



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 15688/2020

In the matter between:

**THE LAND AND AGRICULTURAL
DEVELOPMENT BANK OF SOUTH
AFRICA**

Applicant

and

LAZERCOR EIGHT (PTY) LTD
(Registration Number: 2001/015752/07)

First Respondent

HFS GROUP (PTY) LTD
(Registration Number: 1998/005279/07)

Second Respondent

ROUBAIX ESTATE (PTY) LTD
(Registration Number: 1998/004840/07)

Third Respondent

PRIME EQUITY INVESTMENTS (PTY) LTD
(Registration Number: 1999/002128/07)

Fourth Respondent

LONGLANDS HOLDINGS (PTY) LTD
(Registration Number: 2004/016623/07)

Fifth Respondent

LA COURONNE WINE ESTATE (PTY) LTD
(Registration Number: 2001/025105/09)

Sixth Respondent

HERMAN BESTER N.O.
(In his capacity as the duly appointed
Business rescue practitioner for the
first to sixth respondents)

Seventh Respondent

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Eighth Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Ninth Respondent

HENDRIK FRANCOIS SMITH N.O.

Tenth Respondent

WILLIAM THOMAS SMITH N.O.	Eleventh Respondent
PETRUS JOHANNES BESTBIER N.O.	Twelfth Respondent
HENDRIK FRANCOIS SMITH	Thirteenth Respondent
HERMAN BESTER	Fourteenth Respondent
THE GEN-X CREDIT OPPORTUNITIES FUND EN COMMANDITE PARTNERSHIP	Intervening Affected Party

Heard on: 15 November 2023

Delivered on: 24 April 2024

JUDGMENT

Pillay AJ

INTRODUCTION

1. In spite of the protracted history of this matter, limited issues remain for determination at this stage of the proceedings. The remaining substantive relief as presently sought by the Tenth to Twelfth Respondents (“**the Trust**”) and the Thirteenth Respondent (“**Mr Smith**”) may be summarised as follows:

- 1.1. First, that in the event that the Applicant (“**the Landbank**”) does not proceed with certain aspects of the relief it had sought, then the costs of the application instituted by the Landbank, be paid by the Seventh Respondent on an attorney and client scale, *de bonis propriis*.

- 1.2. Second, that any claim by the Seventh Respondent for any fees for services allegedly rendered as business rescue practitioner (“**BRP**”) of the First to Sixth Respondents (“**the six companies**”) be disallowed.
 - 1.3. Third, that to the extent that the Seventh Respondent has already been paid any fees for services allegedly rendered as the BRP to the six companies, that the Seventh Respondent be ordered to repay same to the six companies in proportion to the payments that they have made to the Seventh Respondent.
 - 1.4. Fourth, that the Seventh Respondent be prohibited from paying its legal costs from the assets of the six companies.
 - 1.5. Fifth, that the Seventh Respondent be ordered to pay the costs of this application on an attorney and client scale, *de bonis propriis*.
 - 1.6. Finally, that the Order of the Western Cape High Court dated 21 April 2022 be rescinded.
2. The relief sought broadly falls into two categories: (a) the forfeiture of the fees paid / due to be paid to the Seventh Respondent (“**Mr Bester**”) as the BRP (“**the forfeiture claim**”); and (b) costs *de bonis propriis* against Mr Bester. Mr Bester has been cited as the Seventh Respondent in his capacity at BRP and as the Fourteenth Respondent in his personal capacity. At the time that the Trust and Mr Smith brought this application Mr Bester was the BRP of the six companies. As at the time at which this application was heard, the business rescue

proceedings had been concluded and Mr Bester was no longer the BRP for the six companies.

3. I shall first briefly set out the relevant background to this matter and then provide an overview of the legal framework. Thereafter, I shall deal with the following issues in turn: (a) whether the Trust and/or Mr Smith as Intervening Parties may seek relief in terms of the notice of motion of the Applicant against a Respondent/s; (b) whether the Trust and/or Mr Smith have the requisite standing in these proceedings to seek relief against Mr Bester for his role as BRP; (c) whether there is a legal basis for the forfeiture claim (in respect of fees paid to Mr Bester and/or due to be paid to Mr Bester); (d) whether there is a basis for the costs orders sought against Mr Bester; (e) whether there are grounds for the rescission of the Order of the Western Cape High Court dated 21 April 2022; and (f) the application to strike out.

BACKGROUND

4. The Trust is the sole shareholder of Second Respondent ("**HFS**"). HFS is the holding company of the First Respondent ("**Lazercor**"), the Third Respondent ("**Roubaix**"), the Fourth Respondent ("**Prime Equity**"), the Fifth Respondent ("**Longlands**") and the Sixth Respondent ("**La Couronne**"). As stated, the First to Sixth Respondents are referred to as "**the six companies**". They are either property owning or business operating companies.
5. The six companies found themselves in severe financial difficulties. A resolution was accordingly taken to commence business rescue proceedings in respect of the six companies. Mr Smith, who is the sole director of the six companies and

a trustee of the Trust, resolved to commence business rescue proceedings in respect of the six companies.

6. On 11 June 2020, Mr Bester accepted his nomination as BRP for all six companies and was duly appointed as such.

7. By way of background:

7.1. On 6 September 2015, the Landbank concluded a loan agreement with the First to the Fifth Respondents in terms of which the Landbank advanced an amount of R12,100,000.00. A mortgage bond was also registered over a farm. On 25 August 2015, La Couronne bound itself as surety and co-principal debtor in respect of the debt owed to Landbank.

7.2. The First to Sixth Respondents failed to make payments due to Landbank and, by 31 May 2020, they were in arrears in the amount of R3,788,457.58. In terms of the loan agreement the full outstanding balance of R12,088,893.43 then became due and payable. On 23 June 2020, the Landbank sent letters to the Group in terms of section 345 of the Old Companies Act, 61 of 1973 thereby threatening the Group with liquidation.

7.3. The Landbank became aware of the business rescue on 24 June 2020. The Landbank was the largest creditor in each of the six companies.

8. On 4 September 2020, Mr Bester presented a business rescue plan in terms of which the six companies would be treated as one entity (**“the singular business**

rescue plan”). The Landbank objected to this plan, demanded that it be amended and eventually voted against it. The Landbank’s main complaint was that the effect of the plan was that its voting interest in the companies were substantially diluted. The other creditors supported the plan and voted for it. Mr Bester later declared that the plan was adopted by the creditors.

9. On 29 October 2020 the Landbank instituted an application in which it sought orders that the adopted singular business rescue plan be set aside, that Mr Bester be removed as the BRP and that the costs of the application be paid by Mr Bester on an attorney client scale *de bonis propriis* (**“the Landbank application”**). Mr Bester opposed the Landbank application.
10. On 24 November 2020, an order by agreement was granted in terms of which:
 - 10.1. The singular business plan was to be converted to individual plans in respect of each entity.
 - 10.2. Mr Bester was directed to prepare and circulate the amended business rescue plans for each individual company to all the affected persons.
 - 10.3. Mr Bester had to convene meetings of creditors in respect of each company to enable them to consider and vote on the new plans.
 - 10.4. Mr Bester was prohibited from dealing with any of the assets of the six companies or to make payment to any of their creditors save in terms of newly adopted plans, a subsequent court order or in accordance with the already concluded sales of the Longlands immovable properties.

11. The main and counter-applications were postponed to 23 February 2021.
12. Individual business plans were then adopted by the creditors in all six companies under business rescue.
13. The Landbank application was settled by the Landbank and the First to Seventh Respondents. The settlement was made an Order of Court by agreement between the parties, on 26 July 2021.
14. The agreement/order was substantially implemented, and the Landbank seeks no further relief in these proceedings.
15. On 25 March 2022, the Trust and Mr Smith launched an application in which they sought leave *inter alia* to commence legal proceedings in the event that the Landbank did not proceed with certain relief claimed in the Landbank application. In that instance, the Trust and Mr Smith sought the removal of Mr Bester as BRP, the costs of their application and the costs of the Landbank application to be paid by Mr Bester on an attorney own client scale *de bonis propriis*. They further sought relief that Mr Bester be ordered to repay his BRP fees to the six companies with interest.
16. After the Landbank application had been settled, on 12 April 2022, the Trust and Mr Smith escalated as urgent (*inter alia*) the orders that leave to commence legal proceedings be granted and that any settlement agreement reached without their involvement in respect of the withdrawal of the main application be set aside. This urgent application was to be heard on 21 April 2022.

17. On 18 April 2022 Mr Bester delivered a notice of intention to oppose and filed an opposing affidavit on 19 April 2022. Mr Bester contended that the application should be dismissed for lack of urgency and/or that the main application was moot due to the settlement with the Landbank that was made an order of court on 26 July 2021.
18. The Landbank delivered a notice to abide in regard to this second application.
19. On 21 April 2022, before the hearing of the urgent application, Mr Bester's attorney delivered a notice of withdrawal as attorneys of record, in which he noted (inter alia) that the Seventh Respondent had filed a compliance certificate, having concluded that there are no longer reasonable grounds to believe that the First to Sixth Respondents are financially distressed.
20. A Court Order was granted on 21 April 2022 in terms whereof:
 - 20.1. Mr Smith and the Trust were given leave to intervene.
 - 20.2. Mr Smith and the Trust were granted leave in terms of section 133(1)(b) of the Companies Act No 71 of 2008 ("**the Companies Act**") to commence proceedings against the Seventh Respondent (Mr Bester as BRP) in accordance with prayers 4 to 9 of the notice of motion filed on 24 March 2022 as well as prayers 4 to 7 of that Order.
 - 20.3. Prayers 4 to 7 included an Order that the Seventh Respondent be prohibited from paying its legal costs from the assets of the six companies.

20.4. Prayers 4 to 6 of the notice of motion dated 24 March 2022 read as follows:

“(4) In the event where the applicant does not proceed with prayer 4 and prayer 8 of Part B of its notice of motion, for whatever reason, then the Intervening Parties will request the following relief:

(a) That the Seventh Respondent be removed as the appointed Business Rescue Practitioner in respect of the First to Sixth Respondents in terms of section 139 (2) of the Companies Act, 71 of 2008.

(b) That the costs of this application, including the costs of the Applicant and the Intervening Parties, are to be paid by the Seventh Respondent on an attorney and client scale, de bonis propriis.

(c) Further and/or alternative relief.

(5) That any claim by the Seventh Respondent for any fees, for services allegedly rendered as business rescue practitioner of the First to Sixth Respondents, be disallowed.

(6) To the extent that the Seventh Respondent has already been paid any fees for services allegedly rendered as the business rescue practitioner of the First to Sixth Respondents, that the Seventh Respondent be ordered to repay same to the First to Sixth Respondent in proportion to that the said Respondents have paid same to the Seventh Respondent.

.....”

20.5. The remaining relief in the notice of motion relates to, amongst other things, interest on the amount claimed regarding fees that had been paid to the Seventh Respondent and that the costs of the intervention application be costs in the main application.

THE LEGAL FRAMEWORK

21. Business rescue is defined as:

“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;”¹*

22. A BRP is the person who is appointed to oversee a company during business rescue proceedings.²

23. During a company’s business rescue proceedings, the BRP:

- “(a) has full management control of the company in substitution for its board and pre-existing management;*
- (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;*
- (c) may –*
 - (i) remove from office any person who forms part of the pre-existing management of the company; or*

¹ Section 128 (1)(b) of the Companies Act 71 of 2008 (“the Companies Act”).

² Section 128 (1)(d) of the Companies Act.

(ii) *appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and*

(d) *is responsible to –*

(i) *develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter and*

(ii) *implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.”³*

24. The overarching duty of the BRP is to act *bona fide*.⁴ Good faith implies that the BRP is obligated to execute the duties with the utmost trust, confidence and loyalty to the benefit of all stakeholders in the business rescue process and that, by virtue of that role, a BRP is held to a higher professional and ethical standard.⁵

25. Section 140 governs the general powers and duties of BRPs. Section 140(3) is of particular relevance and provides as follows:

“(3) *During a company's business rescue proceedings, the practitioner-*

(a) *is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;*

(b) *has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and*

(c) *other than as contemplated in paragraph (b)-*

³ Section 140 (1) of the Companies Act.

⁴ **Knoop v Gupta** 2021 (3) SA 88 (SCA) (“Knoop”) at par 33.

⁵ Henochsberg, p 526 (48) as well as **African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & Others** 2015 (5) SA 192 (SCA) at par 37 and **Knoop** at par 33.

- (i) *is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but*
- (ii) *may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner."*

26. Section 77 of the Act addresses, *inter alia*, issues of liability of a director.

27. Section 143 governs the remuneration of a BRP and provides:

"143 Remuneration of practitioner

- (1) *The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).*
- (2) *The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to-*
 - (a) *the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or*
 - (b) *the attainment of any particular result or combination of results relating to the business rescue proceedings.*
- (3) *Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by-*
 - (a) *the holders of a majority of the creditors' voting interests, as determined in accordance with section 145 (4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and*
 - (b) *the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-*

up, present and voting at a meeting called for the purpose of considering the proposed agreement.

(4) A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that-

(a) the agreement is not just and equitable; or

(b) the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company.

(5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.

(6) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1)."

28. It is clear from the Act that business rescue proceedings are of limited duration and, in general, end when:

28.1. The court (i) sets aside the resolution or order that began those proceedings; or (ii) has converted the proceedings to liquidation proceedings;

28.2. The BRP has filed with the Commission a notice of the termination of business rescue proceedings; or

28.3. A business rescue plan has been (i) proposed and rejected in terms of the relevant provisions of the Act, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or (ii) adopted in terms of the relevant provisions of the Act and the

practitioner has subsequently filed a notice of substantial implementation of that plan.

29. Removal of a BRP is governed by section 139 which provides as follows:

- “(1) A practitioner may be removed only-*
- (a) by a court order in terms of section 130; or*
 - (b) as provided for in this section.*
- (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.*
- (3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130 (1) (b) to set aside that new appointment.”*

IS IT COMPETENT FOR AN INTERVENING PARTY TO SEEK RELIEF IN TERMS OF THE NOTICE OF MOTION OF ANOTHER PARTY?

30. Mr Bester argues that it is not possible for an Intervening Party (the Trust and Mr Smith) to seek relief in terms of the notice of motion of another party. He submits that an intervenor must establish, in its papers, all the elements for the relief that it seeks.
31. Mr Bester relies on **Fullard v Fullard** 1979 (1) SA 368 (T). That matter was determined in the context of an insolvency application. The Court in that matter found that where the applicant does not proceed with the existing sequestration order, a fresh order can be issued with the creditor as applicant and not as a co-applicant. In these circumstances, it requires that the intervening creditor must make out a case for sequestration and furnish security as though he had originally been the applicant, though he may rely on facts which appear from the record in the existing proceedings.
32. The issues in the present matter are however distinguishable in that the subject of the relief in the present application does not concern an order for sequestration. Furthermore, in terms of the Order of 21 April 2022 the Trust and Mr Smith were granted leave to commence legal proceedings against Mr Bester in accordance with prayers 4 to 9 of the notice of motion filed on 24 March 2022 as well as in respect of certain further relief as provided for in that Order.
33. In the circumstances, I am of the view that the Trust and Mr Smith have been granted leave to seek the relief they do in these proceedings. It is however a different matter as to whether a case has been made out for the relief sought.

STANDING

34. As to the question of standing, Mr Bester argues that neither the Trust nor Mr Smith have standing in that:

34.1. The Trust and Mr Smith, initially, based their *locus standi* to approach this Honourable Court to intervene in the main proceedings, as “affected persons”, as provided for in the Companies Act. The Trust is the shareholder of the Second Respondent, and the Second Respondent is the holding company of the First, Third, Fourth, Fifth and Sixth Respondents.

34.2. The principal relief sought by the Trust and Mr Smith is the disallowance and repayment to the First to Sixth Respondents fees earned by Mr Bester in his capacity as BRP of the First to Sixth Respondents. These fees were payable and were paid by the First to Sixth Respondents to Mr Bester as BRP at the time.

34.3. Since termination of business rescue proceedings, the Trust has no *locus standi* given that a company is separate and distinct from its shareholders.

35. The Trust and Mr Smith argue:

35.1. They have standing to claim the relief sought herein because they fell within the definition of an affected party.

- 35.2. The standing acquired as an affected person prevails even after the business rescue proceedings. Reference was made to section 145 of the Companies Act in this regard.
36. The legal principles in respect of standing are well established. The following key principles are of relevance:

- 36.1. As Harms JA said in **Gross and Others v Pentz** 1996 (4) SA 617 (A) ([1996] 4 All SA 63) at 632C:

“The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as a litigating party.”

- 36.2. In **Public Protector v Mail & Guardian Ltd** 2011 (4) SA 420 (SCA) ([2011] ZASCA 108) at par 29 the SCA held:

“[29] The common law has no fixed rule that determines whether a party has standing to bring litigation, and the courts have always taken a flexible and practical approach. The right to bring litigation before the courts is restricted for various reasons: the courts are not there to pronounce upon academic issues; they are not there to pronounce upon matters that have no significant consequences for the initiating party; they are not there for the benefit of busybodies who wish to harass others; and so on. Thus the courts have always required that an initiating litigant should have an interest in the matter. The interest that is required has been expressed in various forms that are collected in Cabinet of the Transitional Government for the Territory of South West Africa v Eins. It has been expressed as 'an interest in the subject matter of the dispute [that] must be a direct interest', and as 'an interest that is not too remote', and as 'some direct interest in the subject-matter of the litigation or some grievance special to himself', and as 'a direct interest in the matter and not merely the interest which all citizens have'. ...”

36.3. In **Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another** (483/22)

[2023] ZASCA 107 (27 June 2023) the SCA held at par 6:

“Locus standi in iudicio is an access mechanism controlled by the court itself. Generally, the requirements for locus standi are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant’s interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant.”

37. I have already referred to the Court Order granted on 21 April 2022, in terms of which the Intervening Parties (the Trust and Mr Smith) were granted leave in terms of section 133 (1)(b) of the Companies Act to commence legal proceedings against the Seventh Respondent in accordance with prayers 4 to 9 of the notice of motion filed on 24 March 2022 as well as prayers 4 to 7 of that Order.

38. Section 133(1)(b) of the Companies Act provides that: *“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.”* As to the purpose underpinning section 133(1), it has been held that:

38.1. The obvious purpose of placing a corporate entity under business rescue is to provide it with 'breathing space' so that its financial affairs may be assessed and restructured in a way which will allow it to return to financial viability. The moratorium on legal proceedings against an entity

under business rescue constitutes a vital part of that 'breathing space' and allows for a 'period of respite' for the necessary restructuring and rehabilitation to take place in terms of a rescue plan which the business rescue practitioner must formulate in conjunction with creditors and other affected parties, such as shareholders and employees.⁶

38.2. The moratorium, in effect, amounts to a stay of legal proceedings against the company, except in certain circumstances or with the consent of the business rescue practitioner or the leave of the court.⁷

38.3. The moratorium is not intended to be an absolute bar to legal proceedings against a company and it is intended to serve merely as a procedural limitation on a litigant's rights of action.⁸

39. At the time at which the Trust and Mr Smith instituted proceedings for the relief they seek, the six companies were under business rescue. The following provisions of the Act were accordingly applicable:

39.1. In terms of section 137(2), during a company's business rescue proceedings, each director of the company: (a) must continue to exercise the functions of director, subject to the authority of the BRP; (b) has a duty to the company to exercise any management function within the

⁶ **Booyesen v Jonkheer Boerewynmakery (Pty) Ltd** 2017 (4) SA 51 (WCC) ([2016] ZAWCHC 192) at par 49.

⁷ **Booyesen v Jonkheer Boerewynmakery (Pty) Ltd** 2017 (4) SA 51 (WCC) ([2016] ZAWCHC 192) at par 50.

⁸ **Booyesen v Jonkheer Boerewynmakery (Pty) Ltd** 2017 (4) SA 51 (WCC) ([2016] ZAWCHC 192) at par 51.

company in accordance with the express instructions or direction of the BRP, to the extent that it is reasonable to do so.

39.2. In terms of section 140(1), during a company's business rescue proceedings, the BRP has, *inter alia* the following powers and duties: (a) full management control of the company in substitution for its board and pre-existing management; (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company; (c) is responsible to (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D; and (ii) implement any business rescue plan that has been adopted in accordance with Part D.

40. It appears from the abovementioned provisions that neither the Trust nor Mr Smith has standing independently seek either forfeiture relief or costs *de bonis propriis* on behalf of the company against the BRP while the six companies were under business rescue. It is presumably for this reason that neither the Trust nor Mr Smith purported to act on behalf of the six companies.

41. According to the application for intervention and the relief sought by the Trust and Mr Smith:

41.1. Leave is sought for the Trustees of the Trust to join the proceedings.

41.2. Leave is sought for Mr Smith to join these proceedings.

- 41.3. Mr Smith deposes to the founding affidavit and states that he is authorised to do so on behalf of the Trust.
- 41.4. Mr Smith also describes himself as the director of the First to Sixth Respondents.
- 41.5. It is stated that the Trust, as creditor of the Second Respondent is entitled to be joined as a party to these proceedings in terms of section 145(1)(b) of the Act.
- 41.6. It is stated that Mr Smith is a creditor of the First Respondent in his personal capacity and as such and in accordance with section 145(1)(b) of the Act is entitled to be joined as a party to these proceedings.
42. Despite the averments made in the affidavit in support of the relief sought, the relief sought relates to the forfeiture of fees in respect of the six companies and costs in relation to the six companies.
43. Mindful of the provisions of section 157 of the Act (which deals with extended standing to apply for remedies), I am of the view that neither the Trust nor Mr Smith have standing to bring these proceedings. My reasons are as follows:
- 43.1. First, section 157 of the Act applies where an application is made in terms of the Act. For reasons set out elsewhere in this judgment, I do not accept that the relief for forfeiture of the BRP's fees constitutes a remedy in terms of the Act.

43.2. Second, on the law, it is the six companies that are liable for the fees of the BRP (section 143 of the Act). On the evidence, it is the six companies that paid / are required to pay the fees of the BRP. It follows that if there is any loss sustained, it is the six companies that sustained that loss as distinct from the Trust as the sole shareholder of the companies or Mr Smith as a creditor of the First Respondent. While the relief sought purports to apply to the six companies, it is unclear as to the basis on which the Trust and Mr Smith assert an entitlement to make such a claim. As to the legal principles on reflective loss:

43.2.1. In **Gihwala v Grancy Property Ltd** 2017 (2) SA 337 (SCA) ([2016] 2 All SA 649; [2016] ZASCA 35), the SCA explained the rule in **Foss v Harbottle** (1843) 2 Hare 461 (67 ER 189) as follows⁹:

"[107] The rule has two components. The first recognises that a company is a separate legal entity from its shareholders and, accordingly, in the ordinary course, any loss caused to the company must be recovered by the company, and not by its shareholders on the basis of the diminution in the value of their shares or the loss of dividends they had anticipated. The second recognises the need for exceptions to this principle in order to avoid oppression and permits a shareholder to recover loss caused to the company by way of what is termed a derivative action. In certain circumstances it also permits recovery of the shareholder's own loss.

[108] A helpful summary of the rule and its different elements is to be found in the following passage from the leading case of Prudential Assurance Co

⁹ See too: **Naidoo v Dube Transport Corp** 2022 (3) SA 390 (SCA) at par 11.

Ltd v Newman Industries Ltd and Others (No 2)
(Prudential Assurance):

'The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkins LJ in Edwards v Halliwell [1950] 2 All ER 1064 at 1066 – 7 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.'

[109] *The parameters of the rule are apparent from this passage. It precludes shareholders from suing in their own right where the claim is one in respect of a wrong done to the company causing it to suffer loss. That is so even where the result is to diminish the value of the shareholders' shares or deprive*

them of a dividend and the company has declined or failed to take steps to recover the loss. On the other hand, where there is no wrong to the company, but only one to the shareholder, there is no reason to bar the shareholder from suing. That is so even if the measure of the shareholder's loss is the diminution in value of their shareholding. Those two propositions appear clearly from the speeches of Lord Bingham of Cornhill and Lord Millett in **Gore Wood**.

[110] There is a third case described by Lord Bingham in *Gore Wood* in the following terms:

'Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers loss separate and distinct from that suffered by the company caused by a breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.'

43.2.2. In **Hlumisa Inv Holdings RF Ltd v Kirkinis** 2020 (5) SA 419 (SCA) ([2020] 3 All SA 650; [2020] ZASCA 83) at par 17 and 18, the Court discussed the principles of reflective loss and summarised the underlying principles as being: (a) that a company has a distinct legal personality; and (b) holding shares in a company merely gives shareholders the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company. In light thereof, the Court held that a personal claim by a shareholder against a wrongdoer who caused loss to the company is misconceived. According to the SCA, where a wrong is done to a company, only the company may sue for damage caused to it. This does not

mean, the SCA found, that the shareholders of a company do not consequently suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The SCA however held that shareholders do not have a direct cause of action against the wrongdoer and that it is the company alone that has a right of action.

43.3. Third, it is correct that, in terms of section 128(1)(a) of the Act, an “affected person”, in relation to a company, means, amongst other things, a shareholder or creditor of the company. An “affected person” may, in terms of section 131(1) of the Act apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings, unless a company has adopted a resolution contemplated in section 129. The Trust and Mr Smith were affected persons during business rescue proceedings. That fact however, does not entitle them to institute proceedings on behalf of the six companies and nor did they purport to do so. In any event, it is common cause that the business rescue proceedings have come to an end. There is no indication in the Act that the Trust or Mr Smith would have any standing after the business rescue proceedings have concluded (as in the present case).

43.4. Fourth, I am of the view that the case of **Islandsite Investments 180 (Pty) Ltd and Another v Knoop N.O. and Others** (1410/2023) [2023] ZAFSHC 142 (2 May 2023) (which I was referred to), provides little

assistance in respect of the dispute on standing in the present matter.

This is so because **Islandsite Investments** is entirely distinguishable on the facts (see par 39) in that: (a) the Court found that the Act did not provide for an absolute bar against the directors from taking any steps to protect the company against the BRPs; (b) the Board continues to exercise functions, although subject to the express instructions or direction of the BRPs; (c) the Applicants' action was on behalf of the company.

44. Having failed to establish standing, this ought to be the end of the matter. It is trite that once an own interest litigant fails to establish standing, the merits do not arise for determination.¹⁰ However, in the event that I am wrong on the issue of standing, I shall nevertheless determine the remaining issues. In so doing, I am mindful of the jurisprudence of the SCA¹¹ and Constitutional Court¹² that even if a single issue may dispose of a matter, it is desirable for a Court to determine all of the issues before it.

FORFEITURE OF THE BRP'S FEES: PAST AND FUTURE

45. There are two issues which arise in this regard: (a) whether the forfeiture of the BRP's fees is competent in law; and (b) if so, whether a case has been made out for such relief.

¹⁰ **Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012)** par 32 to 34.

¹¹ **Maharaj v Mandag Centre of Investigative Journalism NPC 2018 (1) SA 471 (SCA)** at par 26 and **Minister of Home Affairs v Somali Assoc of SA 2015 (3) SA 545 (SCA)** at par 18.

¹² **S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) (2002 (2) SACR 499; 2002 (11) BCLR 1117; [2002] ZACC 22)** para 21.

Whether the relief is competent

46. A key question that arises is whether this Court has the power to make an order of forfeiture of the BRP's fees.

47. In **Cawood N.O. v Murray N.O. and Others**¹³ it was held that:

47.1. Section 141(3) of the Companies Act (which refers to a residual power that a Court considers appropriate in the circumstances), as read in context, cannot be interpreted to include the power of the court to order a repayment of the BRP's fees.¹⁴

47.2. A Court does not have the inherent power over BRPs for the following reasons: (a) section 140(3)(a) of the Act suggests that BRPs are officers of the Court during a company's business rescue proceedings (i.e. temporarily and while appointed in a specific case); (b) section 140(3)(a) applies specifically in relation to the reporting duties of BRPs and the wording suggests that beyond this specific function, they bear no further obligations as officers of the court akin to those of legal practitioner; (c) the structure of the section suggests that this is a sui generis office (given that the BRP has responsibilities and duties of a director).¹⁵

47.3. In addition, on a purposive approach to interpretation the concept of an officer of the court must be given a limited meaning given that BRP's (unlike attorneys and advocates) are not subject to the same set of

¹³ A judgment by the full court of the Gauteng Division, Pretoria, under case number: A127/19.

¹⁴ At par 61.

¹⁵ At par 49 to 52.

ethical rules which carry with them disciplinary consequences for non-compliance.¹⁶

47.4. The conduct complained of traverses negligence, gross negligence and bad faith and, as such does not entail a contravention of a professional rule in respect of the charging of fees.¹⁷

47.5. A Court does not have an inherent power to order a business rescue practitioner to repay fees for misconduct. Such an Order would be beyond the Court's powers in terms of the principle of legality.¹⁸

47.6. An interested party, where the repayment by the practitioner of his/her fees is justified, would not be without remedy. Such a party's remedy would lie in the provisions of section 140(3)(c)(ii), which provides that the BRP may be held liable, in accordance with any relevant law, for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and the performance of the functions as practitioner.¹⁹

48. I am of the view that the forfeiture relief is not competent for the following reasons:

48.1. First, I find myself to be in respectful agreement with the findings in **Cawood N.O.** that a Court does not have the inherent power to order

¹⁶ At par 54 and 55.

¹⁷ At par 56.

¹⁸ At par 58.

¹⁹ At para 62 and 63.

the forfeiture of the BRP's fees. I have not been able to identify a provision in the Act (and nor have the parties identified any such provision) which allows for forfeiture of the BRP's fees.

48.2. Second, as regards section 140(3) of the Act, it: (a) imposes certain duties on the BRP; and (b) provides that during business rescue proceedings a BRP: (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but (ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner. This provision does not appear to found a basis for the ordering of forfeiture of fees of the BRP in that it refers to liability for the consequence of certain actions or omissions. Furthermore, section 140(3) appears to contemplate a claim for damages. In any event, the Trust and Mr Smith do not: (a) rely on section 140(3) of the Act as the basis for their claim; and (b) do not allege gross negligence in support of their claim for forfeiture of fees.

48.3. Third, I am of the view that the BRP was entitled to fees in accordance with section 143 of the Act given that he was not removed in terms of section 139 and that there is no basis on which to disallow such fees. Notably, section 143 of the Act contemplates: (a) an entitlement to charge fees; (b) an agreement regarding further remuneration which, subject to the approval process contemplated by the Act is "final and binding on the company".

49. For all of these reasons, I am of the view that it is not competent for this Court to grant an Order for the forfeiture of the BRP's fees. This ought to be the end of the matter. I shall however proceed to consider whether a case has been made out for the forfeiture of fees in the event that I am wrong on this issue. I make clear at the outset that none of the findings I make in this regard bear on a claim for damages founded on negligence, a far lower threshold than that of gross negligence.

No case to sustain the relief

The legal threshold

50. In what follows, I deal with the legal principles in respect of gross negligence as provided for in section 140(3)(c)(ii).

51. As to the legal threshold for gross negligence, in **Diener NO v Minister of Justice and Correctional Services and Others 2019 (4) SA 374 (CC)** the Constitutional Court held:

“[61] It was argued that there are sufficient mechanisms to hold practitioners accountable for incurring fees where there is little chance of the business being rescued. These mechanisms do exist, for example in ss 138 to 141 of the Companies Act. Furthermore, practitioners have the same fiduciary duty to the company as a director. If they do not exercise their duty properly, they can be removed and held liable for fruitless expenses. However, it must be noted that the standard of gross negligence is a high one and in cases where there is good faith the courts have been reluctant to find that practitioners should be held liable for fruitless expenses.”

52. In **MV Stella Tingas: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another** 2003 (2) SA 473 (SCA), para 7, the SCA held:

- 52.1. Gross negligence is not an exact concept capable of precise definition.
- 52.2. Despite *dicta* which sometimes seem to suggest the contrary, what is now clear, following the decision of the SCA in **S v Van Zyl** 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. If consciously taking a risk is reasonable there will be no negligence at all.
- 52.3. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances.
- 52.4. *"If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, dolus eventualis; but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (Van Zyl's case supra at 559D - H). It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine*

whether the deviation from what is reasonable is so marked as to justify it being condemned as gross."

52.5. *"It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity."*

The evidence

53. As stated, in the affidavit filed in support of the relief sought no case for gross negligence has been made. Instead, it is alleged that: (a) Mr Bester's conduct during the business rescue proceedings amounted to conduct as contemplated in section 139(2)(a),(b),(c) and/or (e) of the Act, that Mr Bester knew that his actions would fall within these provisions and that it was "improper and incorrect"; and (b) alternatively, Mr Bester should at the very least have known that his conduct was "improper and incorrect".

54. In addition, I am unable to reach a finding of gross negligence in light of the many disputes of fact in this regard as is apparent from the following:

54.1. The Trust and Mr Smith allege that Mr Bester knew that the "one pot approach" in drafting a singular business rescue plan for the companies

under business rescue was incorrect and that he attempted to unlawfully dilute the voting rights of the Landbank. However, according to Mr Bester:

54.1.1. The parties always agreed on a consolidated approach, even prior to resolving to place the six companies under business rescue.

54.1.2. Mr Smith represented at the time by his attorney, Mr Burger, did not object to the approach. The approach was also based on legal advice obtained from Mr Smith's legal team at the time.

54.1.3. There is no authority prohibiting such an approach.

54.1.4. Sound accounting principles dictated and supported a consolidated approach.

54.1.5. The approach was taken openly, transparently and *bona fide*.

54.2. The Trust and Mr Smith allege that on 2 September 2020, two days before the publication of the consolidated business rescue plan, Mr Bester signed a sole mandate in favour of Bidx in respect of the sale of the farm (La Couronne) and other immovable property held by the First Respondent and that no mandate was granted by the Sixth Respondent in respect of the sale of its assets. It is further alleged that the particulars

of this mandate were never incorporated into the business rescue plan.

However, in response, Mr Bester alleges:

54.2.1. The mandate was also in respect of the Second to Fifth Respondents' immovable property.

54.2.2. The written mandate inadvertently did not include the Sixth Respondent.

54.2.3. The assets of the Sixth Respondent were, and to the knowledge and with consent of Mr Smith, offered for sale on behalf of both the First and Sixth Respondents in terms of an oral mandate that Mr Bester, as BRP of the companies, gave to BidX.

54.2.4. The fact that the mandate was not incorporated into the business rescue plan is of no import "as this is neither legally required nor accepted practice in the industry."

54.3. The Trust and Mr Smith allege that Mr Bester never disclosed the mandate concluded with Bidx to the creditors of the First Respondent and Sixth Respondent, or any of the companies under business rescue. Mr Bester denies this and alleges:

54.3.1. The mandate was openly and transparently given.

54.3.2. In September 2020 a meeting was held with, inter alia, Messrs Bester, Smith, Burger (the Trust's and Mr Smith's attorney at

the time), MC du Toit (BidX) and Mr Van Rensburg of Hectare and Home Auctioneers. At that meeting, Messrs Smith and Burger not only approved the mandate given to BidX, but also requested Mr Bester to provide BidX with a mandate in respect of the Trust's immovable property.

54.4. The Trust and Mr Smith allege that: (a) the November 2020 Order did not authorise Mr Bester to deal with any of the Sixth Respondent's assets, save for as stated in a newly adopted business rescue plan; (b) that the sale of the Sixth Respondent's assets, specifically the BP Garage/Filling station business conducted on Erf 4 Longlands, was not included in the Sixth Respondent's business rescue plan (published on 26 November 2020). Despite being prohibited by the November 2020 Order, Mr Bester proceeded with concluding a sale agreement in respect of the Sixth Respondent's BP business and proceeded with implementation of the transaction. According to Mr Bester:

54.4.1. Paragraph 6 of the November 2020 Court Order specifically authorised Mr Bester to proceed with the sales of the Longlands immovable properties. One of the mentioned sale agreements was the agreement attached to Mr Smith's affidavit, which in clause 1.2. defines the assets as the assets of Longlands and La Couronne.

54.4.2. In clause 1.28 of that agreement, the La Couronne assets are defined as all the assets of La Couronne utilised in the La

Couronne business which, in turn, is defined as a going concern operating BP Fuel Station along with a convenience store etc. Paragraph 1.36 of the agreement defines the property as Erf 4 Longlands. The agreement was concluded before the November 2020 Order.

54.5. The Trust and Mr Smith allege that Mr Bester, as a practitioner, received offers from Buffdaxco and Microlab; yet, Mr Bester advised that offers in a different format than Bidx's conditions of sale would not be considered. Microlab was not prepared to submit an offer on the Bidx conditions of sale (and to pay commission to Bidx), and did not submit a further offer to Mr Bester. It is alleged that Microlab's offer was significantly better than Buffdaxco's and that Mr Bester followed this approach to secure a commission payment for Bidx. But, according to Mr Bester:

54.5.1. Microlab was not interested in only purchasing Erf 4 Longlands, but also the immovable property and business belonging to La Couronne.

54.5.2. Mr Bester presented Microlab's offer to attorney George Marais, a partner of attorney Burger, in order to be advised thereon. Mr Marais, in response, dealt with numerous potential and actual difficulties identified in the Microlab offer. The difficulties were communicated to Microlab's agent, and the issues could not be resolved.

54.5.3. Mr Bester subsequently received the Buffdaxco offer and presented same to Gen-X, the secured creditor of Longlands in terms of a further covering bond over the immovable property. Gen-X, as secured creditor, instructed Mr Bester to accept the Buffdaxco offer. Both Messrs Smith and Bronn were included in the communication from Gen-X.

54.5.4. Mr Bester denies that he acted as he did in order to secure a commission payment to Bidx. He asserts that there was a valid, at arms-length, mandate agreement with Bidx and Mr Bester (and the companies in business rescue) were bound thereby.

54.6. The Trust and Mr Smith allege that Bidx threatened to claim commission based on the Arxisol transaction and that the Trust and Mr Smith's attorneys advised Mr Bester of various reasons why BidX was not entitled to any commission in the Arxisol transaction. In response, Mr Bester alleges:

54.6.1. Acting on legal advice, he considered the Bidx mandate agreement to be binding and valid.

54.6.2. Mr Bronn, the Trust's and Mr Smith's attorney, advised that by simply changing the property sale agreement to the sale of shares (as opposed to property) agreement, the contractual obligations owed to Bidx falls away.

54.7. The Trust and Mr Smith allege that the business rescue plan provided for the acceptance of the Arxisol transaction or the Michem Bid. The initial business rescue plan circulated by Mr Bester in relation to the First Respondent, indicated that commission was payable on the Arxisol transaction. From the correspondence, it is evident that Mr Bester transmitted the agreements relating to the Arxisol transaction to Mr Burger and to Mr. M C Du Toit from Bidx, that Mr Du Toit advised Mr Bester prior to circulation of the business rescue plan of Bidx's claim for the full 10% commission on the Arxisol transaction. The contention is made (by the Trust and Mr Smith) that BidX sent the notification on Bester's request that BidX should come on record. According to Mr Bester:

54.7.1. He held the view that the Arxisol transaction was a clear, improper and disingenuous attempt to bypass a lawful and binding mandate given to Bidx.

54.7.2. He considered himself to be bound by the mandate that had been given to BidX.

54.7.3. The statements made by Mr Smith are designed at tainting him.

54.7.4. Mr Bester did inform Mr Du Toit of the Arxisol offers, as he considered he was duty bound to do given that these offers fell inside the mandate period given to BidX. Mr Bester

requested Bidx to take a formal view on their position, in order to ensure transparency.

54.8. The Trust and Mr Smith argue that Mr Bester was always aware that Bidx would be paid 5% (purchaser's commission) and a further 5% (seller's commission), plus VAT. He also knew that creditors (particularly Landbank) would not support this arrangement and that as a result, Mr Bester hid this fact from creditors. Mr Bester denies these allegations and alleges that:

54.8.1. The offer was presented to Landbank, being the secured creditor, for its consideration.

54.8.2. Mr Bester did confirm to Mr Du Toit that the Landbank will not accept both seller's and buyer's commission.

54.8.3. Any interested party, who would have requested the conditions of sale, would have been provided with same.

54.8.4. Mr Bester did not agree to 10% auctioneer's commission being paid to the auctioneer in the mandate agreement.

54.8.5. Mr Bester had always maintained that BidX was only entitled, in terms of the mandates, to 5% auctioneer's commission and that he had never in any capacity, acknowledged BidX's entitlement to a 10% commission relating to the sale of the property of the First to Sixth Respondents.

54.9. The Trust and Mr Smith argue that Mr Bester did not have the required authority to conclude the Mandate to Sell Immovable Property by Auction, based on section 134 of the Companies Act. In response, Mr Bester argues:

54.9.1. That he was, in fact, authorised to conclude the mandate with Bidx.

54.9.2. At all times, he acted on legal advice, which advice he believed to be correct.

54.9.3. The Bidx mandate is a *bona fide* transaction at arms-length for fair value approved in advanced and in writing by him as BRP and, as a result, he was authorised to enter into the transaction.

54.9.4. The mandate provided to Bidx does not constitute the disposal of property as contemplated in section 134 of the Companies Act.

54.10. The Trust and Smith allege that, generally, there was an inappropriate relationship between Mr Bester and Mr Du Toit of Bidx, and that Bester did not act in the best interest of the companies. Mr Bester denies these allegations and alleges:

54.10.1. That acting on legal advice, he accepted the validity of the Bidx mandate.

54.10.2. Mr Bester was uncomfortable with the manner in which the Trust, Mr Smith and their attorneys sought to avoid paying commission to Bidx, which commission Mr Bester, at the time, considered was legally and morally due to Bidx.

54.11. The Trust and Mr Smith allege that Mr Bester's insistence on an undertaking that his fees would be paid with transfer of the Oubaai property was in conflict with the Fourth Respondent's interests. According to Mr Bester, the published and adopted business rescue plan, of the Fourth Respondent, clearly provided for payment of Mr Bester's fees. He was accordingly entitled to such payment.

54.12. The Trust and Mr Smith contend that Mr Bester confirmed that the commission will be paid to BidX once the money becomes available despite the fact that: (a) the accepted plan does not allow for payment of any commission; and (b) the mandate granted to Bidx was unenforceable because Mr Bester lacked the necessary authority at the time of its conclusion. According to Mr Bester, he did not confirm that BidX commission will be paid. Instead, Mr Bester informed Mr Du Toit that he received legal advice (which he accepted as correct) that the BRP (Mr Bester) must pay the commission.

54.13. According to the Trust and Mr Smith, Mr Bester and Mr Du Toit colluded in the approach to be followed on how, and when, Bidx will demand the commission allegedly payable in respect of the Arxisol agreement. This is denied by Mr Bester who explained that he communicated with Mr Du

Toit openly and frankly, about his and his legal advisors' opinion with regard to BidX's rights in respect of the mandate agreement.

Findings

55. On an application of the rules relating to disputes of fact in motion proceedings²⁰, I am unable to reach a finding of gross negligence.

COSTS AGAINST THE SEVENTH RESPONDENT DE BONIS PROPRIIS

56. In **African Banking Corp of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd** 2015 (5) SA 192 (SCA) ([2015] 3 All SA 10; [2015] ZASCA 69) at par 38 the SCA held:

- 56.1. A BRP is expected to act objectively and impartially in the conduct of the business rescue proceedings.
- 56.2. So too, when it came to the institution of legal proceedings, an objective and impartial attitude was to be expected from the BRP.
- 56.3. This was lacking in the extreme in that matter where the BRP filed the principal answering affidavit to the appellant's application in the court a quo and actively engaged both in the proceedings in the court below and in the SCA.

²⁰ **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) ([2008] 2 All SA 512; [2008] ZASCA 6) at par 12 and 13.

56.4. In light of his conduct, there is no reason for the BRP in this matter not to be obliged to pay the appellant's costs as would any other ordinary unsuccessful litigant. Section 140(3)(c)(ii) of the Act does make provision for holding a practitioner to be held liable "in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of a practitioner".

56.5. The BRP's grossly improper conduct was deliberate and, as a result, he was ordered to pay the appellant's costs jointly and severally with Mr and Mrs Nchite.

57. First, while it is correct that at the time the matter was argued, the Seventh Respondent was no longer the business rescue practitioner of the First to Sixth Respondents, I do not accept that this fact would non suit an otherwise legitimate claim. The costs were incurred while the Seventh Respondent was BRP.

58. Second, it appears from the above case that the basis for the costs order against the BRP was a finding of gross negligence as provided for in section 140(3)(c)(ii) of the Act. In light of the findings that I have made that there was no gross negligence by the BRP, section 140(3)(c)(ii) cannot, in my view, constitute a basis for the costs order sought.

59. Third, the lis between the First to Seventh Respondents and the Landbank was settled at the time at which the Intervening Parties had instituted their application. In the latter application the Landbank filed a Notice of Intention to Abide. The following pertinent aspects of the Court Order dated 26 July 2021 refer:

59.1. It was by agreement between the Applicant and First to Seventh Respondents.

59.2. It states that in the event that the sale transactions are successfully finalised the Applicant and the Seventh Respondent, irrevocably undertake to file notices of withdrawal in respect of the main application and any counter applications.

59.3. It states that the First to Seventh Respondents are each liable for their own legal costs.

59.4. It states that no respondent disputes the Applicant's legal costs, in as far as it is included in the cancellation amount for which a guarantee is required from the purchaser in respect of the sale transaction in respect of the First Respondent's shares.

59.5. It states that save for the provisions contained in the Order, all parties rights remain reserved.

60. The rules in respect of the interpretation of Court Orders are well established.²¹

In my view, on an application of these rules of interpretation (applied in the context of an Order by agreement), the issue of costs was finally settled as between the Landbank and the First to Seventh Respondents. In these

²¹ See: **HLB Intl (SA) v MWRK Accountants & Consultants** 2022 (5) SA 373 (SCA) at par 25-28 and 30, **Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd** 2013 (2) SA 204 (SCA) ([2012] ZASCA 49) at par 13 and **Eke v Parsons** 2016 (3) SA 37 (CC) (2015 (11) BCLR 1319; [2015] ZACC 30) at par 13.

circumstances, I do not accept that it is appropriate for me to reopen the issue of costs.

APPLICATION FOR RESCISSION

61. In the application for rescission brought by Mr Bester, it is stated that the Order was “effectively granted against me in my personal capacity, in my absence both in my representative and personal capacities.”

62. The legal principles pertaining to a rescission of judgment are well-established. As a general rule, a Court has no power to set aside or alter a final Order.²² The instances in which it is permitted to do so are narrowly circumscribed under the Rules or in terms of the common law. This is to preserve the doctrine of finality and legal certainty.

63. On the evidence in this matter:

63.1. When the Intervening Parties instituted their application on 24 March 2022, Mr Bester was still acting as BRP.

63.2. When the joinder portion of the application (“the urgent application”) was escalated, Mr Bester still acted as business rescue practitioner.

63.3. The affidavit in support of the urgent application made clear that: (a) no costs would be sought where the application is not opposed; (b) where the application is opposed, a punitive costs order will be sought,

²² **Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape)** 2003 (6) SA 1 (SCA) (“Colyn”) at par 4.

including a cost order *de bonis propriis* against Mr Bester, in the event he opposes the application.

63.4. Mr Bester (qua BRP) opposed the urgent application and filed an answering affidavit. In his affidavit, Mr Bester asked that the application be dismissed and that the First Intervening Party should pay the costs of the application.

63.5. The urgent application was set down for hearing on 21 April 2022. Counsel appeared on Mr Bester's behalf and informed the Presiding Judge in chambers that: (a) Mr Bester had filed a substantial implementation notice of the business rescue plan; (b) the Court cannot make any order against Mr Bester as the business rescue proceedings had been concluded; and (c) as a result, Mr Bester and his legal team would not be involved further in the proceedings and that his instructions were to withdraw from the matter.

63.6. In response to the above-mentioned statements, Counsel for the Intervening Parties informed the Judge that notwithstanding the position taken by Mr Bester and his legal representatives, the Intervening Parties intended to proceed with the urgent application.

63.7. The Judge then stood the matter down and invited both Counsel back to her chambers. Mr Bester's Counsel did not return but Counsel for the Intervening Parties did return. The Presiding Judge granted the Order in chambers.

63.8. It is clear from the above that Mr Bester and his legal team were aware that: (a) the Intervening Parties were seeking a costs order *de bonis propriis* against him; (b) the Intervening Parties intended to proceed with the urgent application despite the filing of an implementation notice; (c) the Presiding Judge had stood the matter down and had invited both Counsel back to her chambers so as to deal with the application.

64. In the circumstances, it is in my view, clear that Mr Bester and his legal representatives were aware that Mr Smith and the Trust intended to proceed with the urgent application and that they intended to request a cost order *de bonis propriis* against him. This notwithstanding, Mr Bester chose not to be in attendance or to have a legal representative in attendance. Therefore, Bester was in wilful default.

65. In light of the foregoing, I am of the view that the application for rescission must fail.

APPLICATION TO STRIKE OUT AND LEAVE FOR THE ADMISSION OF A FURTHER AFFIDAVIT

66. Mr Bester has brought a substantive application to strike out certain new matter in reply, hearsay evidence and defamatory, vexatious and irrelevant evidence. I do not accept that there are any grounds for a striking out on the latter two bases.

67. As to the new matter in reply, Mr Bester has filed a further affidavit in response which he seeks leave to admit. In the circumstances, I am of the view that there is no prejudice to Mr Bester. I have accordingly decided to dismiss the

application to strike out and grant leave for the admission of Mr Bester's further affidavit 13 October 2023.

CONCLUSION AND ORDER

68. By way of summary, my findings are: (a) that the Trust and Mr Smith do not have *locus standi* in this matter; (b) even if I am wrong in that regard, it is not competent for me to issue an Order of forfeiture in respect of the BRP fees; (c) even if section 140(3)(c)(ii) of the Act may be used as a basis for such an Order, it was not invoked or relied upon by the Trust and/or Mr Smith; (d) in any event, on the evidence, I cannot reach a finding of gross negligence on the part of Mr Bester as the BRP; (e) in light of the Court Order that was taken by agreement on 26 July 2021, I may not grant a costs order *de bonis propriis* against Mr Bester; (f) Mr Bester's application for rescission of judgment must fail.

69. In the circumstances, I make the following Order:

69.1. The application to strike out is dismissed, the further affidavit of the Fourteenth Respondent dated 13 October 2023 is admitted, and the costs in respect thereof are costs in the main application.

69.2. The Tenth to Thirteenth Respondents' application for relief as sought is dismissed with costs, which costs shall include the Fourteenth Respondent's application for leave to intervene and the costs referred to in paragraph 69.1 hereinabove. The Tenth to Thirteenth Respondents shall pay, jointly and severally the one paying the other to be absolved,

the costs of the Fourteenth Respondent which costs shall include the costs of two counsel where so employed.

69.3. The application for the rescission of the Order granted by this Court on 21 April 2022 is dismissed. The Fourteenth Respondent shall pay the costs of the Tenth to Thirteenth Respondents in respect of the application for rescission, which costs shall include the costs of two counsel where so employed.



Pillay AJ
Acting Judge of the High Court

APPEARANCES:

For the Tenth to Thirteenth Respondents: Adv. L M Olivier SC & Adv. H N de Wet
Instructed by: Werksmans Attorneys (Ref: Mr Marne Brönn)

For the Fourteenth Respondent: Adv. R Raubenheimer & Adv. M M van Staden
Instructed by: Mostert & Bosman (Ref: Mr Pierre du Toit)