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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 62604/2021/ 62601/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: **11/12/2023**

In the matter between:

In the matter between:

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 62604/2021 / 62601/2021

In the matter between:

TEGETA EXPLORATION & RESOURCES (PTY) LTD

Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

KURT ROBERT KNOOP N.O. Second Respondent

JOHAN LOUIS KLOOPER N.O. Third Respondent

In re:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

TEMPLAR CAPITAL LTD Respondent

And in re:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

KURT ROBERT KNOOP N.O. First Respondent

JOHAN LOUIS KLOOPER N.O. Second Respondent

KGASHANE CHRISTOPHER MONYELA N.O. Third Respondent

JUANITO MARTIN DAMONS N.O. Fourth Respondent

SUJAY ABBAI NAIDOO N.O. Fifth Respondent

OPTIMUM COAL MINE (PTY) LTD
(IN BUSINESS RESCUE) Sixth Respondent

KURT ROBERT KNOOP N.O. Seventh Respondent

JOHAN LOUIS KLOPPER N.O. Eighth Respondent

TEGETA EXPLORATION & RESOURCES (PTY) LTD
(IN BUSINESS RESCUE) Ninth Respondent

KURT ROBERT KNOOP N.O.
Respondent

Tenth

JUANITO MARTIN DAMONS N.O.

Eleventh Respondent

OPTIMUM COAL TERMINAL (PTY) LTD
(IN BUSINESS RESCUE)

Twelfth Respondent

THE REGISTRAR OF THE COMPANIES AND
INTELLECTUAL PROPERTY COMMISSION

Thirteenth Respondent

THE REGISTRAR OF DEEDS N.O.

Fourteenth Respondent

PETRUS FRANCOIS VAN DEN STEEN N.O.
THE COMMISSIONER OF THE SOUTH AFRICAN
REVENUE SERVICE N.O.

Fifteenth Respondent

Sixteenth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 December 2023.

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This case concerns the question of *inter alia* whether a board of directors of a company in business rescue has *locus standi* to oppose the applications for a

forfeiture order without the consent of the Business Rescue Practitioners (“the BRPs”) of the affected company.

THE PARTIES

[2] The Applicant is Tegeta Exploration and Resources (Pty) Ltd (“Tegeta”), a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its registered address at Grayston Ridge Office Park, Block A, Lower Ground Floor, 1[...] K[...] Street, Sandton.

[2.1] Tegeta’s holds shares in two companies namely; Koornfontein Mines (Pty) Ltd (“KFM”) which is in voluntary business rescue. It is a colliery, a private company duly registered and incorporated in accordance with the company laws of South Africa, which also has its registered office at Grayston Ridge Office Park, Block A, Lower Ground Floor, 1[...] K[...] Street, Sandton.

[2.2] Optimum Coal Terminal (Pty) Ltd (“OCT”), a company dully incorporated and registered in terms of the company laws of South Africa with its registered office at Grayston Ridge Office Park, Block A, Lower Ground Floor, 1[...] K[...] Street, Sandton.

[2.3] Tegeta is the sole shareholder of the aforesaid companies. The forfeiture applications pertain to both OCM and OCT.

[2.4] Ms Ragavan, the only board of directors of Tegeta, is said to be representing Tegeta in these proceedings.

[3] The First Respondent is the National Director of Public Prosecutions appointed in terms of section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 read together with section 10 of the National Prosecuting Act whose offices are at 1[...] W[...] Avenue, Weavind Park, Silverton, Pretoria.

[4] The Second Respondent is Kurt Robert Knoop, a professional BRP who

conducts business under the name “Manci Knoop Financial Services” at 98 Jan Smuts Avenue, at the corner of Saxonwold Road, Johannesburg. Mr Knoop was appointed as BRP by the boards of each of the applicants’ companies.

- [5] The Third Respondent is Johan Louis Klopper, also a professional BRP conducting business under the name “Coronado Consulting Group” at 1[...] B[...] Street, Pietermaritzburg, KwaZulu-Natal. Mr Klopper was appointed as the BRP for the applicants’ companies except for OCT.

THE ISSUES FOR DETERMINATION

- [6] The issues for determination are:

[6.1] Whether a board of directors of a company in business rescue has standing to oppose an application for a forfeiture order, irrespective of, or in addition to, the company's BRPs.

[6.2] Whether the Rule 7 notices were valid.

[6.3] Whether Tegeta has *locus standi* in the Templar matter.

[6.4] Whether Tegeta has *locus standi* to seek relief in this application.

FACTUAL BACKGROUND

- [7] During 2018, Tegeta, OCM, and OCT were placed in voluntary business rescue as per the provisions of section 129 of the Companies Act 28 of 2008 by their board of directors.

- [8] The Second and Third Respondents were appointed as the BRPs of the aforesaid companies. The business rescue plan has not yet been adopted.

- [9] On 8 December 2021, the First Respondent launched preservation applications for preservation orders against the property interests of Tegeta. In doing so, the First Respondent served the copies of the application on the BRP's attorneys

and the attorneys of the board of directors of Tegeta. The said orders were granted.

[10] On 3 May 2022 Tegeta, through its board of directors Ms Ragavan, issued a notice to oppose the granting of a forfeiture application in terms of Section 39 of the Prevention of Organised Crime Act 121 of 1998 (“the POCA”).

[11] On 13 May 2022, the First Respondent issued notices under Rule 7 disputing the authority of Van der Merwe and Van der Merwe Attorneys to act on behalf of Tegeta.

[12] On 01 July 2022, the First Respondent instituted forfeiture applications against Tegeta.

[13] On 8 December 2022, the board of directors of Tegeta, Ms Ragavan, launched this interlocutory application in respect of case numbers 62601/2022 and 62604/2021 to resolve the issue of whether the board of directors of Tegeta has *locus standi* in the forfeiture proceedings even though Tegeta is in business rescue and under the full control management of the BRPs.

APPLICABLE LEGAL LAW

[14] *Locus standi* relates to a litigant’s interest in the matter and their ability to institute a legal claim and seek the necessary redress. In *Groenewald Lubbe Incorporated v Fick*¹, Molefe J held that:

Locus standi concerns the sufficiency and directness of a litigant’s interest in proceedings which warrants his or her title to prosecute the claim asserted.

[15] This entails that a person instituting legal proceedings must have a “*direct and substantial interest in the right which is the subject matter of the litigation and*

¹ [2013] ZAGPPHC 479 at para 7.

the outcome of such litigation”². In other words, a party instituting legal proceedings must make out a case that he/she has the necessary *locus standi* to institute legal action. The duty to allege and prove *locus standi* rests on the party instituting legal proceedings.³ Failure to do so is dispositive of the entire case because that person is not capable of claiming redress from the court.⁴

[16] Section 140(1)(a) of the Companies Act is also clear in that during business rescue proceedings, the BRPs have full management control of the company in substitution for its board and pre-existing management. The business rescue practitioner may, nonetheless delegate any of his or her powers or functions to a person who was part of the board or pre-existing management of the company in terms of section 140(1)(b) of the Companies Act.

[17] Whilst the Companies Act spells out the duties of the BRPs during the business rescue process, it also specifies the duties of directors whilst the company is under business rescue proceedings. For example, sections 137(2)-(4) of the Companies Act provides that:

“ ...

(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 practitioner;

(b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

² *Ibid* at para 8.

³ *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (AD) at para 14.

⁴ *Four Wheel Drive Accessory Distributors CC v Rattan* NO 2019 (3) SA 451 (SCA) at para 19.

- (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and
 - (d) to the extent that the director acts in accordance with paragraphs (b) and (c) is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).
- (3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.
- (4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner."

[18] The above provision entails that during business rescue proceedings, the directors of the company do not become redundant. They continue exercising their fiduciary duties as directors of the company. However, they perform their functions subject to the authority of the practitioner. In other words, whatever they want to do, must go past the BRP.

[19] In *Absa Bank Limited v Marotex (Pty) Ltd and Others*⁵, the court held that:

"Now s140 is clear that the business rescue practitioners are authorised to manage the company in business rescue even though the directors retain their functions as such (s137 (2) (a)). However, these functions are still subject to the authority of the business rescue practitioners in terms of s140. So whichever way one spins it the authority to manage the company will always lie with the business rescue practitioner, whether one is a shareholder, director

⁵ [2016] ZAGPPHC 1190 at para 22.

or co-founder. In the result, the fifth to eighth respondents do not and would not have the right and authority to appoint the attorneys representing the first respondent. This could only come about with the authorisation of the business rescue practitioners who are the *de facto* managers of the company during business rescue proceedings” (own emphasis added).

[20] Furthermore, in *NDPP v Sharma and Others*⁶ it was held that:

“... during business rescue proceedings, the business rescue practitioners have full management control of the company in substitution for its board and pre-existing management. The business rescue practitioner may, however, in terms of section 140(1)(b) delegate any of his or her powers or functions to a person who was part of the board or pre-existing management of the company. It is common cause that the business rescue practitioners did not delegate any power to the third defendant or its directors to oppose this application” (own emphasis added).

[21] The first glance at the aforementioned decisions shows that the legal position is that the directors of a company that is in business rescue retain the exercise of their functions, but they do so under the authority of the BRP. However, a closer look at the ruling of the Supreme Court of Appeal in *Tayob and Another v Shiva Uranium (Pty) Ltd and Others*⁷ reveals that there is a distinction that needs to be drawn between the concepts of management and governance to fully appreciate the extent of the powers of the BRPs and those of the directors during business rescue. To this end, the court in *Tayob and Another v Shiva Uranium (Pty) Ltd and Others* said:

“The word ‘management’ is not defined in the Act. Consequently, it must be ascribed its ordinary meaning, that is, to be in charge of or to run a company, particularly on a day-to-day basis. To appoint a

⁶ 2022 (1) SACR 289 at para 26.

⁷ [2020] ZASCA 162 at para 24.

substitute practitioner (who will then be in full management control of the company) is rather a function of governance and approval thereof is not in my view a management function (own emphasis added)".⁸

[22] The Court proceeded to state that:

...Subsection 137(2)(a) must, of course, be read with the provisions of "Chapter 6 of the Act and those of s 140 in particular. They circumscribe the ambit of the authority of the practitioner. Any function of a director that falls outside of that ambit, cannot be subject to the approval of the practitioner. It follows that s 137(2)(a) only affects the exercise of the functions of a director in respect of matters falling within the ambit of the authority of the practitioner. As I have shown, the appointment of a practitioner does not fall within the powers or authority of a practitioner" (own emphasis).⁹

[23] This decision, therefore, implies that the BRP has exclusive powers and duties in so far as the management of the company is concerned and which pertains to the day-to-day running of the business affairs. Consequently, any other functions that fall outside the management of the company such as the appointment and/or removal of a BRP, remain that of the directors' functions and are not subject to the authority of the BRPs.

[24] In so far as the legal proceedings against the company are concerned, section 133(1)(a) of the Companies Act expressly states that during business rescue proceedings, no legal proceedings may be commenced or proceeded with against the company or "*in relation to any property belonging to the company*" except with the written consent of the business rescue petitioner.

[25] The above legal position was recognised in *NDPP v Sharma and Others*¹⁰

⁸ *Ibid* at para 25.

⁹ *Ibid* at para 25.

¹⁰ 2022 (1) SACR 289 (FB) at para 31. See also *NDPP v Sharma and Others* [2022] ZAFSHC 35.

where the court held that:

....There is no reason in law or logic why the converse should also not hold true: the company may not commence, defend or proceed with legal proceedings without the consent of the business rescue practitioner (own emphasis added).

[26] In light of the above legal position, I now turn to consider the circumstances of this case taking into consideration the oral and written submissions of the parties before this Court to ascertain whether Ms Ragavan has made out a case for the relief sought.

APPLICANT'S SUBMISSIONS

[27] The Applicant's submissions included that Ms Ragavan authority to depose to an affidavit cannot be challenged. According to Ms Ragavan, it is the "institution of the proceedings and the prosecution thereof which must be authorised".

[28] Relying on *PM v MM and Another*¹¹, the Applicant argued that although dealing with a matter within the context of an application for rescission, the Supreme Court of Appeal "*distinguished authority to institute an application and to depose to an affidavit, from standing*". Consequently, counsel contended that "*there can be no doubt*" that Ms Ragavan is authorised by the board of Tegeta and that the board has a direct and substantial interest including *locus standi* in the forfeiture applications.

[29] Counsel further argued that the use of Rule 7 by the Respondents was wrong because the rule is only used to determine whether the attorney has a mandate from a party whose authority is challenged. In addition, they averred that the Rule 7 challenge was brought outside the prescribed 10-day period and that there was no application for condonation.

[30] The Applicant further contended that the board of directors has *locus standi*

¹¹ 2022 (3) SA 403 (SCA).

because Tegeta has a real and subnational in the forfeiture applications as its assets are the subject matter in the applications. Furthermore, they averred that Tegeta is a shareholding company whose shares are in both OCT and OCM.

[31] In respect of Templar, counsel argued that “...*the claims which Templar Capital Ltd holds, and which are preserved under the preservation order in the Templar matter are claims specifically against OCM*”. Consequently, counsel submitted that if the claims were to be forfeited to the State, they would be against OCM and that this is sufficient to establish interest under the POCA.

[32] Relying on section 38 of the Constitution of the Republic of South Africa, 1996, and cases¹², counsel contended that the said provisions envisage a broad approach to *locus standi* in constitutional cases.

[33] Furthermore, counsel argued that the opposition to forfeiture applications involves the protection of constitutional rights against the arbitrary deprivation of property and the right to a fair public hearing. As a result, counsel averred “*that any opposition in the interest of Tegeta would be based on inter alia sections 25 and 34 of the Bill of Rights*”. To this end, counsel argued that “*mere interests is sufficient*”.

[34] Relying on cases such as *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others*¹³ where the board had not sought to obtain the approval of BRPs to appoint substitute practitioners, counsel argued that the board retains the power to protect the company against existential threats and/or “*life of the company*” such as forfeiture order under the POCA. To this end, counsel *inter alia* contended that the opposition of “*an application aimed at forfeiting in effect, the entirety of the company, is a governance function*”.

[35] Based on the above submissions, counsel argued that Ms Ragavan had made out a case for the relief sought.

¹² *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

¹³ 2022 (2) BCLR 197 (CC).

FIRST RESPONDENT'S SUBMISSIONS

- [36] The First Respondent argued that the steps taken by Ms Ragavan about the forfeiture applications all purport to have been taken on behalf of Tegeta as a cited party in the litigation whereas the Rule 39(3) notices were served in the name of Tegeta, and not in the name of the board of directors of Tegeta.
- [37] Counsel further submitted that the power of attorney filed purported to be a power of attorney to represent Tegeta in the forfeiture applications.
- [38] In addition, the First Respondent averred that the *“present applications purport to have been launched by Tegeta”*.
- [39] According to counsel, *“none of the steps taken by Ms Ragavan purport to have been taken on behalf of the board of directors of Tegeta as a party seeking to intervene in either of the forfeiture applications, as opposed to steps taken on behalf of the company itself.”*
- [40] Based on the above, counsel argued that the issues of *locus standi* of the board of directors were irrelevant to the forfeiture application and therefore moot.
- [41] Counsel for the First Respondent submitted that the aforesaid issues would only become relevant if the board of directors purported to intervene as a party in either of the forfeiture applications, but they have not done so. Consequently, counsel averred that the board of directors will be unable to intervene since a period of more than a year has passed since the forfeiture application was launched.
- [42] Counsel submitted that section 39 of the POCA governs ways in which non-cited persons with an interest in restrained property may intervene in a forfeiture application. To this end, counsel submitted that section 39(3) the POCA provides for intervention using a notice.

[43] In addition, counsel submitted that section 39(4)(b) of the POCA requires the section 39(3) notice to be delivered to the NDDP within 14 days of the *Gazetting* of the preservation order. According to counsel, the *Gazetting* of the preservation order occurred on 13 May 2022. Consequently, counsel averred that any attempt to intervene by the board of directors of Tegeta in the forfeiture applications is more than 14 months out of the permissible time.

[44] Counsel further submitted that the board of directors has no *locus standi* to intervene in the forfeiture proceedings on the basis that the board of directors of a company is not an entity with legal personality and cannot sue or be sued in its name.

[45] Furthermore, counsel argued that the board of directors has no legal interest in the outcome of the forfeiture application as the application concerns property belonging to Tegeta. As a result, they averred that the board of directors of Tegeta has no interest in the property of Tegeta.

[46] The First Respondent contended that the proposition by Ms Ragavan that sections 140(1)(a) and 137(4) of the Companies Act do not deprive directors of a company in business rescue to represent it in litigation in forfeiture is wrong. The basis for this is that section 140(1)(a) and 137(4) of the Companies Act are clear in that during a business rescue proceeding the BRP are responsible for the day-to-day affairs of the company and that anyone who purports to act on their behalf without approval is not authorised to do so and that their actions are void.

[47] In so far as litigation is concerned, counsel averred that several cases¹⁴ have confirmed that *“litigating on behalf of a company is part of the management control of the company that is vested exclusively in the BRPs”*.

[48] The First Respondent also contended that Ms Ragavan’s attempt to intervene

¹⁴ See for example, *Absa Bank Limited v Marotex (Pty) Ltd* 2016 JDR 1987 (GP), *Van Jaarsveld NO v Q-Civils (Pty) Ltd* (675/2017) [2017] ZAFSHC 53, *Razzmatazz Trading Investment 19 (Pty) Ltd v Q-Civils (Pty) Ltd (CPMS Civil Road Rehabilitation (Pty) Ltd and another intervening)* [2018] JOL 39925 (FB).

in the Templar forfeiture application amounts to abuse of court process because Tegeta has no *locus standi* to protect claims against one of its subsidiaries.

[49] In light of the above, counsel submitted that Ms Ragavan's case ought to be dismissed with costs against her personally and not Tegeta whose authorised representatives do not seek the relief that she wants.

SECOND AND THIRD RESPONDENT'S SUBMISSIONS

[50] The First and Second Respondents' arguments included that since a company is distinct from its board of directors, Tegeta does not have *locus standi* to seek relief which concerns the legal standing of the board of directors.

[51] Counsel further contended that Tegeta is a juristic entity with a separate legal personality that has the capacity to sue and be sued in its own name. Consequently, its legal interests are distinct from its board of directors.

[52] Relying on *Areva NP Incorporated in France v Eskom Holdings SOC Limited*,¹⁵ they averred that "*The own interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected...*". Based on this, they argued that Tegeta's legal interests are distinct from its board of directors. Consequently, they argued that Ms Ragavan, as the sole director of the board, should have been the one who instituted the present proceedings.

[53] Counsel further relied upon *Goldrush Group (Pty) Ltd v North West Gambling Board* and contended that where "*own-interest standing is lacking, a court will dispose of the matter exclusively on that basis and will not enter into the merits*".¹⁶

[54] Relying on *Johannesburg City Council v Elesander Investments (Pty)*¹⁷, the First and Second Respondents further argued that Rule 7 required Van der

¹⁵ 2017 (6) SA 621 (CC) at para 32

¹⁶ *Ibid* at para 16.

¹⁷ *Ltd* 1979 (3) SA 1273 (T).

Merwe and Van der Merwe Attorneys whose authority is disputed to satisfy the court of their authority to act on behalf of Tegeta. According to counsel Van der Merwe and Van der Merwe Attorneys mistakenly seek to establish authority to act on behalf of the board of directors. Consequently, they argued that the relief sought by the applicants concerning *locus standi* of the board of directors should not be entertained in the absence of Van der Merwe and Van der Merwe Attorneys establishing its authority to represent Tegeta.

EVALUATION OF SUBMISSIONS

[55] Concerning Ms Ragavan's *locus standi*, section 133(1)(a) of the Companies Act expressly indicates that any litigation against a company in business rescue should be authorized by the BRP(s). However, the BRPs in this case have not authorized Ms Ragavan to institute these proceedings on behalf of Tegeta.

[56] Counsel for Ms Ragavan tried to persuade this Court that the board of directors does not require the approval of a BRP to institute these proceedings as the forfeiture proceedings are a threat against the existence or life of the company itself. It is pivotal to note with approval that recently in *Islandsite Investments (Pty) Ltd v The National Director of Public Prosecutions and Others*¹⁸, the Supreme Court of Appeal held that:

...the POCA litigation directly implicates the property of the company, which falls within the ambit of the authority of the BRPs. What must be borne in mind is that both the directors and the BRPs are enjoined to act in the best interests of the company. The first resort would be to explore whether the directors and the BRPs are able to agree on the conduct of the POCA litigation. If agreement cannot be reached, and if it can be shown that the BRPs had acted or were about to act in a manner which could be shown to prejudice the company, there are remedies available to interested parties such as directors (own emphasis added).

¹⁸ [2023] ZASCA 166 at para 22.

[57] The court proceeded to hold that:

In the light of the provisions of the Act, there is no warrant for finding that the directors have the requisite authority to appoint attorneys to litigate on behalf of the company. The clear interpretation of the Act affords the BRPs that authority in the POCA litigation. This is, in particular, because property of the company is implicated in the POCA litigation. It follows that the order of the high court cannot be faulted. As a result, the appeal must be dismissed¹⁹ (own emphasis added).

[58] The above case settles an argument related to governance and management in so far as the property of the company is concerned. The BRPs, as opposed to the board of directors, are in control of the property. If directors were to appoint attorneys without the involvement of the BRPs in litigation matters, such a move would undermine the very essence of business rescue proceedings and the express provisions of the Companies Act. Furthermore, in *Sharma*²⁰ Musi JP held that:

Instituting or defending legal proceedings has financial implications. Costs orders against a financially distressed company may have far-reaching implications for the implementation of a business rescue plan and may result in the company not achieving a better return for its creditors or shareholders. This, on its own, is more than enough reason why the business rescue practitioners must be centrally involved when litigation on behalf of the company in business rescue is embarked upon (own emphasis added).

[59] The above decisions weaken Ms Ragavan's case. Ms Ragavan's reliance on *PM v MM and Another* is not clear. Its relevance to the present case is misplaced. In the aforesaid case, no one had statutory powers of full control and management of the company. This alone distinguishes it from the current

¹⁹ *Ibid* at para 23.

²⁰ *Supra* at fn 6, at para 30.

one where there are BRPs who are lawfully appointed to represent the interests of the company. My difficulty when going through all the submissions of Ms Ragavan is that they prefer to pretend as if the company concerned is operating under normal circumstances and not in business rescue. This is not the position. I am of the view that *“it can never be business as usual once the company has been placed under business rescue”*.²¹ In light of the above exposition, the board of directors has no *locus standi* in the forfeiture applications to represent Tegeta, and that Van der Merwe and Merwe Attorneys are not authorised to represent Ms Ragavan without the consent of the BRPs. Furthermore, Tegeta has no *locus standi* to act in the interest of Templar. This is the end of the matter.²²

[60] The recourse for the board of directors is elsewhere. In *NDPP v Sharma and Others*²³ the court was clear in that:

...they [directors] do not have any authority to act on behalf of the third defendant [company] in the restraint proceedings without approval of the BRPs. They also lack authority to act on behalf of the third defendant in these proceedings.

[61] The court proceeded to hold that *“in so far as the directors purported to act on behalf the third defendant when making the extension application, they would not have any standing to do so”*. The same principle was applied in an earlier decision in *Razzmatazz Trading Investment 19 (Pty) Ltd v Q-Civils (Pty) Ltd (CPMS Civil Road Rehabilitation (Pty) Ltd and another intervening)* where the court held that:

“...[I]n the BRP application the court held that Fortune lacks the necessary locus standi to represent and act on behalf of the company without the assistance and consent of the BRP. I am

²¹ *Supra* at fn 14 at para 21.

²² *Supra* at fn 4 at para 19.

²³ [2022] ZAFSHC.

bound by that decision unless convinced that it is clearly wrong...(own emphasis added).²⁴

[62] I do not find any reasons whatsoever that have persuaded this Court to deviate from the above decisions. Counsel for Ms Ragavan unsuccessfully tried to convince this Court that the forfeiture applications also touch on governance issues such as involving the existence of the company. I have already dealt with this aspect earlier.²⁵ The submission has no merit and ought to be rejected in its entirety.

[63] Concerning the submission that the BRPs are not privy to certain information regarding the company, Ms Ragavan, is ignorant of the fact that the BRPs have full control management of the company and that in executing their duties, the board of directors is bound to co-operate with them as per the provisions of section 137(3) of the Companies Act. Unfortunately, when the BRPs extended the invitation to the board of directors to assist with answering certain issues regarding the forfeiture applications, the request was turned down by Ms Ragavan.

[64] Concerning fair public hearing, there is no merit in this submission that the directors will not be heard. Counsels for the Respondents were in my view correct when they said that the BRPs could represent the views of the board of directors and/or that the boards of directors could make their submissions through the BRPs. However, Ms Ragavan appears not to be at liberty to so do. This is to her detriment. Snellenburg AJ correctly found in *NDPP v Sharma and Others*²⁶ that the “directors have several options available to them to protect their interests and that of the company, none of which they elected to exercise”. The said options include that:

23.4.1 The directors have a residual interest and could request leave to intervene in the proceedings in personal capacity. In such

²⁴ [2018] JOL 39925 (FB). See also *Absa Bank Limited v Marotex (Pty) Ltd* 2016 JDR 1987 (GP), *Supra* at fn 4.

²⁵ See para 70 of this judgment.

²⁶ At para 23.4.

event the directors will be able to address any allegations of criminality pertaining to the company.

23.4.2 The BRPs could present the evidence of Ms Ragavan.

23.4.3 The directors could challenge the BRPs' authority directly in the circumstances. They have not done so.

23.4.4 The directors could apply for an order compelling the BRPs to authorise them to defend these proceedings.²⁷

[65] Both counsel for the Respondents did raise some of these arguments such as the option to intervene but Ms Ragavan has opted not to do so. The Respondents were indeed correct to state that Ms Ragavan has no interest²⁸ as a director in these proceedings because a company enjoys a distinct legal personality with the capacity to sue and be sued whereas it is the opposite case when it comes to the board of directors.

[66] All these factors point me to one conclusion, the Ms Ragavan has no *locus standi* to bring these proceedings on behalf of Tegeta. In light of the above findings, it is not necessary for this Court to deal with other issues.

COSTS

[67] Counsel for the First Respondent argued that Ms Ragavan purported to institute these proceedings in the name of Tegeta without the authority of the BRPs to do so. Based on this, counsel contended that the costs order should be personally against Ms Ragavan, and not against Tegeta. I think that there is merit in the submission. Why should a company bear financial responsibility for someone who purports to represent it without authorization? I do not think that Ms Ragavan's actions were in the best interests of Tegeta. Her conduct undermines the essence of business rescue and the work of the BRPs. To

²⁷ *Ibid.*

²⁸ See *Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc* 2023 JDR 2274 (SCA) at para 6.

order Tegeta to pay the costs of this application would be tantamount to misuse of Tegeta's financial resources.

[68] Section 133(1)(a) of the Companies Act in clear and express terms requires the consent of a BRP if anyone including the board of directors seeks to embark on legal proceedings on behalf of a company. In addition, Ms Ragavan, declined to attend to the request of the BRPs to answer certain issues related to the forfeiture applications. This is unfortunate especially when one purports to act in the interests of the company. This is further contrary to section 137(3) of the Companies Act which provides that *"during a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required"*. Furthermore, Ms Ragavan's action in purporting to represent Tegeta without the approval of the BRPs is void as per section 137(4) of the Companies Act. I fail to understand how these clear provisions were overlooked.

[69] In any event, the Respondents have been successful parties. There is therefore no reason as to why the costs should not be personally paid by Ms Ragavan because she acted counter to the interests of Tegeta through her conduct of seeking to bypass the BRPs.²⁹

ORDER

[70] Having regard to the above, the following order is made:

(a) The application is dismissed with costs.

(b) Ms Ragavan, in her personal capacity, is ordered to pay the costs of this application including the costs of two counsel on a party and party scale.

PHOOKO AJ

²⁹ *Public Protector v South African Reserve Bank* 2019 (6) 253 (CC) at para 221.

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

Counsel for the Applicants: Adv PF Louw SC & Adv L Van Gass

Instructed by: Instructed by VDM Attorney

Counsel for Respondents for: GD Wickins SC and Adv VR Van Tonde

First to Fourth Respondents

Instructed by: Smith Sewgoolam Incorporated

Date of Hearing: 7 September 2023

Date of Judgment: 11 December 2023