

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: **1191/2022**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

WERNER CAWOOD N.O.

1st Applicant

(In his *nomino officio* capacity as the duly
appointed business rescue practitioner for
Joluza Boerdery (Pty) Ltd)

JOLUZA BOERDERY (PTY) LTD

2nd Applicant

(in business rescue)

and

JAMES LUDWIG CLAASSEN

1st Respondent

ANNA CATHARINA CLAASSEN

2nd Respondent

**Any other person(s) occupying Farm 850,
La Rochelle, District, Vrede, Free State and/or acting
under the instruction of Ludwig Claassen or any
person previously associated with the
Claassen Agri Boerdery (Pty) Ltd**

3rd Respondent

CORAM: JP DAFFUE J

HEARD ON: 29 MARCH 2022

DELIVERED ON: 18 MAY 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 18 May 2022.

I INTRODUCTION

[1] A person whose *locus standi* as business rescue practitioner has been challenged decided to launch an urgent application which was set down for hearing during the recess on Tuesday, 29 March 2022. This person and his attorneys, if they had any knowledge of this court's Practice Directives, would have realised that only one judge was on duty who had to deal with pre-trial conferences, the normal unopposed motion court and urgent applications.

[2] The respondents' counsel submitted during oral argument that the application ought to be struck from the roll due to lack of urgency, alternatively self-created urgency. I decided not to strike the matter from the roll insofar as a full set of affidavits have been filed pertaining to the main application as well as the counter-application. A postponement to the first available opposed motion court roll of 12 April 2022 would merely cause further inconvenience insofar as another judge would have to be called upon to read in excess of 700 pages of application papers. I shall deal later herein in more detail with the alleged urgency and pressure under which the respondents and I as the presiding judge were placed.

II THE PARTIES

[3] Mr Werner Cawood (Mr Cawood) refers to himself as the duly appointed business rescue practitioner of Joluza Boerdery (Pty) Ltd ("Joluza"). He is cited as the first applicant.

[4] Joluza, who according to the first applicant is still in business rescue, is cited as the second applicant.

[5] Insofar as the *locus standi* of the first applicant is in dispute, I prefer to refer to him in this judgment as Mr Cawood and not the business rescue practitioner. It is recorded that Mr Cawood is a practising attorney and that his law firm, Cawood Attorneys Inc of Pretoria, are the instructing attorneys. Adv HC Van Zyl appeared in the application before me, allegedly on behalf of the first and second applicants.

[6] The respondents are Mr James Ludwig Claassen, a major male person residing on the farm La Rochelle, district Vrede, Free State. His mother, Mrs Anna Catharina Claassen is cited as the second respondent whilst all other persons occupying the farm La Rochelle are cited as the third respondent.

[7] Adv SJ Reinders appeared for the respondents. The instructing attorney, Mr Charl van der Merwe, is also a creditor of Joluza and the point is made by Mr Cawood that he has a conflict of interest.

III THE RELIEF CLAIMED

[8] There is no reason to quote the notice of motion. Save for the customary order pertaining to condonation, Mr Cawood sought an order in terms whereof the first and second respondents be interdicted from interfering with the duties of an entity referred to as Park Village, appointed by Mr Cawood, from having access to various farms of Joluza as well as an entity known as Claassen Agri Boerdery (Pty) Ltd ("Claassen Agri"). An order was also sought in terms whereof these respondents had to point out all assets of Joluza and Claassen Agri as well as to hand over all documents, statements and records, including banking documents and statements pertaining to these two companies, failing which the sheriff should be authorised to assist a representative of Park Village to gain access to the properties and to obtain access to the assets of the two entities.

[9] The respondents were given two court days' notice to oppose the application and another three court days to file answering affidavits. The notice of motion reads

incorrectly. In the first paragraph thereof the date of hearing is indicated as 29 March 2022, but the last paragraph makes it clear that the application will be enrolled on the unopposed roll for hearing on 29 March 2022 in the event of no notice of intention to oppose be given. Therefore, Mr Cawood and his attorney knew beforehand that the matter was supposed to be set down for 29 March 2022 only in the event of no opposition being filed.

IV THE VOLUMINOUS PAPERS

[10] Papers were still filed as late as Friday, 25 March 2022, bearing in mind that the application was set down to be heard the next Tuesday. On Monday, I requested my secretary to email the parties to inform the first applicant in particular that:

- 10.1 the application papers consist of over 700 pages;
- 10.2 the papers had been indexed and paginated during the course of Monday only;
- 10.3 the papers were contained in one bundle fastened with paper binders which might cause studying the papers during the course of the evening extremely difficult and it should be rectified;
- 10.4 The parties were instructed to file written heads of argument, failing which I might decide not to hear the application.

[11] I did in fact receive heads of argument the next morning just before the hearing of the application, but had to be content with an unusual bundle of documents which is about 7 cm thick. Numerous unnecessary documents were attached to the founding affidavit which in any event consists of 50 pages. Mr Cawood decided to attach his rejected business rescue plan dated 10 March 2021, consisting of 155 pages, to the affidavit.¹ Numerous valuations of assets were attached as well. The relevance hereof escapes me. The notice of motion and annexures consist of 420 pages. Mr Cawood decided that the court should be informed of a lease agreement, cession agreements and his endeavours till about July 2021 to manage Joluza. I do not intend to deal with these aspects which are

¹ Annexure "J7", pp 101

really irrelevant to the present enquiry. This background was totally unnecessary, but in fairness to the parties I decided to hear the application.

V THE SECOND BUSINESS RESCUE PROCEEDINGS

[12] Having been placed in business rescue in January 2020, Joluza's first business rescue process terminated on 21 May 2020 on the basis that it was no longer in financial distress.²

[13] The second business rescue proceedings in respect of Joluza commenced on 3 November 2020 and Mr Cawood was appointed as business rescue practitioner on 10 November 2020.³ It is recorded that more than sixteen months have lapsed by the time this application was issued.

[14] Five secured claims and one unsecured claim were received. Three of the secured claims were from ABSA in the total amount of just under R32 million. The other two secured claims belonged to Toyota in a total amount of approximately R1.3 million. Mr Charl van der Merwe, the respondents' attorney, proved an unsecured claim in the amount of R93 234.50. Clearly, ABSA's total claim consists of approximately 96% of the total claims.

VI THE LITIGATION PRIOR TO THIS APPLICATION

[15] Mr Cawood brought a so-called collapse application on behalf of Joluza in terms whereof it was declared that Claassen Agri was not a separate juristic person, but that it collapsed into Joluza and that the two companies exist as a single entity as contemplated in s 20(9) read with s 22 of the Companies Act⁴. Relief was granted on 19 October 2021 in the Mpumalanga division of the High Court at Middelburg under case number 3064/2. It is common cause that there is a pending application for the reconsideration of the relief granted. Mr Claassen must however pay the taxed costs

² Founding affidavit: para 17, p 19

³ *Ibid*: para 19, p 26

⁴ Act 71 of 2008

first, but at the stage when the present application was heard, Mr Cawood had failed to present his bill of costs for taxation.

[16] Mr Cawood also came to the conclusion that Joluza could not be rescued and therefore applied to the Gauteng division of the High Court for a conversion in accordance with s 141 of the Companies Act under case number 52221/2021. This application was issued on 3 November 2021. His insistence in these circumstances to continue as a business rescue practitioner with a fact-finding exercise in order to obtain data and information and to ask this court for relief on an urgent basis as his counsel submitted, is incomprehensible. The winding up application is opposed by ABSA, alleging that Mr Cawood has no *locus standi* to proceed with the application.⁵ The application is still pending.

[17] No doubt, ABSA has an interest in the present application, especially insofar as it is by far the largest creditor of Joluza and more importantly, because Mr Cawood's *locus standi* to act as business rescue practitioner of Joluza is in dispute, a live issue that still has to be considered in the Gauteng division of the High Court. I expressly insisted during oral argument to be provided with proof of service of this application on ABSA. Mr Van Zyl, appearing for Mr Cawood, submitted that although there was no proof in the papers before the court, it could be obtained and forwarded after the hearing. Leave was granted to him to file proof. Instead of receiving proof of service on ABSA, I merely received a service affidavit from Mr Jan Jacobus Nell, a candidate attorney of Cawood Attorneys, pertaining to service of the application papers on the respondents as well as their attorney, Mr Charl van der Merwe. This is not what I required. I accept therefore that ABSA as an affected person and the largest creditor is unaware of the present application.

[18] When the business rescue plan of Mr Cawood was rejected on 24 March 2021 – more than a year ago – the Claassen Family Trust issued an application out of the Gauteng High Court in terms of s 153(1)(b)(bb)(i) of the Companies Act in order to declare the vote inappropriate.⁶ ABSA opposed the application and filed a counter-application for the winding up of Joluza. The inappropriate vote application

⁵ Founding affidavit: para 15, pp 18 & 19

⁶ *Ibid*: para 30, p 34 read with the letter of Werksmans at pp 696 - 698

was withdrawn on 28 September 2021. A second similar inappropriate vote application, apparently based on different facts to which Mr Cawood objected insofar as he was painted in a bad light, was issued by the Trust in December 2021. These applications are also pending.

[19] Werksmans attorneys, acting on behalf of ABSA, and by agreement with all the parties, requested consent in terms of the Gauteng Local Division Practice Manual for all these applications to be heard during the week of 11 April 2022 on the basis that all parties agreed that the matters could be disposed of within one day. The Deputy Judge President responded on 10 March 2022, indicating that the request that the matters be placed under case management was declined.⁷

VII URGENCY

[20] I mentioned in paragraph 2 *supra* that the first available opposed motion court day in the Free State after 29 March 2022 was Thursday, 12 April 2022. Mr Cawood and his alleged expert could not be heard to be serious in stating that irreparable harm would result if the application was set down for hearing two weeks later. Mr Cawood suggested that the “new harvest is apparently on the land, and the nature of the crop itself and the potential yield needs to be determined as soon as possible.”⁸ Later it is alleged that Joluza planted soybeans, sorghum and maize which were harvested between May and August 2021. However, based on Mr Maree’s input, it was alleged that soybeans might be harvested this year from the beginning of April. Mr Maree has not provided any facts to show that he is an expert on the harvesting seasoning in the north-eastern Free State where Vrede is situated. There is also no evidence that crops like sorghum and maize might have been harvested by the beginning of April. In any event, Mr Cawood did nothing to ensure that the yield of the 2021 crop received in September 2021 was attached in the interests of creditors. He knew at all relevant time that Joluza was in the business of cultivating crop and should have known that crops had been planted to be harvested this winter. In reply, Mr Cawood admitted a total lack of knowledge of what crop was planted,⁹ clearly

⁷ Annexure “W2”, p 699

⁸ Founding affidavit: para 49, p 53

⁹ Replying affidavit: para 35, p 687

proving that the reliance of early harvesting of soybeans was a fabricated story which can easily be rejected. The respondents made it clear when is harvesting season and their version is in line with Mr Cawood's memory of what transpired the previous year. He has known since at least September 2021, if not earlier, due to the animosity between him and the Claassens and the history of litigation between them, that he could not rely on their cooperation. Yet, he waited until the middle of March 2022 to issue an urgent application. He averred that the respondents had siphoned about R45 million relating to the proceeds of the 2021 harvest, and consequently, there was reason to believe that they will do the same this year. But, so he averred, no reliance could be placed on the events of 2021 to show that urgency was self-created. This is without substance. As said, he unnecessarily and unreasonably put not only the respondents, but also the court, under pressure. Mr Reinders submitted with reference to all the usual authorities and trite principles that the application should be struck from the roll. I declined to do so as mentioned above, but with the benefit of hindsight and bearing in mind the extremely busy recess period encountered, I should have done so. I shall consider the lack of urgency again when I exercise my discretion pertaining to costs.

VIII BUSINESS RESCUE PROCEEDINGS

[21] 'Business rescue' is defined in s 128(b) of the Companies Act to mean —

“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) the 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; ...”

[22] In *Absa Bank Ltd v Caine NO*¹⁰ I stated that business rescue proceedings were much better suited to provide solutions for financially distressed companies than judicial management under the previous Companies Act¹¹ and continued as follows:

“Business rescue proceedings are much more flexible and financially distressed company friendly than judicial management. The potential business rescue plan provided for in ss 128(1)(b)(iii) has two objects in mind, the primary object being to facilitate the continued existence of the company in a state of solvency and secondly and in the alternative, in the event that the primary objective cannot be achieved or appears not to be viable, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. Consequently the Supreme Court of Appeal found in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) in para [26] as follows:

‘It follows, as I see it, that the achievement of any one of the two goals referred to in section 128(1)(b) would qualify as 'business rescue' in terms of section 131(4).’

As further stated by the Supreme Court of Appeal in para [27]:

‘. . . business rescue proceedings are not limited to the return of the company to solvency ...”

[23] In their article dealing with the last decade’s authorities pertaining to business rescue proceedings, O’Brien and Calitz¹² used a medical metaphor which they believe are apposite to business rescue proceedings. They argued that as a medical practitioner cannot do anything for the dead, so, business rescue must have regard

¹⁰ [2014] ZAFSHC 46 at para 40

¹¹ Act 61 of 1973

¹² “Considerations that inform the view of whether there is a reasonable prospect of rescuing a company: A decade of legal precedent”, 2022 TSAR 25

to the reality that some companies are simply beyond resuscitation. Also, in medical treatment the support of all structures available to a patient are important; likewise, with business rescue the support of the relevant stakeholders is important. Just as the recovery of a patient is difficult where there is serious disharmony among those who should ideally provide a support structure for the patient undergoing medical treatment, disharmony between relevant stakeholders of the company may make business rescue difficult, if not impossible.¹³ Having said this, I do not make any finding in respect of the financial viability of Joluza, but want to drive the point home that the serious disharmony between Mr Cawood as business rescue practitioner, ABSA, the major creditor and the directors and shareholders of Joluza is indicative of the failure to rescue Joluza. There are two options left: either Joluza settles its debt, or it will be wound up.

[24] A substantial degree of urgency is envisaged once a company has decided to adopt a resolution to institute business rescue proceedings. While sentiments expressed in adopting business rescue procedure to avoid liquidation of a company may be noble, it should not lead to a situation that an extraordinary amount of time is taken in an attempt – often futile - to achieve this result. Delay is often at the expense of the rights of creditors. Although this is not an application to terminate business rescue proceedings, I respectfully agree with the following *dictum* of Kusevitski AJ in *South African Bank of Athens v Zennies Fresh Fruit CC*:¹⁴

“In my view the mechanisms of business rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. The delay in the finalisation of the business rescue proceedings is unreasonable in the circumstances and I am satisfied that an order terminating the proceedings is justified.”

A balancing of the various rights of affected persons and that of the company should always be paramount in order to achieve fairness.

¹³ *Ibid*: p 27

¹⁴ 2018 (3) SA 278 (WCC) at para 43; see also *Advanced Technologies & Engineering Co (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquées SAS GNP 72522/11*

IX MR CAWOOD'S *LOCUS STANDI*

[25] *In casu*, Mr Cawood's business plan has been rejected. This is common cause. He did not receive instructions to finalise an amended plan for consideration¹⁵ and he was under a statutory duty to file a notice of termination. There has been an extraordinarily long period of time since the business rescue proceedings were initiated. These proceedings have terminated. I refer to ss 132(2) which reads as follows:

- “(2) Business rescue proceedings end when-
- (a) the court-
 - (i) sets aside the resolution or order that began those proceedings;
 - or
 - (ii) has converted the proceedings to liquidation proceedings;
 - (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or
 - (c) a business rescue plan has been-
 - (i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or
 - (ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.” (Emphasis added)

Mr Cawood failed to apply for an extension in accordance with ss 132(3) which reads as follows:

“(3) If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must-

¹⁵ Section 153(3) of the Act

- (a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
- (b) deliver the report and each update in the prescribed manner to each affected person, and to the-
 - (i) court, if the proceedings have been the subject of a court order; or
 - (ii) Commission, in any other case.” (Emphasis added)

[26] Koen J held in *The Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd*¹⁶ that the *locus standi* of a business rescue practitioner to continue with business rescue ends *ex lege* as a consequence of his plan being rejected by creditors. I quote from his judgment with which I respectfully agree:

“[33] Section 153(5) provides for good administrative governance – that is, that the CIPC must be advised promptly of the termination of business proceedings by the practitioners. Section 153(5) does not prescribe an additional prerequisite for the termination of business rescue proceedings where a business rescue plan has been rejected and no further steps were taken, otherwise the end of business rescue proceedings would be in the hands of practitioners and the speed and diligence with which they may file a notice of termination, subject only to the constraint that they must act ‘promptly.’ More specifically, if business rescue would only terminate after the business rescue plan has been rejected once the notice of termination is filed, then there would be no need for s 132(2)(c)(i), because in every instance where the business plan was rejected and it would be required to be followed by a notice of termination, the business rescue would terminate in terms of s 132(2)(b). Section 132(2)(c)(i) would be rendered unnecessary and superfluous.”

[34] The business rescue terminated on 26 February 2020 when the business rescue plan was rejected and no affected person had acted to

¹⁶ 2021 JDR 1238 (KZP) at paras 33 - 39

extend to extend the proceedings in any manner contemplated in s 153. The mechanism of business rescue proceedings was not designed to protect a company indefinitely to the detriment of the rights of its creditors. The practitioners' locus standi to continue as business practitioners ended with the business rescue coming to an end. That is a consequence which flowed ex lege from the business rescue plan being rejected by creditors. It follows that the practitioners then did not have locus standi, following the rejection of the business plan, to bring the second application for conversion and for the liquidation of AOM....

[35] The above interpretation is also consistent with the wording of s 141(2) which provides that business rescue practitioners may bring an application to end the business rescue proceedings where there is no reasonable prospect of business rescue succeeding, that is during the business rescue proceedings. It is also consistent with the investigative and rescue function practitioners are required to perform. But once that comes to an end because the plan the practitioners were able to devise is rejected, then the practitioners have no further business with the company save to hand its administration, assets and the like, back to the company. No provision is made in s 141 for a conversion and, specifically, an order 'discontinuing the business rescue proceedings' post the rejection by creditors of the business rescue plan." (Emphasis added)

[27] Wallis JA set the record straight as follows in a unanimous judgment of the Supreme Court of Appeal in *Knoop N.O and Another v Gupta and Another*:¹⁷

"[39] Potentially the most difficult issue relates to the purported termination of the business rescue of the two companies. Reliance was placed upon the principles in cases such as *Tasima* to contend that there needed to be an application to set aside the termination. But that was based upon the misconception that the termination was an official act by the CIPC. This is not correct. When one is dealing with a company that is

¹⁷ 2021 (3) SA 135 (SCA) at paras 39 & 40

placed in business rescue voluntarily by way of a resolution of the board of directors, the process of business rescue is conducted on the basis of the actions of the company; affected persons, that is, shareholders, any trade union representing employees, and employees; the BRP; and the creditors. It is the company, acting through its directors, that commences the process and appoints the BRP. The company then gives notice of the resolution to commence business rescue. During the course of the business rescue the directors of the company remain in office and must continue to perform their functions as directors and perform their management functions in accordance with the express instructions of the BRP to the extent that it is reasonable to do so. The BRP must investigate the affairs of the company and develop a business rescue plan to be considered by affected persons. If the plan is adopted, the company is obliged to implement it under the direction of the BRP.

[40] If it transpires at any stage of the process that the company cannot be rescued, the BRP is obliged to give notice of this and approach the court for a liquidation order. If the business rescue plan is substantially implemented, the BRP files a notice with the CIPC and the business rescue terminates when that notice is filed. If the business rescue plan is proposed and rejected and no affected person has acted to extend it in terms of s 153(1) of the Act, the business rescue terminates. The BRP is obliged in that event to file a notice of termination of the business rescue. If at the end of the BRP's investigation, they conclude that there are no longer grounds for thinking that the company is financially distressed, they must inform the court, the company and all affected persons of that fact and file a notice of termination of the business rescue. On filing that notice, the business rescue proceedings end.” (Emphasis added)

[28] Bearing in mind the legislation and the authorities quoted, the business rescue proceedings have terminated on 30 March 2021, five days after the business rescue plan was rejected, or at the latest and at best for Mr Cawood, on 28

September 2021.¹⁸ ABSA requested Mr Cawood to file a notice in terms of s 153(5) of the Act, terminating the business rescue proceedings, but he refused to do so. Alternatively, the business rescue proceedings terminated in terms of s 132(2)(c)(i).¹⁹ As mentioned, it is evident that Mr Cawood never asked for an extension of the business rescue proceedings in accordance with the provisions of s 132(3) of the Act. Even if I am wrong in coming to anyone or all of these conclusions, there is no sufficient reason to grant relief in favour of Mr Cawood as explained herein before and after.

[29] It is appropriate to caution the drafters of the various affidavits with reference to what Wallis JA said in *Knoop NO v Gupta*:²⁰

‘Before concluding it is appropriate to remark that the application papers in this matter reflect little credit on the legal practitioners responsible for their preparation. They were replete with allegations in emotive terms not borne out by any of the evidence. Ms Ragavan’s allegations against the BRPs did not stand up to scrutiny and the charges of incompetence, conflict of interest, lack of independence, a failure to live up to the high professional standards expected of BRPs, and the like, were unwarranted. It should not be necessary to remind legal professionals who draft affidavits for their clients that they bear a responsibility for the contents of those documents and may not use them for the purpose of abusing their clients’ opponents. Such allegations should only be made after due consideration of their relevance and whether there is a tenable factual basis for them. This aggressive tone was likewise reflected in the affidavits of Mr Knoop where he described Ms Ragavan and others as “Gupta acolytes”, an expression more appropriate to a newspaper report than an affidavit. On many points, he would have been better advised to set out greater detail and less rhetoric. As to some of the correspondence between the attorneys, the less said, the better. It was marked by aggression, hostility and accusations, but little of great relevance to the case, and little that reflected well on the authors.’

¹⁸ Answering affidavit: pp 440 – 449 & founding affidavit: para 15, p 18

¹⁹ *Ibid*: para 8.1, p 440 & para 9.2, p 443

²⁰ *Knoop* at para 145

The attitude of the parties, evident from the papers *in casu*, is in line with those in *Knoop*. I concur respectfully with the admonishment of Wallis JA. Some of the averments border on the hysterical and should not be countenanced.

X COSTS

[30] The respondents alleged in their answering affidavit that this was an appropriate case where costs *de bonis propriis* ought to be awarded against Mr Cawood in his personal capacity.²¹ Mr Cawood responded thereto by merely saying that such an order could not be granted insofar as he was not personally cited in the proceedings.²² Such an approach is flawed. It could not be expected to join him in his personal capacity. He is accused of improper conducted in the alleged execution of his duties as business rescue practitioner. That is how he refers to himself. Furthermore, he averred that he was duly authorised by Joluza's Board of Directors to launch these proceedings.

[31] If the main application is dismissed with costs, it would mean that Joluza, in business rescue, would have to pay such costs. That would be an inappropriate order as there is no reason why the creditors of Joluza or any of the affected persons should be prejudiced indirectly. Mr Cawood cannot avoid an order against him personally on the basis that he was not cited in his personal capacity. The issue was clearly and patently raised by the respondents under oath and he had full opportunity to respond thereto. He was duly warned that a punitive costs order would be sought against him as will be shown hereunder. Mr Reinders pointed out that Joluza should not be prejudiced by granting costs against it. According to him, Mr Cawood knew that his *locus standi* was in dispute. Mr Van Zyl, on the other hand, submitted that Mr Cawood did not want to be guilty of a dereliction of duties and did what was required of him in accordance with the Companies Act. Therefore, he shall not be penalised with a costs order as requested.

²¹ Answering affidavit: paras 12 – 19, pp 446 - 448

²² Replying affidavit: para 27, pp 684 – 685; the matter was also revered to in the answering affidavit: paras 56 – 60, pp 475 - 478 and responded to in the replying affidavit: paras 56 – 57, p 694

[32] Orders *de bonis propriis* are punitive orders and are not usually made except in exceptional circumstances. There must have been egregious conduct on the part of the party acting in a representative capacity to attract such an order of costs. The assessment of the gravity of the conduct is objective and lies at the discretion of the court.²³ Such orders are made as a mark of the court's displeasure with the conduct²⁴ of the particular party.

[33] It is also appropriate to refer to Herbstein & Van Winsen.²⁵ I quote:

“An award of costs *de bonis propriis* may be made only when a person acts or litigates in a representative capacity.

It is unusual to order a litigant in a fiduciary position to pay costs *de bonis propriis*, and good reason for such a course should be shown, such as want of *bona fides*, negligent or unreasonable action, or improper conduct by a trustee or executor. 288 The basic notion is material departure from the responsibility of office, which includes absence of *locus standi*. Other litigants who institute or defend proceedings in a representative capacity, such as executors, guardians, sureties or agents, or public officers such as a mayor, are in a similar position. Thus, costs have been awarded *de bonis propriis* against a trustee whose conduct was actuated by an ulterior motive, and because he did not believe it was for the benefit of the estate, and against an executor who was clearly pursuing his personal interest, the estate having no funds. In *Kohlberg v Burnett*, where the executor's real reason for deciding to appeal was a personal interest (intestacy, being to his financial advantage), the court dismissed the appeal with costs, as it would have been inequitable to have ordered that the executor's costs of appeal should come out of the estate of the deceased.

²³ *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC)

²⁴ See also the Constitutional Court judgment in *SA Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) at para 54

²⁵ Cilliers *et al*, *Herbstein & van Winsen, The Civil Practice of the High Courts of South Africa*, vol 2, 982 - 987

A representative litigant whose conduct is so unreasonable as to justify this special order can, despite acting in good faith, be ordered to pay the costs *de bonis propriis*. The court will not, however, make such an order lightly, and mere errors of judgment will not be sufficient. It has been held that such an order should not be granted in the absence of some really improper conduct, and that the fairness or unfairness of proceedings honestly brought should not be scrutinised too closely. The criterion has been stated to be actual misconduct of any sort or recklessness, and the reasonableness of the conduct should be judged from the point of view of the person of ordinary ability bringing an average intelligence to bear on the issue in question, not from that of the trained lawyer.

Costs *de bonis propriis*, if sought, should be specially asked for, or an application for an order for the payment of costs *de bonis propriis* should be made at the hearing, but the court may entertain a subsequent application if made within a reasonable period.

In a proper case the court will also order company directors, liquidators, administrators or even insolvents to pay costs *de bonis propriis*.” (footnotes omitted)

[34] An order *de bonis propriis* shall not be made against a person or party unless he or she had been afforded an opportunity to respond to the allegations in question and to state his or her case.²⁶ In *casu*, Mr James Ludwig Claassen, the first respondent, made three allegations against Mr Cawood in his capacity as the business rescue practitioner which he backed up with facts, to wit

1. Mr Cawood lacked *locus standi* to launch the application in his alleged capacity or on behalf of Joluza;
2. lack of urgency;
3. non-joinder of a party with a direct and material interest in the outcome of this application.²⁷

²⁶ *CB & Another v HB* 2021 (6) SA 332 (SCA) at para 20

²⁷ Answering Affidavit: para 5, p 436

[35] There is a pending application in Gauteng by ABSA as majority shareholder for the winding up of Joluza, but Mr Cawood failed to join ABSA in the present proceedings. In fact, as will be shown, he even failed to give notice to ABSA of the proceedings. His own application for Joluza's winding up is opposed by ABSA who is of the opinion that he has no *locus standi*. In fact, the respondents warned Mr Cawood beforehand that his *locus standi* is disputed.²⁸

[36] ABSA requested the applicant to file a notice in terms of s 153(5) of the Act to terminate the business rescue proceedings, but Mr Cawood refused to do so.

[37] On 3 November 2021 Mr Cawood also filed an application for Joluza's winding up in the Gauteng High Court. In doing so, he had to aver that there was no reasonable prospect of Joluza being rescued, that he therefore applied for an order discontinuing the business rescue proceedings and placing Joluza into liquidation.²⁹

[38] According to the respondents the business rescue proceedings terminated five days after rejection of the business plan on 24 March 2021; alternatively, Mr Cawood could not act as business rescue practitioner after 28 September 2021, the date on which the inappropriate vote application was withdrawn.

[39] A factual dispute has arisen insofar as it is clearly stated on behalf of the respondents that the crop is harvested between June and August every year as was the case last year as well. Consequently, the reliance on urgency was attacked.³⁰

[40] It is also alleged that Mr Cawood did nothing since his appointment on 3 November 2020 to inspect any assets belonging to Joluza. He never attempted over the course of almost a year and three months to inspect the harvests. This is also the case since the collapse application, *ie* for a period of five months since 19 October 2021.³¹

²⁸ See the detailed letter of attorney Charl van der Merwe dated 2 March 2022: annexure "J36", p 401/2

²⁹ See the requirements of s 141 of the Companies Act

³⁰ See para 35.1, p 459

³¹ See paras 41.3 & 41.4, p 463

[41] In paragraphs 41.9 and 41.10 it is pointed out that Mr Cawood was harassing the respondents and running up substantial legal costs. Consequently, whilst this application is not urgent, he should be ordered to pay the costs on a punitive scale.³²

[42] It is stated that Mr Cawood did not have authority from Joluza's board of directors to bring the application, that he acted on his own volition and without any authority and that it would be unfair to burden Joluza with the costs of the application. Therefore, Mr Cawood should be ordered to pay the costs on an attorney and client scale insofar as the application is vexatious and *mala fide*. It is clear from the papers that Mr Cawood and the Claassens do not see eye to eye, accusing each other of even fraud and malpractices.³³

[43] In paragraph 28 of his replying affidavit Mr Cawood said the following:

"I have already dealt with the legal arguments contained in these paragraphs. I have not been joined to these proceedings and a costs order against me cannot be granted. The application is necessitated by the respondents who refuse access to the assets. Had access been provided, the report could have been obtained with no prejudice to any of the parties."

[44] The case is distinguishable from the facts in *Kgoro Consortium (Pty) Ltd and Another v Cedar Park Properties 39 (Pty) Ltd and Others*.³⁴ In that case the draft order presented to the High Court reasonably indicated to the particular attorneys that no costs order would be sought against them and also, the High Court did not call upon the firm of attorneys to explain itself. Consequently, the Supreme Court of Appeal found that it was denied an opportunity to state its case and the appeal against the punitive costs order succeeded. It should be born in mind that in that case the firm of attorneys was representing one of the parties in the court *a quo* and was not even cited as a party to that proceedings. In *casu* Mr Cawood in his representative capacity cited himself as first applicant. There is no substance in his

³² See also paras 55 – 59, pp 576 & 578

³³ See paras 12 – 19, pp 446 – 448 & the Cawood's response in paras 27 & 28, pp 684 & 685 as well as paras 55 – 60, p 475 – 478 and the response paras 56 & 57, p 694

³⁴ (935/2020) [2022] ZASCA 65 (9 May 2022)

argument that in order for a punitive costs order to be made against him, he should be cited in his personal capacity as well.

XI THE COUNTER-APPLICATION

[45] The counter-application should have been lodged in the Gauteng High Court where the registered address of Joluza is situated, but over and above that, the orders are of academic value only. The respondents sought declaratory orders in terms whereof Joluza's business rescue proceedings had come to an end and that Mr Cawood's appointment as business rescue practitioner had terminated. Mr Reinders conceded that there was no necessity in granting the orders as requested.

[46] In my view the counter-application should be dismissed and the parties be ordered to pay their own costs. The dismissal of the counter-application does not mean that the respondents' factual averments, which were made in opposition to the main application as well as in support of the counter-claim may be disregarded. They have raised valid points as indicated above. I do not exercise my discretion to order costs in favour of Mr Cawood for the reasons advanced herein. There is also no reason to award costs in favour of Joluza who was unnecessarily made a party to the litigation.

XII CONCLUSION

[47] I conclude in repeating that Mr Cawood had no *locus standi* to launch the present proceedings, but even if I am wrong in this regard, no relief could be granted as requested, *inter alia* insofar as ABSA was not joined in these proceedings or at least duly informed accordingly. I refer again to the metaphor of the sick patient. Just as his recovery is difficult where there is serious disharmony among those who should ideally provide a support structure for him while undergoing medical treatment, disharmony between relevant stakeholders of a company in financial distress may make business rescue difficult, if not impossible. Mr Cawood accepted this and decided to launch the winding up application in November 2021. Now, four months later, he wants to continue as business rescue practitioner whilst that and others applications are pending.

[48] Mr Cawood failed to show that he was entitled to an interdict. The requisites for a final interdict have not been met. He failed to prove a clear right. The absence thereof should be the end of the enquiry. It is averred by him that no affected person would be prejudiced if the inspection of assets and managerial control over Joluza are allowed, but in my view he has no right to access, inspection or management in the circumstances as explained above. Serious costs implications apply. He acted on a frolic of his own. His allegation that if the relief is granted, it will benefit all affected parties and in the event of winding up, the appointed liquidators will benefit from his report and the supporting documents obtained, is without substance. The liquidators to be appointed in the event of winding up will have the backing of the legislation to assist them. I find it amazing that Mr Cawood has now all of a sudden elected to ensure “proper administration” in light of the excessive delay, his failure to ask for extension of time as he was required to do, the rejection of his business plan more than a year ago and in the face of the pending winding up applications and other applications in Gauteng. It was not shown that irreparable harm would be caused to Joluza or any affected persons if the interdict is not granted. Mr Cawood has no interest in the business of Joluza and should have handed over the administration thereof to its directors as stipulated in the authorities quoted above. The obvious alternative remedy, if it is alleged that Joluza cannot be saved, is to apply for its winding up and such processes are underway in Gauteng. Once Joluza is wound up, its liquidators will take charge. It is not expected of Mr Cawood to pave the way for them as he articulated in his papers. My impression of his conduct is that he is rather interested in ensuring that his interests, and nobody else’s interests, are catered for. Furthermore, in the exercise of my discretion and bearing in mind the pending litigation in Gauteng, there is no reason why relief shall be granted to Mr Cawood. The steps taken in that court serve as proof that an alternative remedy exists.

XIII ORDERS

[49] The following orders are made:

1. The main application is dismissed.

2. Mr Werner Cawood, the first applicant, shall be liable *de bonis propriis* for the applicants' costs of the main application as well as the respondents' costs in opposing the main application and he shall not be entitled to claim any such costs payable by him from Joluza Boerdery (Pty) Ltd.
3. The counter-application is dismissed.
4. The parties shall pay their own costs in respect of the counter-application.

JP DAFFUE J

On behalf of the Applicants: Adv HC Van Zyl
Instructed by: Cawood Attorneys
c/a McIntyre & Van Der Post
BLOEMFONTEIN

On behalf of the Respondents: Adv SJ Reinders
Instructed by: Charl Van der Merwe Attorneys
c/a Badenhorst Attorneys
BLOEMFONTEIN