THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 543/2021

In the matter between:

PFC PROPERTIES (PTY) LTD **First Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **First Respondent**

TIANJIN PENGBO WEIYE SA (PTY) LTD **Second Respondent**
(previously 21 PORTLAND ROAD PMB (Pty) Ltd)
(Registration Number 2008/010786/07)

THE REGISTRAR OF DEEDS, PRETORIA **Third Respondent**

CLOETE MURRAY NO **Fourth Respondent**

ROSELYN CHANTAL NOEL NO **Fifth Respondent**
(in their capacities as Joint Provisional Trustees
Of the Insolvent Estate of Paul de Robillard)

and

Case No: 409/2022

In the matter between:

BRITA DE ROBILLARD NO **First Appellant**

CLIFFORD EDWARD ALEXANDER NO **Second Appellant**
(in their capacities as Trustees of the De Robillard Family Trust)

and

PFC PROPERTIES (PTY) LTD **First Respondent**
(Registration Number: 2003/026791/07)

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **Second Respondent**

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **Third Respondent**

CLOETE MURRAY NO **Fourth Respondent**

ROSELYN CHANTAL NOEL NO **Fifth Respondent**
(in their capacities as Joint Provisional Trustees
Of the Insolvent Estate of Paul de Robillard)

Neutral citation: *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others* (Case no 543/21) and *Brita De Robillard NO and Another v PFC properties (Pty) Ltd and Others* (Case No 409/22) [2023] ZASCA 111 (21 July 2023)

Coram: SCHIPPERS, MBATHA, HUGHES and WEINER JJA and UNTERHALTER AJA

Heard: 15 May2023

Delivered: 21 July 2023

Summary: Winding-up application – business rescue application launched thereafter – stratagem to avoid winding-up – business rescue application an abuse of court process – applicants in business rescue application non-suited – winding-up order correctly granted.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria, case no 543/2021 (Van der Schyff J sitting as court of first instance);

The KwaZulu-Natal Division of the High Court, Pietermaritzburg, case no 409/2022 (Moodley J sitting as court of first instance):

1 Case no 543/2021: The appeal is dismissed with costs, including the costs of two counsel, where so employed.

2 Case no 409/2022: The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Weiner JA (Schippers, Mbatha and Hughes JJA and Unterhalter AJA concurring)

Introduction

[1] Two related matters came before this Court on appeal. The first (case no 543/2021) concerned an appeal against a winding-up order granted against the appellant, PFC Properties (Pty) Ltd (PFC), in favour of the first respondent, the Commissioner for the South African Revenue Services (SARS). The winding-up order was granted by the Gauteng Division of the

High Court, Pretoria (Pretoria High Court). The appeal is with the leave of that court.

[2] The second matter (case no 409/2022) concerned a business rescue application brought in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Pietermaritzburg High Court), after the launch of the winding-up application, by Mrs Brita De Robillard NO and Mr Clifford Edward Alexander NO, the trustees (DRFT trustees) of the De Robillard Family Trust, the sole shareholder of PFC, to place PFC into business rescue (the business rescue application). The DRFT trustees applied for a postponement of the application, which was refused. The business rescue application was thereafter dismissed. The appeal, which is with the leave of the Pietermaritzburg High Court, is against both these orders.

[3] In opposing the winding-up application, PFC relied on s 131(6) of the Companies Act 71 of 2008 (the Act), which provides that the launch of a business rescue application automatically suspends the winding-up proceedings, until the business rescue application is adjudicated upon.[1]

Factual overview

[4] PFC is a property and asset owning company. Mr Paul De Robillard was a director of PFC until 28 February 2011. Mrs Britta De Robillard, his

[1] Section 131(6) provides:
'If liquidation proceedings have already been commenced by or against the company at the time an application [for business rescue] is made in terms of subsection (1), the application will suspend those liquidation proceedings until—
(a) the court has adjudicated upon the application; or
(b) the business rescue proceedings end, if the court makes the order applied for.'

wife, was a director from 1 March 2012 until 24 November 2020. SARS had conducted an audit on PFC for the tax periods 2007/11 and 2011/01 to 2018/12 in respect of VAT and income tax and had issued revised assessments totalling over R52 million in respect of VAT and over R5 million in respect of income tax.

[5] In the 2010 tax year, PFC commenced with the construction of a residential home situated in the Serengeti Golf and Wildlife Estate (the Serengeti property) in Gauteng. SARS was informed that this was a property development by PFC and numerous VAT claims were submitted to SARS in respect of this development. However, Mr and Mrs De Robillard utilised this property as their matrimonial home.

[6] In September 2012, SARS informed Mr De Robillard that it held him personally liable for customs and excise related debts incurred by a company styled Doltek Enterprises (Pty) Ltd (Doltek), in the amount of over R89 million.[2] SARS has been engaged in litigation with Mr De Robillard since 2012.

[7] On 7 November 2012, Mr De Robillard brought an urgent application to interdict SARS from collecting these debts, pending finalisation of an action for declaratory relief (the action). This action was instituted in March 2013, but no steps were taken by Mr De Robillard to prosecute it.

[2] In terms of s 103 of the Customs and Excise Act 91 of 1964.

[8] When construction of the Serengeti property was completed in 2014, PFC claimed input tax on the construction and development costs. In August 2018, SARS issued a letter of audit findings stating that the input tax claimed was of a private nature and any expenses incurred would be disallowed. In September 2019, the representatives of PFC, Mani Financial Services (MFS), requested reasons for SARS' findings.

[9] On 23 September 2019, SARS furnished PFC with the reasons for its audit findings. No response was received to the letter. SARS then issued letters confirming the finalisation of the VAT and income tax audits. PFC filed an objection on 14 November 2019. On the same day, SARS received a written request on behalf of PFC to suspend payment of the debts. PFC did not tender any security and the suspension was refused.

[10] PFC submitted a supplementary request for the suspension of payment of its tax debt on 13 December 2019, and offered security to SARS. It described itself as 'an asset holding company [which] constructs and develops properties for the reselling in the property market'. PFC undertook not to dispose of the Serengeti property, as well as two other properties in Dainfern and Douglasdale. Mr De Robillard stated that the properties were 'immovable properties and there is no risk of dissipation of assets, pending the finalisation of the dispute resolution provided for in Chapter 9 of the TAA.[3] Furthermore, [PFC] is prepared to grant SARS the right to make an endorsement against the properties owned by [PFC] to the effect that the properties will not be sold, or

[3] Tax Administration Act 28 of 2011.

if sold, that the [proceeds] will be kept in trust until the dispute resolution process has been finalised'.

[11] SARS requested details of the properties and their values, which PFC provided. On 18 February 2020, MFS, acting on behalf of PFC, undertook to hold any proceeds of the sale of any of the properties in trust, pending the outcome of the objections in the tax matters. SARS granted the suspension, but, due to an oversight, did not register any endorsements against the properties.

[12] Mr De Robillard did not proceed with the action instituted in 2013. SARS thus enrolled the matter for hearing. In July 2020, seven years after the action was instituted, Mr De Robillard withdrew it and tendered SARS' costs. The withdrawal of the action enabled SARS to recover the outstanding amount from Mr De Robillard and in September 2020, SARS demanded payment of R148 381 928.26. Payment was not forthcoming and on 3 November 2020, SARS applied to sequestrate Mr De Robillard.

[13] Mr De Robillard did not file an answering affidavit dealing with the merits of the sequestration application. He filed a 'preliminary answering affidavit' with a counter-application to stay the sequestration application until the interdict granted in 2012 (referred to in para 7) was set aside. He could not show that the interdict had been granted. Unable to prove these allegations, his counter-application was dismissed. On 3 November 2020, a provisional

sequestration order was granted against Mr De Robillard. It was confirmed on 24 May 2021.[4]

[14] The fourth respondent, Ms Roselyn Chantal Noel and the fifth respondent, Mr Cloete Murray, were appointed as joint trustees in the insolvent estate of Mr De Robillard[5] (the trustees). On 9 December 2020, Mr Murray visited the Serengeti property and was informed by the De Robillards, who were still residing there, that PFC was no longer the owner of the Serengeti property. It had been sold and transferred to the second respondent, Tianjin Pengbo Weiye SA (Pty) Ltd for R11,5 million in November 2020, despite being valued at R50 million. Only R1 million of the purchase price had been paid to PFC. Mr Murray reported this to SARS.

[15] Despite having given SARS security in relation to the properties and its undertaking that if they were sold, the proceeds would be kept in trust, PFC, acting through Mr De Robillard, embarked upon a campaign to strip itself of all its assets against which a creditor could levy execution. In particular, it sold all three immoveable properties which it had undertaken not to dispose of. In addition, it disposed of a luxury yacht valued at R45 million in PFC's 2019 financial statements. It was sold for R12 million. Another yacht valued at R13 million was sold for R570 000.

[16] As a result of this fraudulent conduct and in the absence of any security, SARS informed Mr De Robillard, in February 2021, that it was withdrawing

[4] An application for leave to appeal is pending in the Pietermaritzburg High Court.
[5] Previously the joint trustees were Cloete Murray NO and Roselyn Chantal Noel NO cited as the fourth and fifth respondents respectively. At the time of the hearing, Cloete Murray had died and Ms Noel was, in terms of an unopposed amendment, cited as the sole trustee and fourth respondent.

the suspension of payment of PFC's VAT and income tax. No response was received to this letter and the suspension of payment was withdrawn. The objection to the tax assessments was also disallowed by SARS on 11 February 2021.

[17] SARS launched the winding-up application against PFC on 26 February 2021. It was set down for hearing on 23 March 2021. On 19 March 2021, the fourth and fifth respondents in their capacity as the trustees of the insolvent estate of Mr De Robillard, launched an urgent application to intervene in the proceedings to wind-up PFC. They requested that PFC be finally or alternatively provisionally wound-up by the court. The intervention application was granted and the applications were, by agreement, removed from the roll and re-enrolled for hearing in the urgent court on 6 April 2021. Times for filing of affidavits were agreed and PFC had to file its answering affidavit by 23 March 2021.

[18] PFC, despite the agreement, failed to file opposing papers in the winding-up application. Shortly after the winding-up proceedings had commenced, PFC's registered address was suddenly changed from Gauteng, to an address within the jurisdiction of the Pietermaritzburg High Court. And on 30 March 2021, a few days before the hearing of the winding-up application, the DRFT trustees launched the business rescue application in the Pietermaritzburg High Court.

[19] One court day prior to the hearing of the winding-up application, PFC's attorney filed an affidavit dated 1 April 2021. He contended that, in terms of s 131(6) of the Act, SARS was precluded from proceeding with the winding-

up application, because the business rescue application automatically suspended the winding-up proceedings until the former application was adjudicated. PFC failed to deal at all with the allegations in the founding papers in the winding-up application.

[20] SARS sought leave, in terms of s 133(1)*(b)* of the Act,[6] to proceed with the winding-up application in the Pretoria High Court. It submitted that the court had a discretion in terms of that section of the Act to proceed with the winding-up application. There was no answer to the facts stated in the winding-up application. After dealing with the submissions of the parties, a final winding up order was granted on 13 April 2021.

[21] PFC's argument in the winding-up application was essentially that in terms of s 131(6) of the Act, the business rescue application in the Pietermaritzburg High Court suspended the liquidation application, because business rescue proceedings only begin once the court makes an order to that effect in terms of s 131(1) of the Act. Accordingly, so it was argued, the liquidation application could not proceed in accordance with s 133 of the Act. But as is shown below, the business rescue application was a stratagem: the DRFT trustees failed to make out a case that it was just and equitable to place PFC under supervision; and there was simply no prospect of rescuing PFC, which had disposed of all its assets. For these reasons, and in view of the decision to which I have come, it is not necessary to consider the proper

[6] Section 133(1) provides: 'During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
. . .
(b) with the leave of the court and in accordance with any terms the court considers suitable;
. . .'

interpretation of the relevant sections of the Act or the submissions of the parties in that regard.

[22] SARS and the trustees filed detailed answering affidavits in the business rescue application. Unsurprisingly, the DRFT trustees did not file any affidavit in reply to the facts stated in the answering affidavits, more specifically, that PFC, an asset holding company, had disposed of all its assets; that it was factually insolvent; and that in its financial statements, it had falsely created the impression that the company could be rescued. The DRFT trustees, predictably, failed to enrol the business rescue application for hearing and SARS applied for the application to be heard on 8 October 2021.

[23] On 7 September 2021, consistent with their stratagem, the DRFT trustees filed an application to have the matter postponed on the basis that an appeal was pending against the winding-up order, which rendered the business rescue application moot, alternatively not ripe for hearing. The appeal, they argued, would dispose of the legal uncertainty concerning the interpretation of ss 131, 132 and 133 of the Act and this would have a material bearing on the business rescue application. The DRFT trustees also submitted that the business rescue application had, by 'implication or inferential reasoning', been terminated and converted to winding-up proceedings when the Pretoria High Court granted the winding-up order. The trustees disputed this and contended that the business rescue application had to be decided by the Pietermaritzburg High Court.

[24] The Pietermaritzburg High Court held that the pending appeal of the winding-up order did not preclude it from determining the business rescue

application. It took into account that the timing of the business rescue application was cause for concern; and that the affidavits filed by SARS and the trustees, to which there was no response, were a 'reliable and useful indication to assess the bona fides' of the DRFT trustees and the prejudice to the other parties. In the light of the prejudice that PFC's creditors would suffer on account of delay; the lack of prospects of success of the business rescue application; and the authorities,[7] the application for a postponement was refused with costs. PFC then did not proceed with the business rescue application and its counsel left the court.

Was the business rescue application an abuse of process?

[25] In this Court, counsel for the parties were referred to the recent decision of the Constitutional Court in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*,[8] and asked to address the following question: Whether the conduct on the part of PFC and the trustees of the DRFT in launching the business rescue application, constituted an abuse of process. More specifically, the question was whether the DRFT trustees should be non-suited if it is found that the business rescue application was launched solely to delay or disrupt the winding-up proceedings; and consequently, whether it could have the effect of suspending those proceedings in terms of s 131(6) of the Act.

[7] *Lekolwane and Another v Minister of Justice and Constitutional Development* [2006] ZACC 19; 2007 (3) BCLR 280 (CC) para 17.
[8] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC).

[26] The purpose of business rescue proceedings as stated in s 128(1)*(b)*(iii) of the Act,[9] is to facilitate the rehabilitation of a company that is financially distressed. One of the prerequisites for an order placing a company under supervision is that, in terms of s 131(4)*(a)* of the Act,[10] there must be a reasonable prospect of rescuing the company.[11] Further, it must be just and equitable to place it under supervision.

[27] Business rescue proceedings are aimed at restoring a company to solvency, and are not to be abused by a company with no prospects of being rescued but mainly to avoid a winding-up or to obtain some respite from creditors.[12] In *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd*,[13] this Court stated:

'It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. *Its use to delay a winding-up, or to afford an opportunity to those who*

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[9] Section 128(1)(*b*)(iii): '"business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—

…

(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;

[10] Section 131(4)*(a)*: After considering an application in terms of subsection (1), the court may— *(a)* make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that— (i) the company is financially distressed; (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or (iii) it is otherwise just and equitable to do so for financial reasons; and there is a reasonable prospect for rescuing the company.'

[11] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) para 29.

[12] *ABSA Bank Limited v Newcity Group (Pty) Ltd*; *Cohen v Newcity Group (Pty) Ltd and Another* [2012] ZAGPJHC 144; [2013] 3 All SA 146 (GSJ) para 20 where Sutherland DJP held: 'Moreover, in this regard, the risk of abuse or manipulation of the rescue application process, through "un-genuine" applications to procure an illegitimate immunity must be guarded against.'

[13] *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* [2019] ZASCA 7; 2019 (4) SA 532 (SCA).

were behind its business operations not to account for their stewardship, should not be permitted'.[14]

[28] In *Villa Crop* the Court dealt with the fate of proceedings launched by a party with an ulterior motive. Unterhalter AJ espoused the position as follows:

'An abuse of process can occur in a variety of ways. The litigation may be frivolous or vexatious. *A litigant may seek to use the legal process for an ulterior purpose or by recourse to conduct that subverts fundamental values of the rule of law*. The behaviour of the litigant may be so tainted with turpitude that the court will not come to such a litigant's aid. The unclean hands doctrine references this latter type of abuse. *It is the abusive conduct of the litigant that, in a proper case, may warrant the exercise of the court's power to non-suit such a litigant.* The court does so, even though the litigant claims a right that they would vindicate in the court proceedings. For this reason, the power is to be exercised with great caution. *Put simply, the court enjoys the power to safeguard the integrity of its process.* The court will only exercise this power upon a careful consideration of the prejudice that this may cause to the abusive litigant, and, in particular, the harm that may be occasioned to a litigant whose claim of right will not be decided by the court. But the court's power to prevent the abuse of its process is not determined by the right that the abusive litigant claims.'[15] (Emphasis added.).

[29] In my view, and for the reasons set out below, the conduct of the DRFT trustees in launching the business rescue application amounts to an abuse of process as described in *Villa Crop*. The facts show that from the outset, the launch of the business rescue application was a stratagem and that the DRFT trustees had no intention of prosecuting that application to its conclusion. To begin with, the address of PFC's registered office was deliberately changed

[14] Ibid para 22, emphasis added.
[15] *Villa Crop* fn 8 para 77.

from Gauteng to KwaZulu-Natal, so that the business rescue application could be brought in the Pietermaritzburg High Court. In the founding affidavit the DRFT trustees baldly alleged that SARS' claim in the liquidation application that PFC had defrauded SARS, by falsely claiming VAT input expenses relating to the Serengeti property and disposing of its assets in suspicious circumstances, were 'unsubstantiated and based on speculation'. What the DFRT trustees did not disclose to the court, was that PFC had never answered SARS' allegations concerning its fraudulent VAT claims and the dissipation of its assets, despite its undertaking to file opposing papers in the liquidation application. That undertaking suggests that PFC had a defence to the liquidation application and was thus not insolvent – which was not disclosed to the Pietermaritzburg High Court.

[30] Next, the DRFT trustees sought to explain away Mr De Robillard's claim for some R93 million against PFC, recorded as such in its financial statements from 2011 to 2019. Regarding this claim and recordal, in the founding affidavit Mrs De Robillard said: 'I can categorically state that the entry is incorrect'; and that it was the result of 'an incorrect journaling method'. This assertion was unsupported by any document or affidavit by the relevant accountant, to explain how the so-called incorrect entry came about. Mrs De Robillard attached draft financial statements of PFC for the year ending 29 February 2020, which instead recorded Mr De Robillard as a debtor of PFC in an amount of R37 million. And this, when Mrs De Robillard stated under oath that she knew nothing about the affairs of PFC, at an enquiry in terms of ss 417 and 418 of the Act, into the affairs of Doltek, a company of which Mr De Robillard was a director. It too had been liquidated by SARS.

[31] What is more, the DRFT trustees knew or ought to have known that the business rescue application had no prospect of success. PFC's very existence – if it was ever a genuine asset holding company – was destroyed by the dissipation of all of its assets. It was factually and commercially insolvent. Yet in the founding affidavit the DRFT trustees claimed that 'the purchaser of the property has agreed to re-transfer it to PFC'. This allegation was made solely to bolster PFC's financial status and to create the impression that it could be rescued. So too, the new allegation by Mrs De Robillard that Mr De Robillard was never a creditor of PFC. Other entries in PFC's 2020 financial statements seeking to demonstrate that PFC could be rescued, were also contrary to figures presented in its previous financial statements.

[32] Crucially, both SARS and the trustees filed comprehensive opposing affidavits in the business rescue application – which were never answered. On the *Plascon-Evans*[16] rule, an order for business rescue could not be granted on the facts. And the DRFT trustees were never going to file a replying affidavit. They failed to enrol the application for hearing. Instead, they filed an application for its postponement. This was part of the stratagem: to advance a technical argument – devoid of any factual foundation that PFC could be rescued – that the application was either moot or not ripe for hearing, so as to delay (i) the winding-up application; (ii) any enquiry into the stewardship of PFC by the De Robillards; and (iii) the payment of the tax liabilities of PFC.

[33] This is buttressed by the fact that when the application for a postponement was refused, counsel for PFC informed the court that they 'had

[16] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

no instructions' to argue the business rescue application, and left the court. This step enabled PFC to apply for leave to appeal purely on the technical argument, and is the clearest indicator that the DRFT trustees had no intention of prosecuting that application, and that it was not brought bona fide. In these circumstances, there can be no question of any prejudice to PFC because its claim for business rescue was not determined by the Pietermaritzburg High Court; or that its appeal against the refusal of the postponement of the business rescue application, is not decided by this Court.[17]

[34] All of this explains why the foundation of the business rescue application comprises the most perfunctory assertion: to pursue an appeal in respect of PFC's liability to SARS which, if successful, would be to the benefit of PFC's creditors. On its own version, PFC owes SARS R16 million, which it is unable to pay. So, even if a tax appeal were to succeed (SARS denied that it has any merit) there would still be a large tax debt due to SARS. In any event, an appeal could still be pursued by a liquidator. Apart from this, PFC owes R93 million to Mr De Robillard, claimed by the trustees of his insolvent estate.

[35] Counsel for the DRFT trustees conceded in this Court that the case for business rescue is 'thin'. That is an overstatement. PFC failed to make out a case that it could be rescued let alone profitable, or that creditors would receive an enhanced dividend. As was said by Brand JA regarding the prospect of rescuing a company:

'It must be a reasonable prospect – with the emphasis on "reasonable" – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not

[17] *Villa Crop* fn 8 para 77.

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.'[18]

[36] From what is set out above, it is clear that the DRFT trustees have sought to use the legal process provided for companies which may legitimately be rescued, for an ulterior purpose – to thwart the winding-up proceedings and the consequences for the De Robillards that may arise therefrom. This stratagem, as stated in *Villa Crop*, 'subverts fundamental values of the rule of law'.[19] The conduct of the DRFT trustees and PFC is so tainted with impropriety that this Court must use the power it has to 'safeguard the integrity of its process'.[20]

[37] In so acting, the power of this Court to non-suit the DRFT trustees is warranted. As a consequence, their ill-fated application should not have been entertained by reason of its use in a scheme of abuse. Although the application was correctly dismissed by the Pietermaritzburg high court, it fails in this court, on appeal, for different reasons.

[38] PFC sought to oppose the liquidation application on the basis of the moratorium provided for in s 131(6) of the Act. But the legislature could not have intended that a business rescue application, tainted by abuse, would have that effect.[21] In essence, because the DRFT trustees were non-suited for the

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[18] *Oakdene Square Properties* fn 11 para 29.
[19] *Villa Crop* fn 8 para 77.
[20] Ibid.
[21] *Oakdene Square Properties* fn 11 paras 32-33; *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* [2012] ZAWCHC 33 paras 12-15.

reasons set out above, the doomed business rescue application was not 'made' as envisaged in s 131(6).[22] Thus, the moratorium did not come into operation and did not suspend the winding up proceedings. That being so, there was no impediment to the winding-up proceedings.

[39] It is clear that PFC is unable to pay its debts, and is commercially and factually insolvent. Its assets had been siphoned off and dissipated; and it had lost its substratum. It was not conducting any business activities. Certain dispositions of its property could be impeached and several transactions needed to be investigated. It was just and equitable that it be wound up. The Pretoria High Court's decision to grant a final order of liquidation is therefore unassailable.

[40] The following order is therefore issued:

1 Case no 543/2021: The appeal is dismissed with costs, including the costs of two counsel, where so employed.

2 Case no 409/2022: The appeal is dismissed with costs, including the costs of two counsel, where so employed.

WEINER JA

JUDGE OF APPEAL

[22] *Lutchman NO and Others v African Global Holdings (Pty) Ltd and Others: African Global Holdings (Pty) Ltd and Others v Lutchman NO and Others* [2022] ZASCA 66; [2022] 3 All SA 35 (SCA); *Nel NO and Others v Astrotail 109 (Pty) Ltd and Another* [2022] ZAGPPHC 873 para 11.

Appearances

For appellants:	P Stais SC (with J Brewer)
Instructed by:	Smit Sewgoolam Inc, Johannesburg
	McIntyre Van Der Post, Bloemfontein
For first and third respondents:	M P Van der Merwe SC (with L G Kilmartin)
Instructed by:	MacRobert Inc, Pretoria
	Lovius Block Attorneys, Bloemfontein
For fourth and fifth respondents:	P J Wallis SC (with L K Olsen)
Instructed by:	Cox Yeats Attorneys, Durban
	Symington & De Kok, Bloemfontein