:

> "[21] In *Secretary for Customs and Excise v Millman NO* 1975 (3) SA 544 (A) at 552H, Botha JA said '[u]pon the compulsory winding-up of a company its directors cease to function as such . . . and they are, therefore, deprived of their control on behalf of the company of the property of the company which is then deemed to be in the custody or control of the Master or liquidator.' As stated earlier the order placing the company under winding up is still in place and has not been set aside. On the granting of the winding-up order, the directors of the company cease to function as directors and the property of the company falls under the control of the Master or the appointed liquidators. The directors of the company in liquidation have been stripped of their control and management of the company placed in winding-up by the court. There is no legal provision either statutory or at common law that sanctions the re-vesting of control and management of the company in liquidation to the director of the said company."

Regarding the status of the Master of the High Court in proceedings similar to the one which served before this court, the Supreme Court of Appeal in *Maroos* held that the Master has a direct and substantial interest in the orders applied for by the applicant and should, accordingly be a party to proceedings pertaining to business rescue:

> "[22]The other question that needs attention is whether the Master has any role to play in business rescue proceedings. As stated earlier the sixth appellant [the Master] was not a party to the proceedings in the court a quo. In their notice of motion in the court a quo the applicant never sought any order which had any impact or effect on the sixth appellant. In their founding and replying affidavits the applicants did not set out any facts which justified the granting of an order requiring the sixth appellant to

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*under the control of the Master."*

perform any functions or duties. The sixth appellant, (the Master) has a direct and substantial interest in the order granted by the court a quo. In *Molusi & others v Voges NO & others* [2016] *ZACC* 6; 2016 (3) SA 370 (CC) para 28, Nkabinde J said '[t]he purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone.' The court a quo granted an order which was not sought by any of the parties and consequently denied the sixth appellant an opportunity to be head prior to the granting of an order under consideration".

[12] Having recognised the fact that the Master of the High Court must be a party to proceedings such as this, the Supreme Court of Appeal proceeded to spell out some of the important functions of the Master:

"[23] ...It also required the sixth appellant [the Master] to monitor the utilisation or disposal of the assets of the company by the manager appointed by the court. The sixth appellant is a creature of statute and may perform only those duties and functions empowered by the enabling legislation. The sixth appellant exercises control and supervision over the winding-up, liquidation and sequestration processes, including rehabilitation of the insolvent and the deregistration of the company. The Master has no powers to deal with a 'manager' appointed by the court or the business rescue practitioner. The appointment of the 'manager' by the court a quo falls outside the scope of the winding-up, liquidation and sequestration processes. There are also no statutory provisions that permits the appointment of a 'manager' in these circumstances."

[13] In light of these principles, I will now proceed to consider the matter.

Points *in limine*

[14] The following points *in limine* were raised on behalf of the respondents. They contended that these points are not adequately addressed in the replying

affidavit:

Misjoinder

[15] Misjoinder in that the Registrar of Deeds, Johannesburg is cited as the twelfth respondent, whereas the two immovable properties that form the basis of this application are situated within the area of jurisdiction of the Registrar of Deeds, Pretoria. The twelve respondent, therefore does not have *locus standi in iudico* herein. In terms of prayer 4.2 of the Notice of Motion, the applicant applies for an order that the second, third and fourth respondents be interdicted and restrained from submitting any documents to the twelfth respondent for the purposes of effecting the transfer of the two immovable properties which were sold on 31 October 2018 at an auction. The two immovable properties fall within the area of jurisdiction of the Registrar of Deeds, Pretoria. As a result of having cited the wrong Registrar, a misjoinder occurred. Although this point was not pressed in argument, a misjoinder clearly occurred where the wrong Registrar has been cited. The application is therefore fatally defective.

Non-joinder

[16] Non-joinder in that the applicant applies for an order in terms of which a final winding-up order (that was granted by this court on 9 February 2017 by Baqwa, J), be set aside. The seventh and eight respondents were appointed as the joint final liquidators of the first respondent on 7 March 2017. I am in agreement with the submission that the Master of the High Court has a direct and substantial interest in this application by virtue of the provisions of section 364[6] of the 1973 Act: It is therefore not competent for this court to set aside the

[6] *"364* ***Master to summon first meetings of creditors and members and purpose thereof***
*(1) As soon as may be after a final winding-up order has been made by the Court or a special resolution for a creditors' voluntary winding-up of a company has been registered in terms of section 200, the Master shall summon-*
*(a) a meeting of the creditors of the company for the purpose of-*
*(i) considering the statement as to the affairs of the company lodged with*

final order of the first respondent's liquidation under circumstances where the Master of the High Court is not a party to these proceedings

[18] This point has merit. In fact, counsel on behalf of the applicant conceded that the Master of the High Court was not served with any papers during the course of instituting this application and was in fact only served the day before the hearing. If regard is had to the decision of the Supreme Court of Appeal in *Maroos,* this omission is fatal. The relief sought in terms of prayer 9 of the Notice of Motion therefore falls to be dismissed.

The relief is notcompetent

[19] The respondents submitted that the relief sought by the applicant is not competent in that the applicant did not comply with the provisions of section 354(1)[7] of the 1973 Act.

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*the Master under section 363;*

*(ii) the proof of claims against the company; and(iii) nominating a person or persons for appointment as liquidator or liquidators; and*

*(b) a meeting of the members of the company or, in the* case *where the winding-up concerns a company limited by guarantee, a meeting of the contributories in respect of that company, for the purpose of-(i) considering the said statement* as *to the affairs of the company; and*

*(ii) nominating a person or persons for appointment* as *liquidator or liquidators, unless the company in general meeting, when passing a resolution provided for in*

*section 349, has already disposed of the matters referred to in subparagraphs (i) and (ii).*

*(2) Meetings of creditors under this section shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency, and meetings of members or contributories in the manner prescribed by regulation: Provided that, in the case of a meeting of creditors, the Master may direct the company concerned or the provisional liquidator to send a notice of such meeting by post to every creditor of the company."*

[7] ***"354 Court may stay or set aside winding-up***

*(1) The Court may at any time after the commencement of a winding-up, on the*

[20] In terms of this section, a court may, at any time after the commencement of a winding-up on application of any liquidator, creditor or member, *and on proof to the satisfaction of this court* that all proceedings in relation to the winding-up ought to be stayed or set-aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the court may deem fit.

[21] The court therefore has a discretion to set aside the wining-up order. The onus to persuade the court to do so rests on the applicant which has to adduce sufficient evidence in support of such an order. Two situations are envisaged: (i) The one is an application for an order setting aside the final winding-up order on the basis that the institution of the winding-up should not have occurred. Such an order will only be granted in *exceptional* circumstances. An applicant must show special circumstances which justified the setting aside of the order and also furnish satisfactory explanations for not having opposed the granting of the order.[8] (ii) The second is an order where the proceedings should be stayed or set-aside consequent upon certain events that occurred subsequently.

[22] If regard is had to the history of this matter: (i) The applicant applied for an order in terms of which the first respondent be placed under supervision as contemplated in terms of section 131 of the 2008 Act.[9] The fourth respondent (as the intervening creditor) intervened and the application was dismissed on 9 February 2017; (ii) a final liquidation order was granted on 9 September 2017 (Baqwa, J). According to the respondents, the applicant is in wilful and deliberate contempt of the order that was made by Makgoka, J (as

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*application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.*

*(2) The Court may, as to all matters relating to* a *winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."*

[8] *Crown Hill Prop 3 CC v Body Corporate Villa Luca* 2013 JDR 0740 (GNP) at para [7]: *"The Applicants under section 354 of the Act must show special circumstances which justified the setting aside of the order and also furnish satisfactory explanations for not having opposed the granting of the order.*

he then was) on 6 September 2017 and that the applicant in any event stands before this court with "dirty hands".

[23] In my view, the applicant has failed to make out a case for the setting aside of the order. No persuasive facts and certainly no exceptional circumstances have been placed before the court to justify the setting aside of the order. The fact that the applicant waited since 9 February 2017 to launch this application (a period of more than 14 months), casts serious doubt over the motives of this application. Moreover, sight must also not be lost of what had transpired since the order was granted: The fourth respondent has proved a claim against the first respondent in the amount of R 10 893 922.45 (ten million eight hundred and ninety-three thousand nine hundred and twenty-two thousand rand and forty-five cents). Moreover, it will not serve the interest of justice to place the first respondent back into the hands of the applicant in circumstances where the first respondent is factually and commercially insolvent and has no prospect of becoming a successful business enterprise. In any event, the Master of the High Court having a direct interest in the matter is not a party to this application.

Best interests of justice

[24] I am in agreement with the submission that it is in the best interests of justice to give effect to the resolutions adopted at the meeting on 5 December 2017. It is not in the interest of justice to terminate the business rescue proceedings nor to set aside the appointment of the business rescue practitioner. It is also noteworthy that the fourth respondent has no objection to the manner in which the business rescue proceedings have been conducted thusfar. I will return to some of these issues hereinbelow.

Irregular steps

[25] In addition to the aforementioned points *in limine,* the respondents

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[9] Case number: 23919/2016.

raised the following issues: When the parties met with the acting Deputy Judge President on 12 February 2019, the legal representatives confirmed that the pleadings were closed. This submission is confirmed in a letter dated 13 February 2019 and addressed to the acting Deputy Judge President.

[26] Notwithstanding this confirmation the applicant took further steps which the respondents submit, are irregular steps in terms of Rule 30 of this Court's Uniform Rules. They are:

(i) The applicant delivered an amended Notice of Motion on 13 February 2019 (dated 12 February 2019) without complying with the provisions of Rule 28 of this Court's Uniform Rules;

(ii) The applicant delivered a second replying affidavit to the second respondent's answering affidavit on 13 February 2019 without complying with the provisions of Rule 6(5)(d) this Court's Uniform Rules. The respondents oppose the amended Notice of Motion and the new reply on the basis that no application for condonation was brought and that it was filed without leave of the court to file further affidavits. The application was served on the second respondent on 26 October 2018. The Notice of Intention to Oppose was filed and delivered on 2 November 2018. The second respondent filed and delivered his opposing affidavit on 16 November 2018. The applicant filed and delivered his replying affidavit on 22 November 2018. No further affidavits were filed until 13 February 2019, when the applicant filed a further replying affidavit;

(iii) The applicant delivered a practice note on 13 February 2019, which does not comply with paragraph 13.16 of this Court's amended Practice Manual, dated

1 July 2012. The practice note is further undated and not signed by the applicant's legal representative;

(iv) The applicant proceeded to then deliver a further amended practice note on 14 February 2019, which practice note also did not comply with paragraph 13.16 of this Court's amended Practice Manual, dated 1 July 2012.

[28] The Rule 30 application therefore succeeds. The applicant clearly took various irregular step in respect of the amended Notice of Motion as well as by delivering a second replying affidavit to the second respondent's answer without complying with the provisions of Rule 6(5)(e) of this Court's Uniform Rules. Lastly, the practice notes do not comply with the requirements set out in this Court's Practice Manuel.

Brief background facts

[29] As a result of the first respondent's failure to comply with its repayment obligations in terms of three loan and royalty agreements , the fourth respondent launched a liquidation application on 22 January 2016 (under case number 23919/16). The fourth respondent relied, *inter a/ia,* on a statutory demand in terms of section 66 read with section 69(1)(a) of the Closed Corporation Act.[10].

[30] The allegations in the liquidation application stood uncontested at the hearing of the application. More in particular, the applicant did not dispute the extent of the first respondent's indebtedness to the fourth respondent in the amount of approximately ten million rand. The applicant also did not dispute the first respondent's liability for the payment of royalties.

[31] In reaction to the liquidation application, the applicant launched a business rescue application on 30 March 2016 in terms of section 131(1) of the Closed Corporation Act.

[32] On 9 February 2017, Baqwa, J dismissed the applicant's business rescue application and placed the first respondent in final liquidation in the hands of the Master of the High Court. It is common cause that this order is not the subject matter of a pending appeal or review.

[33] Pursuant to the provisions of section 348 of the 1973 Act, the liquidation proceedings of the first respondent commenced on 22 January 2016. The seventh and eighth respondents were appointed as joint liquidators ("the liquidators").

[34] The liquidators discovered that the applicant had been paying

[10] Act 69 of 1984.

personal expenses from the business account of the first respondent and that most of the tenants who rented rooms on a monthly basis had been paying their rental in cash. This is admitted by the applicant in the urgent application proceedings This continued even after the final liquidation of the first respondent. The applicant failed to account to the first respondent or to the liquidators.

[35] The applicant further prevented the liquidators from gaining access to and control of the buildings of the first respondent and started to utilise the account of a different company. This allegation is also admitted by the applicant in the present application. As a result, the liquidators applied for various court orders against the applicant, *inter alia,* on 28 April 2017 and 17 May 2017.

[36] On 6 September 2016, the second respondent was appointed by this court as the first respondent's business rescue practitioner (by Makgoka, J). By virtue of such appointment, the second respondent assumed the powers and duties as provided for in the Act. These powers were extended significantly by this court in an order dated 6 September 2017. The applicant was ordered to pay all monies received from the rental of the two immovable properties owned by the first respondent to the second respondent into the banking account nominated by the second respondent.[11]

[37] It is common cause that the applicant failed and omitted to comply with paragraph 7 of the court order dated 6 September 2017. In paragraph [18] of the Founding Affidavit, the applicant makes the statement that "I rent these buildings out to students that study at the North West University". This statement by the applicant conveys the clear impression that he collects the rental income - rental income that was supposed to have been paid into a bank account nominated by the business rescue practitioner. What the applicant seems to forget it that he is no longer in control of the financial affairs of the first respondent: Paragraph [5] of the court makes it patently clear that the business practitioner is authorise to "immediately take full management control of the company".

[38] The second respondent took the issue in respect of the non-payment of all monies collected up with the applicant who conceded that the amounts have

not been paid over. He apologised for the inconvenience caused by him not depositing all funds into the designated bank account. The correspondence attached to the papers confirm that the applicant has been informed on 1 February 2018 of the relevant bank account details. The applicant in fact acknowledged having received the information.

[39] On 20 February 2018, the second respondent informed the applicant that an amount of R287 610.00 (two hundred and eighty-seven thousand six hundred and ten rand) was outstanding and that immediate payment was sought.

[40] On 27 March 2018, the applicant responded stating that the court order in terms of which the second respondent was appointed as a business rescue practitioner have "reduced you [the business practitioner] in a collection agent".

[41] The second respondent persists with his allegation that the applicant misappropriated an amount in excess of two million rand. According to the second respondent this allegation has never been denied by the applicant. The court was referred to the fact that the applicant had confirmed that an amount of R 3 231 185.05 (three million two hundred and thirty one thousand one hundred and eighty five rand and five cents) was collective in respect of rent received. If all the expenses or overheads are taken into account, an amount of two million rand is unaccounted for. The second respondent insists that the applicant is not in a position to explain the whereabouts of this amount.

[42] On 17 May 2017, the seventh and eight respondents approached this court on an urgent basis to freeze the bank account of Zakhele Mzansi Bricks (Pty) Ltd - a private company of which the applicant is the sole director. Its principal business is to manufacture bricks. This application was necessitated after it was discovered that the applicant caused funds which belonged to the first respondent to be paid into this company's bank account. Janse van Nieuwenhuizen, J made an order on 17 May 2017 in terms of which the said bank account was frozen pending the finalisation of an action to be instituted.

[43] Since 7 September 2017, the applicant made no effort or attempt to approach this court for an order in terms of section 132(2)(a)(i) of the 2008

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[11] Paragraph [7] and [8] of the court order.

Act.

[44] On 31 October 2018, the liquidators sold the immovable property of the first respondent (bonded in favour of the fourth respondent) on auction. The sale and transfer of the properties were not completed in the course of the liquidation proceedings. The first respondent remains the registered owner of three properties. Two are situated in Vanderbijlpark, Gauteng and one in Emfuleni Local Municipality. Two of the properties (identified as Roval and Santrust) were sold on 31 October 2018, at an auction for more than thirteen million rand. The fourth respondent instructed the second respondent to proceed with the transfer and registration of the properties into the name of the purchaser.

[45] On the basis of this sale, the respondents submit that prayer 3 of the Notice of Motion has therefore become moot and it could be of no force or effect. The respondents further submit that the applicant has, at all times since 5 December 2017, been aware of the intention to sell all the properties that belong to the first respondent and has made no attempt to interdict or prohibit the second respondent from selling or alienating the properties belonging to the first respondent.

[46] On 5 December 2017, a business rescue plan was adopted in terms of section 151. It is in terms of this plan [12] that a Notice of Substantial Implementation of the Business Rescue Plan will be filed once all the properties have been sold and all dividends have been paid to the creditors as stipulated in this plan. The applicant attended the meeting held in terms of section 151 of the 2008 Act. At the meeting it was specifically discussed that it was the intention in terms of the plan to sell all the encumbered and unencumbered assets of the first respondent during the next twelve months. The applicant voted in favour of the adoption of the business rescue plan.[13]

[47] On 1 August 2018, the tenth respondent launched business rescue proceedings. The tenth respondent - previously known as Ramatsebe Consulting CC and represented by Mr DP Ramatsebe ("Ramatsebe") alleged that it is a

[12] Clause 25.2 of the Business Rescue Plan.

creditor of the applicant and an "affected person". The result of the business rescue application was to suspend the liquidation proceedings of the first respondent and also had the effect that the liquidators were precluded from exercising their statutory powers. Ramatsebe enrolled his application for hearing on the unopposed motion role some two and a half months later - on 9 November 2017.

[48] The liquidators established during their investigations into the affairs of the first respondent that the monthly rental collected by the applicant in cash, were substantially more than previously estimated. The fourth respondent then launched an urgent business rescue application to place the first respondent under supervision and commenced business rescue proceedings. The second respondent was then appointed as practitioner.

[50] I interpose here to restate that, in terms of section 131(6) a business rescue application suspends the liquidation proceedings until the court has adjudicated upon the application or, if the order is granted, until business rescue proceedings end (see Maroos[14] ).

[51] It is on this basis that the respondents submit that there is a misjoinde:r The applicant seeks to set aside the final liquidation order as well as the order commencing business rescue proceedings. However, business rescue proceedings have not terminated. The first respondent was already in final liquidation when the business rescue proceedings commenced. It was thus necessary to join the master. (I have already dealt with this issue hereinabove.)

The business rescue plan

[52] A business rescue plan that has been adopted is binding on the company and on each of its creditors in terms of section 152(4).

[53] In terms of this plan, it was resolved that the immovable property of the first respondent would be sold and that it would be sold as a going concern. This

[13] Clause 8.4 of the minutes of the meeting held on 5 December 2017.

would have resulted in a better return for the first respondent's creditors opposed to the immediate liquidation of the company. The second objective as envisaged in section 128(1)(b) would therefore have been achieved.

[54] The fourth respondent further compromised its claim for further royalties. The total outstanding amount still due and payable to the fourth respondent in terms of the loan agreements is R 8 720 495.99 (eight million seven hundred and twenty thousand four hundred and ninety-five rand and ninety-nine cents). This is not disputed in the reply. The fourth respondent contends that should the business rescue plan not be implemented but set aside, the compromise in respect of the royalties will lapse and the first respondent will remain liable for the payment thereof.

[55] I now return briefly to the relief sought.

Prayers 3 and 4: The properties

[56] In terms of these prayers, the applicant seeks an order that the second, third and fourth respondents be interdicted from continuing with and concluding "the proposed sale on 31 October 2018" in respect of the two properties. There is no merit in this relief sought: The immovable properties have been sold on auction on 31 October 2018 and the relief sought in terms of prayer 3 and 4 has accordingly become moot.

Prayer 5: Full control of the first respondent

[57] In terms of this prayer, the applicant seeks an order removing the second respondent as the business rescue practitioner and to grant the applicant "full sole control of his company".

[58] The applicant is not entitled to "full sole control" of the first respondent and the order is, accordingly not competent. The applicant has further not, in terms of section 139(2) of the 2008 Act, made out a case for the removal of the duly court appointed business rescue practitioner. In terms of this section, a business rescue practitioner may only be removed on the following grounds:

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[14] *Supra .*

"(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

*(a)* Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;

*(b)* failure to exercise the proper degree of care in the performance of the practitioner's functions;

*(c)* engaging in illegal acts or conduct;

*(d)* if the practitioner no longer satisfies the requirements set out in section 138 (1);

*(e)* conflict of interest or lack of independence; or

*(f)* the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time."

[59] Nothing, apart from a mere allegation of "fraud, deceit, incompetence, maladministration", has been placed before this court. The relief sought in this prayer is accordingly dismissed.

Prayer 6: Application to set aside the adopted plan

[60] The plan has been adopted by agreement between the first respondent and the creditors. The applicant voted in favour of the plan and cannot now claim that the plan should be set aside merely because he has changed his mind. This relief sought in this prayer is accordingly dismissed

Prayer 9: Rescission of the liquidation order

[61] An applicant under section 345 of the Act, must not only show there are "special or exceptional circumstances" to justify a recession of the liquidation order, such applicant must provide a "satisfactory explanation for not having opposed the granting of a final order or appealed against the order". No such

case has been made out. In any event, as already pointed out, the Master of the High Court has a direct and substantial interest in the orders applied for by the applicant. The Master of the High Court has not been joined and therefore it is not competent for this Court to set aside the final liquidation order of the first respondent.

Prayers 10 and 11: Business rescue proceedings

[62] In terms of prayer 10 the applicant sought an order to set aside the order commencing the business rescue proceedings and in terms of prayer 11, the applicant seeks an order to "terminate" the business rescue proceedings. No such a case has been made out.

Prayer 12: Royalty agreements

[63] The applicant contended that the royalty agreements "are nothing less than simulated agreements to increase the earnings of the fourth respondent". There is no merit in this contention. On the applicant's own version, the fourth respondent as early as 2014 informed him that he signed and agreed to a 17% royalty. Moreover, the royalty agreements are part and parcel of the loan agreements. Furthermore, it is a condition of the loans that royalty agreements are entered into.

[64] A similar attack against the fourth respondent's royalty agreements was rejected by the full bench in this division in *Business Partners Limited v Silverstars Trading* 245 CC.[15] At issue in this matter was whether the court a *quo* correctly found that the royalty agreement is contrary to public policy and void. The court in *Business Partners* confirmed that the onus to establish that a contract is void and unenforceable is upon the party who alleges it:

> "[40] The onus to establish that a contract is void and unenforceable because it is contrary to public policy is upon the party who alleges

it; refer Diners Club SA v Singh 2004 (3) SA 530 (D) at 645 G where Levinsohn J said the following:

*'The legal onus of establishing that* a *term in* a *contract (admittedly entered into by the*

*defendants) is contra bonos mores rests on the defendants. This carries with it the duty finally to satisfy the court that it ought to succeed on the issue and they have also the duty to adduce evidence in regard to the factual background relevant to the defence.'"*

[65] There is nothing before the court to indicate that the applicant was not aware and that he did not understand that royalty payments were payable. In fact, the applicant admits that he had signed and agreed to a 17% royalty.

Prayer 13: Refund of payments

[66] The applicant claims a refund of all payments. There are several issues with the relief claimed here. First, the applicant does not have *locus standi* to claim the relief sought; secondly, it is not pleaded which amounts, if any, are claimed; thirdly, the royalty agreements were concluded during 2012 and 2013 and any claim for a refund has now become prescribed or at least partially prescribed.

Prayers 14 and 15: Business rescue fees

[67] The applicant claims a refund of all business rescue fees. There is no merit in this claim and I am in agreement with the submission made by the fourth respondent that one of the creditors of the first respondent can never be liable for the refund of business rescue fees.

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[15] (A762/2012, 14408/2008) [2015] ZAGPPHC 1108 (29 May 2015).

Prayer 16: Damages

[68] The applicant essentially claims damages for alleged maladministration. There is no merit in this claim. Firstly, no legal basis is made out for this claim. Secondly, the fourth respondent furthermore disputes the allegations that form the basis of this claim. Declaratory relief in application proceedings in these circumstances is simply inappropriate.

Prayer 17: Claim of tenth respondent

[69] The applicant claims relief on behalf of the tenth respondent. The applicant simply, does not have any *locus standi* to claim anything on behalf of the tenth respondent. In any event, the claim of the tenth respondent was rejected by the practitioner.

[70] In the event, the relief sought in the Notice of Motion is dismissed with costs such costs to include the costs occasioned by the employment of senior counsel.

Heads of argument

[71] In conclusion it is necessary to make a few remarks regarding the manner in which this matter was conducted. It is trite law what the purpose of Heads of Argument is. In light of what served before this court, it is unfortunately necessary to again remind parties what the purpose of Heads of Argument is. It is certainly not the purpose of the Heads of Argument to merely regurgitate the facts contained in the papers.

[72] Paragraph 13.8 of this court's amended Practice Manual sets out, in broad terms, what the purpose is and states as follows:

> "2. The heads of argument should indicate the issues that fall for determination and counsel's contentions in respect of those issues. Reference to the authorities relied upon for those contentions should be set out."

[73] I can do no better than to refer to what was stated by the Court in *S v Ntuli*[16] (albeit in the context of a criminal trial):

> '"[16] Unless counsel properly represents his or her client, the right to a fair trial and the right to a fair appeal may be negated. At issue is simply the basic proposition that the minimum required of counsel is to prepare and present a proper argument on behalf of his or her client. Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard. In *S v Steyn* 2001 (1) SA 1146 (CC) para [24] at 1160C - 1161A (2001 (1) SACR 25 at 38e - 39c; 2001 (1) BCLR 52) at the Constitutional Court stressed the importance of oral argument in the context of criminal appeals. The same holds true for written argument."

[74] The Heads of Argument in this matter consist of 127 pages and consist mainly of a regurgitation of the evidence. Apart from one single judgment referred to in paragraph 9 of the applicant's Heads of Argument, the applicant omitted to refer to any authorities in support of the relief he applies for. This is clearly not helpful to a court.

[75] More concerning is the fact that the Heads of Argument are replete with numerous defamatory statements or allegations. Counsel is expected to respect the decorum of this court and should refrain from insulting the other party, their attorneys and even counsel acting on behalf of one of the parties. I refer to some examples:

> Ad par 3: "It now transpired that Dawid Maartens is stealing the

[16] 2003 **(4)** SA 258 (W) at 2658 - D.

money of Pat Zoo and whittling away the assets of Pat Zoo."

Ad par 6.24: "This just shows how skewed Dawid Maartens priorities are."

Ad par 6.25: "He is more set to remain in power as business rescue practitioner of Pat Zoo at the expense of Pat Zoo, so he can steal more money from Pat Zoo than paying the day to day expenses of Pat Zoo and making sure Pat Zoo survives."

Ad par 6.29: "The reason of course why this expense was incurred by Dawid Maartens and his attorney Wim Cornelius is of course because the money is not their money and they could not care less what happens to it."

Ad par 6.30: "This just shows the sick mind of Dawid Maartens."

Ad par 6.39: "The truth is that Dawid Maartens wants Pat Zoo to fail to cover up his theft and impropriety."

Ad par 7.6: "Dawid Maartens also lies to make up paper space and pad his answering affidavit."

Ad par 7.7: "It will also be shown that Dawid Maartens is a liar, a conman, a thief, a criminal and corrupt to the bone. "

Ad par 8.12: "Ms Van Heerden on behalf of Business Partners lied."

Ad par 20: "It is therefore submitted that on the proper interpretation of the dirty hands principal the Honourable Court should immediately remove Dawid Maartens and order him and his cohorts to pay back the money they stole from Applicant and Pat Zoo."

Ad par 24: "This is of course a blatant lie. The problem that Dawid Maartens however faces is that he has to lie to justify the selling of the buildings. Dawid Maartens has no other option."

Ad par 24.1.11: "He now does not want to justify his conduct therefore he lies by alleging that Pat Zoo is insolvent."

Ad par 25: "The only reason why Dawid Maartens now out of the blue suddenly allege that Pat Zoo is financially insolvent , is to justify his illogical, nonsensica,l irrational and illegal conduct, which is to sell the Roval and Santrust Buildings of Pat Zoo."

Ad par 35: "This annexure "DM12" is all part of a pathetic attempt by him to show that Pat Zoo is insolvent. This is not only misleading but a blatant lie."

Ad par 37: "Dawid Maartens has done this before. It seems he has become quite an expert in conjuring up income and expense sheets of Pat Zoo showing that Pat zoo is insolvent whenever it is convenient for him to do so."

Ad par 40: "On Dawid Maartens' own version and therefore according to the annexure "DM12" despite Dawid Maartens rewarding himself and his close associates generously Pat Zoo is economically viable up and until 16 November 2018 the day Dawid Maartens disposed of his answering affidavit."

Ad par 40: "Dawid Maartens is lying. Dawid Maartens is a liar."

Ad par 41: "He stole this money. Dawid Maartens is a thief, a criminal and a crook."

Ad par 43: "He together with his cohorts, his attorney Wim Cornelius, advocate Goertzen and maybe even his accountant Michelle Nieman are stealing from me and Pat Zoo. Apart from stealing from Pat Zoo Dawid Maartens made no contribution whatsoever to the rescuing of Pat Zoo. Dawid Maartens and his cohorts are whittling away the assets of Pat Zoo. If he and his cohorts are not stopped on an urgent basis there will be nothing left."

Ad par 63: "This further shows that Pat Zoo has indeed recovered and will be able to pay its debts especially since Dawid Maartens will not be around to misuse or steal from Pat Zoo."

Ad par 66: "Annexure"DM12" and annexure "DM56" shows it is only after 16 November 2018 and some doctoring by Dawid Maartens that Pat Zoo showed a negative balance."

Ad par 78: "Only after Applicant saw the financial statements of Pat Zoo, Applicant became aware of how in more detail Dawid Maartens stole money from Pat Zoo to enrich himself and his fellow cohorts."

Ad par 88: "If Michelle Nieman took money to which she was not entitled, she is a thief."

Ad par 94: "Once again, no explanation given as to why this payment was made. Applicant was not given an account by advocate Goertzen. A total payment of R54 394.50 was made towards advocate Goertzen with no explanation given. What other reasonable inference must Applicant make that this is nothing else but a kick- back payment Dawid Maartens made towards advocate Goertzen as a reward for recommending Dawid Maartens as business rescue practitioner of Pat Zoo. Advocate Goertzen took this R54 394.50 to which he is not entitled. Advocate Goertzen is a thief."

Ad par 100: "Dawid Maartens took money from Pat Zoo to which he is not entitled. Dawid Maartens stole from Applicant and Pat Zoo. Dawid Maartens is a thief."

Ad par 102: "Dawid Maartens is corrupt to the bone."

Ad par 105: "DawidMaartens is lying. Dawid Maartens is a liar."

Ad par 108: "He stole this money. Dawid Maartens is a thief, a criminal and a crook."

[76] The conduct of Advocate Hugo warrants the attention of the Professional and Ethics Committee as this type of conduct reflects negatively on our profession. All practitioners must respect the decorum in this court.

Order

1. The application is dismissed.
2. The applicant is to pay the first, second, third and fourth respondents' costs on an attorney and client scale.

**AC BASSON**

**JUDGE IN THE HIGH COURT**

Appearances:

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|---|---|
| Applicant: | Advocate Hugo |
| Instructed by: | Hamann Attorneys |
| First, second and third respondents: | Advocate FW Bates SC |
| Instructed by: | Wolvaardt Incorporated |
| Fourth respondent: | Advocate Y Coertzen |
| Instructed by: | Strydom Britz Mohulatsi Inc. |