

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

Case Number: **23112/2023**

REPORTABLE

In the matter between:

ARTHUR LIMBOURIS

First Applicant

KAREN JANSEN VAN RENSBURG

Second Applicant

STEPHAN BRYAN UPPINK

Third Applicant

OLIVER MARTIN DAWBER

Fourth Applicant

and

JACQUES DU TOIT N.O.

First Respondent

**(in his capacity as the Business Rescue
Practitioner of Cambridge Services (Pty) Ltd)**

JACQUES DU TOIT

Second Respondent

CAMBRIDGE SERVICES (PTY) LTD

Third Respondent

(Registration Number: 2006/000073/07)

(in business rescue)

**ALL AFFECTED PERSONS OF CAMBRIDGE
SERVICES (PTY) LTD (IN BUSINESS RESCUE)**

Fourth Respondent

GARY JOHN SHAYNE
(Identity Number: 7[...])

Fifth Respondent

COMMISSIONER FOR INTELLECTUAL PROPERTY AND COMPANIES Sixth Respondent

Heard: 14 August 2024

Judgment: 16 August 2024

JUDGMENT

Handed down by email to the parties' legal representatives on 16 August 2024

KANTOR, AJ:

1. The applicants seek the following core relief:

1.1. Leave in terms of section 133 of the Companies Act 71 of 2008 ("the Act") to launch this application and certain action proceedings envisaged therein ("**the Proposed Action**").

1.2. An interim interdict against the first respondent, the business rescue practitioner of the third respondent ("**the Company**"), from filing a certificate of substantial compliance in respect of the Company pending determination of the Proposed Action.

2. The following issues (amongst others) emerge in this application, some of which are novel legal issues:

2.1. Whether the applicants require leave in terms of section 133 of the Act to launch this application and/or the Proposed Action. The applicants contend that they do while the first to third respondents (“**the respondents**”) contend that they do not.

2.2. If the answer to the first sentence above is in the affirmative, whether such leave should be granted.

2.3. Whether the relief to be sought in the Proposed Action in respect of the business rescue proceedings relevant to this matter is competent in law.

2.4. This is one of the aspects which informs whether or not a *prima facie* case is established for the purposes of the interim interdict. This is, in my view, the core issue in the application. It involves various legal sub-issues, including:

2.4.1. Whether the relief sought to set aside the business rescue plan relevant to this matter (“**the BR Plan**”) is competent in terms of the Act.

2.4.2. Whether common law remedies which may otherwise have been employable to set aside the BR Plan are excluded by the Act.

2.4.3. Whether this even includes a situation in which a business rescue plan was induced to be concluded by fraud.

2.4.4. The obligations of a business rescue practitioner in regard to investigations leading to a BR Plan and the projections and representations set out therein.

2.4.5. The meaning of ‘substantial implementation’ of a business rescue plan in the Act.

2.4.6. Whether there has there been substantial implementation of the BR Plan.

2.4.7. Whether the failure of a BR Plan on a commercial or intended basis plays a role in the question as to whether there has been substantial implementation thereof.

Background

3. This application has its origin in a dispute about the BR Plan which was adopted by the creditors of the Company which was known at the time as Coast2Coast Capital (Pty) Ltd (now Cambridge Services (Pty) Ltd). The Company was placed under supervision in business rescue in terms of a resolution adopted by its sole director, the fifth respondent, which was filed with the Commission for Intellectual Property and Companies ('CIPC') in November 2019. The first respondent was appointed as the Company's sole business rescue practitioner ('**the BR Practitioner**'). He published the BR Plan on 5 March 2020. The BR Plan was adopted on 13 March 2020. The Company remains under supervision in business rescue to date, almost five years later.

4. The main relief which the applicants, all creditors of the Company at the time of the adoption of the BR Plan, seek in this application is twofold:

4.1. The applicants seek leave in terms of s 133(1) of the Act to institute this application and to institute the Proposed Action in which the setting aside of the BR Plan and its adoption will be claimed.

4.2. The applicants seek an interdict restraining the first respondent from filing a notice of substantial implementation in terms of s 132(2)(c)(ii) of the Act, pending final determination of the Proposed Action.

5. In the Proposed Action the applicants intend to seek the setting aside of the BR Plan. The other relief therein is not relevant to the determination of this application. I was informed by Mr Hartzenburg, who appeared with Mr Randall for the respondents, that the relief in respect of the application for leave in terms of section 133 applies only in respect of the BR Plan. This is dealt with further below.

6. By agreement between the applicants, on the one hand, and the respondents, on the other, on 22 May 2024 the applicants were granted leave to amend their notice of motion. At the same time, a Rule *Nisi* was issued by agreement between the same parties, calling upon all interested and affected persons to show cause on 14 August 2024, why an order in the following terms should not be granted:

‘2.1 That the Applicants be granted leave to institute this application and the action proceedings substantially in accordance with the draft particulars of claim, being annexure "AL 40" to the founding affidavit in this application (**“the action”**);

2.2 That the Applicants be required to institute the action within one month of the granting of the relief under paragraph 2.1 above;

2.3 That the First Respondent be interdicted from filing a notice of substantial compliance in terms of section 132(2)(c)(ii) of the Companies Act, 71 of 2008, pending the final determination of the action; and

2.4 That the costs of this application be reserved as costs in the action.’

7. The order granted by agreement on 22 May 2024 catered for the problem that service of the application on the affected persons in this matter (cited collectively as the fourth respondent) had not yet taken place as applicants did not have their details for the purpose of service. The applicants and the respondents are to be commended and appreciated for their co-operation in agreeing to the rule *nisi* which included that the BR Practitioner would provide the service details of the fourth respondent affected persons.

8. An affidavit of compliance was delivered in respect of the service on fourth respondent which appeared to establish that sufficient service had taken place. The service of the rule *nisi* upon interested and affected persons, where such parties do not oppose the application, gives rise to the inference that such parties consent to

the relief sought by the applicants (Ex Parte Gold 1956 (2) SA 642 (T) at 649EF; Ex Parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T) at 584FH).

9. All of the respondents, other than the (first to third) respondents, have not participated in this application and do not oppose the relief sought by the applicants. None of the affected parties have opposed the application. Nor have any of them to date sought to intervene in their own names or participate in this application, save that one, Nigel John Chapman ("Chapman"), has delivered an affidavit in which he records that "I unequivocally support" the application, citing concerns similar to those raised by the applicants. Chapman was a creditor of the Company in the staggering amount of R106 331 575 prior to the conversion thereof into equity in the Company in terms of the BR Plan. He is recorded as a creditor in this amount on page 12 of the BR Plan. He and the applicants make up over 70% of what appear to be the independent creditors referred to in the BR Plan, the other liabilities being "**Loans from group companies**" in the amount of R1 607 520 395.

10. The determination of the substantive relief was accordingly ready for hearing on the return day of 14 August 2024.

11. On 12 August 2024 the applicants delivered what was termed 'replying heads of argument' in which they noted that it was held in Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd (83344/14) [2015] ZAKZPHC 21 (20 March 2015) (at paragraphs 8 to 13) that no leave is necessary in terms of s 133(1)(b) of the Act to institute removal proceedings against a business rescue practitioner in terms of section 139 of the Act and that the "... reasoning in the judgment, with respect, appears to be based upon a proper interpretation of both ss 133(1)(b) and 139 of the Act. It is therefore accepted that no leave is required by the applicants to commence proceedings for the removal of the first respondent as business rescue practitioner of Cambridge Services." I agree with this conclusion. I was also informed by Mr Hartzenburg that the applicants do not persist in this application with the relief in respect of the repayment of the BR Practitioner's fees.

12. Flowing from this, the applicants recorded in their 'replying heads of argument' that the relief sought by them will be limited to the following:

‘1. That leave be granted to the applicants in terms of s 133(1)(b) of the Companies Act, 2008 (Act 71 of 2008) (*‘the Act’*) to:

1.1 institute this application;

1.2 commence an action in which the applicants claim an order setting aside the business rescue plan dated 5 March 2020 in respect of the Company, Cambridge Services (Pty) Ltd (*‘Cambridge Services’*) and its adoption on 13 March 2020.

2. That leave be granted to the applicants in terms of Rules 4(2) and 5(2) to serve the applicants’ combined summons for the purposes of instituting the aforesaid action by electronic mail on all affected persons of Cambridge Services at the email addresses furnished by the first respondent’s attorneys to the applicants’ attorneys.

3. That the said action be instituted within one calendar month from the date of this order, failing which the leave granted to the applicants to commence such action in paragraph [1.2] shall lapse.

4. That pending final determination of the said action referred to in paragraph [1.2] above, the first respondent shall be interdicted and restrained from filing a notice of substantial implementation of the business rescue plan approved and adopted by the creditors of Cambridge Services on 13 March 2020 in terms of s 132(2)(c)(ii) of the Act.

5. That the costs of this application shall be reserved for decision in the said action.’

The issues

13. The two remaining central substantive issues are whether:

13.1. the applicants should be granted leave to institute this application and the Proposed Action in respect of the setting aside of the BR Plan'

13.2. the first respondent should be interdicted from filing a notice of substantial implementation of the BR Plan in terms of s 132(2)(c)(ii) of the Act, pending the final determination of the Proposed Action.

Facts

14. The applicants were all members of Musgrave Agencies CC (**'Musgrave'**) which held the South African distribution rights for a number of upmarket retail brands, including Jeep. Musgrave was based in Durban. The focus of its business was the supply of clothing on a wholesale basis to retailers.

15. The Company was conceived as a private equity investment company involved in the acquisition of businesses. The driving force behind it was the fifth respondent, who is a chartered accountant.

16. The applicants disposed of their interests in Musgrave and in due course became creditors of the Company. On 30 April 2019, the applicants took judgment against the Company and the fifth respondent for payment to them of the combined amount of R82 468 013,64.

17. A feature of this matter is the vast sums of money which have at various times been involved (which I perceive to be referred to with some element of desensitisation on the part of the respondents as to their staggering extent):

17.1. Over R230 million in respect of loans from the Company to its directors on very favourable terms, including fifth respondent in the amount of R68 726 725 which bore interest at the SARS rate of interest for employees and which falls due on 30 June 2034, and which was expected to be recoverable on the basis that the BR Plan was approved. Although the figures have not been provided, with the debt having been incurred between 2012

and 2017, the interest thereon (the SARS interest rate is currently 11.75%) would have result in the overall debt having approximately doubled.

17.2. R377 670 452 in respect of the liability of the Company to third parties, including the applicants and Chapman.

18. On 20 June 2019, the fifth respondent and the Company instituted proceedings to set aside the judgment referred to above (**“the Rescission Application”**).The applicants filed answering affidavits in the rescission application on 4 July 2019. No replying affidavits were ever delivered, and the matter has not been pursued since 2019. Subsequent events as detailed in the founding affidavit illustrate that the rescission application has been abandoned.

19. The applicants’ claims against the Company were admitted in the business rescue proceedings as appears from the BR Plan, as was Chapman’s.

20. The Company was placed under supervision in business rescue at a time when the fifth respondent was its sole director.

21. The BR Plan was published and circulated on 5 March 2020. The plan was to be considered by affected persons at a meeting on 13 March 2020. The BR Plan was adopted on 13 March 2020.

22. On the morning of 13 March 2020, the first respondent communicated certain aspects to the applicants by email (which the applicants allege were undertakings given by the first respondent to them) which included the following in paragraph 2 (the first respondent contends that the email was a proposal which was not accepted by applicants):

“1b I wish to confirm that as Business Rescue Practitioner and based upon the above assumption the debt to equity conversion in C2C Capital (Pty) Ltd with regard to yourselves will be ring fenced whereby the debt to equity is not effective with immediate effect which debt to equity conversion will only take place in future as and when litigation has been finalised meaning that your

principal debt in C2C Capital will stay in place and only upon conversion in future the principal debt will be cancelled waived or forfeited. The shares allocated to your debt will be held in trust on your behalf until such time as the debt to equity is effected, if any.”

23. The applicants allege that the undertakings were not incorporated into the BR Plan. The applicants contend that the BR Practitioner breached that undertaking and that this constitutes a form of serious misconduct on his part. There is a dispute in this respect, but I do not consider it necessary for it to be resolved for the purposes of this application. For the sake of completeness, the respondents contend as follows:

23.1. Factually, the applicants’ contentions do not accord with the terms of the email itself and it has been fully explained by the BR Practitioner.

23.2. On 13 March 2020, at the meeting of creditors, the BR Practitioner proposed to the third applicant that in respect of the litigation which the applicants had brought against Bounty Brands, those claims could be safeguarded.

23.3. Thereafter, the applicants voted against the adoption of the BR Plan. The BR Practitioner then sent an email to the applicants in which he proposed that they change their vote in favour of the adoption of the BR Plan. This is in the email relied on by the applicants referred to above. That proposal was that the applicants could proceed with the litigation against other parties and that their claims would be preserved for those purposes, if they changed their vote in respect of the BR Plan.

23.4. The applicants did not respond to that email and did not change their votes, thereby not accepting the proposal.

23.5. There was nothing untoward in his proposal as the BR Practitioner was seeking to ensure that the moratorium in respect of legal proceedings be

maintained but that the applicants would be free to pursue other parties should they so wish.

23.6. Upon perusal of the document itself, the proposal which was made by the BR Practitioner was dependent upon the applicants changing their vote both in respect of the Company and Coast2Coast Holdings (Pty) Ltd. In particular, the following was stated:

“I would appreciate you in changing the vote in regard to C2C Capital (Pty) Ltd and C2C Holdings (Pty) Ltd based on the above-mentioned undertakings and confirmations which will also then as stated above be applicable to Holdings.”

23.7. The letter concludes with: “I look forward to hearing from you as a matter of urgency.”

23.8. It is apparent that the alleged undertaking was not an undertaking at all, but instead a proposal, which was not accepted by the applicants. There is no basis on which it can be argued that the proposal should have been incorporated in the BR Plan.

24. As I have said, however, I do not consider it necessary to determined this dispute for the purposes of this application and I therefore decline to do so.

25. The BR Plan contained statements which included the following:

25.1. The assets of the Company included a loan by the Company to the fifth respondent in the amount of R68 726 725 which bore interest at the SARS rate of interest for employees and fell due on 30 June 2034, and which was expected to be recoverable on the basis that the BR Plan was approved.

25.2. Forecast earnings of the Company would be as per annexures 12 to 14 to the BR Plan, read with paragraphs 14.15 to 14.18 thereof.

25.3. More particularly:

25.3.1. The Company was forecast to earn net after tax profits in the first year, that is in the 2020 year, to December 2020, of R11 374 518.

25.3.2. In the second year, that is 2021, the Company was projected to earn a total income of roughly R42 million.

25.3.3. In the third year, that is 2022, the Company was projected to generate a profit of just under R60 million (R58 981 958) with a cash balance of R22 million, and in this year the first dividends were expected to be paid to investors (shareholders).

26. The aforesaid projections were material to the viability of the proposed BR Plan for the purpose of the claims of creditors (including the applicants) which were to be converted into a minority shareholding in the Company.

27. The BR Plan included the following two provisions:

27.1. The creditors of the Company would capitalise their debt in the Company in exchange for 49% of the shares in the Company.

27.2. Should creditors approve the BR Plan, payment under the plan by way of the capitalisation of their loans will be in settlement of their claims against "... the Company, group company/entity, shareholders and directors and the directors shall be released from any personal sureties entered into up to the date of the filing of the notice of substantial implementation."

28. The unaudited annual financial statements ('**AFS**') of the Company for the years 2019 to 2021, signed by fifth respondent, which were available to the applicants when the application was instituted, showed the following with regard to the profits and losses generated by the Company during the years 2019 to 2021:

2019 (loss)	R414 924 000
2020 (loss)	R 27 887 000
2021(loss)	R 230 000

29. The first respondent has made certain allegations in the answering affidavit qualifying some of the figures in the AFS, but these qualifications do not show that the Company reached the projected levels of performance as set out in the BR Plan.

30. The first respondent provided the 2023 AFS of the Company (which contain the comparative figures for 2022) in the respondents' answering affidavit. In terms thereof, the net profit for the Company for the years 2022 and 2023 were as follows:

2022	R3 302 000
2023	R9 001 000

31. The income shown in the Company's AFS includes substantial interest which accrues on the debt owing by the fifth respondent to the Company (except for the 2020 year). It is not evident that such interest has actually been paid by the fifth respondent to the Company. The contrary appears from the fact that the debt owing by the fifth respondent is recorded in the Company's 2023 annual financial statements in the amount of R87 978 000, having increased from R80 621 000 in 2022.

32. The consequence of the foregoing is that any trading profit which may have been achieved after the adoption of the BR Plan is, in the circumstances and context of the matter, is negligible.

33. The applicants' claims against the Company were converted into shares during October 2020.

34. During the period from about 2012 to 2018, the Company made loans to the fifth respondent and also to Gregory von Holdt ("Von Holdt") and Johan Botha ("Botha"). In the case of Botha this was a company controlled by him called Rocket Capital. The amounts involved were extraordinarily large which, at face value, were

unusually favourable to the borrowers (including that they were unsecured and were repayable in the distant future). These amounts are:

34.1. The fifth respondent:	R87 978 000
34.2. Von Holdt:	R97 199 210
34.3. Botha (Rocket Capital)	R67 254 619

35. The applicants, in execution of the judgment which they secured against the Company under Case Number 5865/2019 (for an amount totalling R82 468 013,64), caused the claims of the Company against Von Holdt and Botha (Rocket Capital) to be attached. On or about 27 August 2019, in terms of two agreements of cession, the applicants took cession from the Company of its claims against Von Holdt and Rocket Capital. On the basis of such cessions, the applicants instituted an action against Von Holdt and Botha, as well as Rocket Capital. That action remains pending.

36. Enquiries from the Financial Sector Conduct Authority ('FSCA') have revealed that the Company does not hold any licences which would entitle it to provide financial advisory services.

The first main issue: the relief sought in terms of section 133 of the Act

37. Section 133(1) of the Act provides *inter alia* as follows:

“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-

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable; ...”

38. The applicants have proceeded on the basis that such leave is necessary. The respondents submit that it is not required.

39. Section 133(1)(b) does not in terms prescribe any specific criteria for determining whether leave should in any specific case be granted to an applicant to commence proceedings against a company in business rescue. In Arendse and Others v Van der Merwe and Another NNO 2016 (6) SA 400 (GJ), it was held as follows at paragraph 11:

“Section 133(1)(b) does not specify the criteria or procedural requirements that must be met in order to obtain the leave of the court. *Ex facie* the provision, the court would appear to enjoy a wide and unfettered discretion to make an order on “... *any terms the court considers suitable*”. That being the position, it is implicit that the court’s discretion must be dictated by the interests of justice. It is also implicit that the discretion must be exercised judicially, having regard to the purpose and objects of s 133(1)(b), read in the context of the Act as a whole. Considerations of fairness and convenience are fundamentally important.”

40. In paragraph 14 of Arendse, it was held that the moratorium on legal proceedings is central to the business rescue process since it provides ‘*breathing space*’ to enable the company to restructure its affairs (see also Chetty t/a Nationwide Electrical v Hart and Ano NNO 2015 (6) SA 424 (SCA) at paragraph 29 and Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) 2017 (4) SA 51 (WCC) at paragraph 41). This allows the BR Practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process without the distraction of having to deal with legal proceedings. It was also held as follows at paragraph 15:

“But the moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue. It is intended to be of a temporary nature only and cannot be utilised to indefinitely delay satisfaction of the claims of creditors; or result in the extinguishment of the claims of creditors ...”

41. The broad '*interests of justice*' test postulated in Arendse does not require that the Court in proceedings of this kind finally determine the merits of the proposed cause of action to be pursued by the applicant. Nor does it require the presentation of conclusive or comprehensive evidence in support of the proposed cause of action. I am of the view that at most what section 133(1)(b) requires is that the applicant presents a *prima facie* case. The interpretation and application of section 133(1)(b) also require that recognition be given to the applicants' right of access to court entrenched in section 34 of the Constitution (Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) 2017 (4) SA 51 (WCC) at paragraph 41).

42. Only the setting aside of the BR Plan in the Proposed Action is relevant to this aspect of the application. The respondents submit that this application and the Proposed Action do not involve an enforcement action against the Company, nor is it in relation to any property belonging to the company, or lawfully in its possession, as specified in section 133(1). With that submission there can be no quibble.

43. The respondents contend that it is apparent from the wording of section 133(1) that the moratorium against legal proceedings against a company in business rescue relates to an enforcement action or actions in respect of property in the company's possession.

44. That is, however, in my view, too simplistic. The pertinent question is whether, despite not falling within either of the instances specified in section 133(1), the relief to be sought in the Proposed Action for the setting aside of the BR Plan is nonetheless still covered by the section 133 moratorium.

45. I think that there is a flaw in the respondents' contention in that it identifies the two specific instances mentioned in the provision but does not afford any or sufficient recognition to the wording of more general import which precedes and follows them: "During business rescue proceedings, no legal proceeding, including [the two specified instances] may be commenced or proceeded with in any forum, except ..."

46. The interpretation of the provision and where the leave of the Court is required has been considered in a number of decisions, not all of which are consistent. I think that in order to assess whether leave is required in terms of section 133:

46.1. Regard must be had to the overall purpose, structure and ambit of the section 133 moratorium in the context of the business rescue construct introduced by the Act.

46.2. Once that is done, then to identify whether or not the action and the relief sought in the proceedings in question (i.e., in this instance, the relief to set aside the BR Plan in the Proposed Action and this application itself) fall within the ambit of that moratorium.

47. As pointed out in paragraph 14 of Arendse, the moratorium on legal proceedings is central to the business rescue process since it provides ‘*breathing space*’ to enable the company to restructure its affairs. This allows the BR Practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process without the distraction of having to deal with legal proceedings. This was described as follows by this court in Land and Agricultural Development Bank of South Africa v Lazercore Eight(Pty) Ltd and Others [2024] 3 All SA 273 (WCC) at paragraph 39.1:

“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.”

48. Three observations occur to me to flow from this:

48.1. If business rescue or a business rescue plan is invalid and falls to be set aside, it would be an exercise in contradiction to regard it to require breathing space. On the contrary, to extend the metaphor, it would be more appropriate to take the patient off oxygen (or life support).

48.2. In relation to, and in support of, the respondents' argument that leave is not necessary, the relief sought in this application does not affect that breathing space because it does not involve a claim in respect of the assets or affairs of the Company and has no effect on its substratum.

48.3. In relation to and in support of the applicants' argument that leave be given (if required), the facts of this matter illustrate that the Company and the BR Practitioner have had, at risk of vast understatement, more than sufficient breathing space.

49. The respondents cited examples of relief against the Company or BR Practitioner not requiring leave:

49.1. The setting aside of a resolution placing a company into business rescue: In Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and Others (10862/14) [2015] ZAKZPHC 21 (20 March 2015) it was held as follows at paragraph 13:

“This application challenges the business rescue proceedings on the substantive ground that such proceedings have come to an end. Furthermore, s130(5) and by way of another example, s132(2)(a)(i) permit applications to court to set aside a company's resolution to begin business rescue proceedings without rendering the sections subject to the leave of the court being granted in terms of s133. Nor is there any rider in s133 qualifying applications brought under those sections.”

49.2. In Oakbay, it was held at paragraph 13 that no leave was required from a court in order to seek the removal of a business rescue practitioner.

49.3. As another example, were a party to seek the liquidation of a company under business rescue in terms of the provisions applicable to business rescue, the leave of the Court is not required. In this regard it was held as follows in Cordeiro Holdings CC and Others v Market Demand Trading 254 (Pty) Ltd and Others (2016/24747) [2016] ZAGPJHC 284 (6 September 2016) at paragraphs 12 and 13:

“[12] The applicants (now minus Spar) want the setting aside of the resolutions, and with them out of the way, a winding up of the two companies, alternatively, Choonilall ought to be ordered to give security, if the business rescue of Rich Rewards is to continue.

[13] They also sought leave to sue in terms of section 133(1)(b) which provides that a court's leave is needed to sue a company in business rescue. In the hearing it was argued they did not need that by virtue of the provisions of section 130(5)(c) which expressly refers to a conversion to winding up proceedings. However they had not cited section 130(5)(c) in the notice of motion. I am of the view that they need not invoke section 133(1)(b) to seek the relief sought, because section 130(5)(c) read together with section 133 implies that section 133 does not apply to the setting aside of a resolution or the conversion into liquidation proceedings. Moreover, the omission of an express allusion, in the notice of motion, to section 130(5)(c) as the provisions in terms of which the winding up is sought, in the context of the relief sought as a whole, is of no moment because it is obvious to the informed reader that section 130(5)(c) is envisaged.”

50. In my view, the common thread in these authorities is that the relief sought in which it was held that leave in terms of section 133 was not required is that the relief related to the business rescue itself or aspects thereof as opposed to aspects of the ordinary affairs, business or assets of the company in question. This feeds into the

underlying purpose of the moratorium which is to provide ‘breathing space’ to a company in business rescue. On the other hand, an invalid business rescue plan, for example, should not be provided breathing space and, on the contrary, should rather be set aside.

51. Therein, I think, the guiding principle ought to lie to determine on which side of the line a particular case falls: If the proceedings involving the company relate to the business rescue itself or aspects thereof, then leave is not required (these may be referred to as aspects relating to the business rescue itself). If the proceedings relates to the ordinary affairs, assets or business of the Company itself, leave is required (these may be referred to as aspects relating to the affairs of the Company itself).

52. In a decision of this court, Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) 2017 (4) SA 51 (WCC), it was held as follows:

52.1. At paragraph 24: “Inasmuch as the proceedings in this matter concern a claim by the applicant for payment of a sum of money (which formed part of a claim which was admitted and included in the rescue plan), it is common cause that they constitute an “*enforcement action*” within the meaning of the provision under discussion. As such, on the face of it these proceedings required either the written consent of the practitioner or the leave of this court before they could be “*commenced*” or “*proceeded*” with.”

This is uncontroversial, I mention it as a further illustration of what clearly falls within the proper ambit of the moratorium provided for under section 133 of the Act.

52.2. At paragraph 29: “In the various conflicting judgments on the issue divergent views have been expressed ... as to whether or not proceedings pertaining to the implementation of a rescue plan are covered by the terms of s 133 and also require either the prior consent of the practitioner or the leave of the court, or not. The divergent judgments are broadly split between the

South Gauteng and Kwazulu-Natal divisions on the one hand, and the North Gauteng division on the other.”

52.3. At paragraph 3: “... in *Moodley v On Digital Media (Pty) Ltd and Ors* [2014 (6) SA 279 (GJ)], a minority shareholder of a company in business rescue sought leave from the South Gauteng division to proceed with an application interdicting the company from implementing certain transactions which it was claimed were contrary to the business rescue plan which had been adopted. The court held that proceedings pertaining to the development, adoption and implementation of a business rescue plan, and its interpretation, did not fall within the ambit of s 133 and the consent of the business rescue practitioner or the leave of the court was thus not required for such proceedings.”

I believe that this ties up and is compatible with the considerations which I have mentioned above to be used to inform the guiding principle in this regard.

53. However in paragraph 34 the Court in *Booyesen* held: “Applicant’s counsel urged me to accept the reasoning and decision in *Moodley* but, after due consideration I am, with respect, not persuaded that its ratio can withstand scrutiny and for the reasons that follow hereinafter I do not believe that it was correctly decided. But it has subsequently been endorsed [*Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and Ors* [2015] ZAKZPHC 21] or followed [*Hlumisa Investment Holdings (RF) Ltd and Ano v Van der Merwe NO and Ors* [2015] ZAGPHC 1055 at paragraph 17] in a number of decisions.

53.1. And in paragraph 57: “As far as the decision in *Moodley* is concerned, the *ratio* appears at para [10] of the judgment. It is stated therein that inasmuch as it is the business rescue practitioner who must develop and implement the business plan (once it is adopted), and it is the company which must take all necessary attempts to satisfy any conditions on which the plan is contingent and which must thereafter implement the plan under the direction of the business rescue practitioner, any legal proceedings which seek to give

effect to such plan (ie to implement it) will be legal proceedings which must be instituted against *both* the business rescue practitioner and the company, and are thus not legal proceedings against the *company* within the meaning of s 133(1). To my mind and with all due deference, the distinction which is sought to be made is an artificial one. Any plan which is adopted and which needs to be implemented by a company in business rescue, is a plan which belongs to that company and the business rescue practitioner merely seeks to give effect thereto as the manager in charge of the company. To this end, the business rescue practitioner steps into the shoes of the board of the company and its management during the period when it is temporarily under supervision for the purposes of business rescue. But, any proceedings taken in relation to such plan ie to set it aside or to enforce its implementation, are proceedings taken against the company, which is represented by the business rescue practitioner and, to my mind, there is no justification in seeking to distinguish such proceedings or to hold that they are not the kind of proceedings covered by the provisions in question." [underlining added]

54. Booyesen, especially the underlined portions in paragraph 57, therefore appears to be direct authority to the effect that leave would be required in this matter. Mr Muller, who appeared with Mr van Reenen for the respondents, submitted that this aspect of the decision in Booyesen was *obiter* because that matter concerned a claim for payment by a creditor for commissions earned prior to the company in that matter having been placed in business rescue, which is an 'enforcement action' specified in section 133(1) and therefore did not concern a question beyond the two instances specified in section 133(1). I agree with Mr Muller. Booyesen is thus not binding in this respect and I am in a position to conclude as I have postulated above in regard to a guiding principle, which I hereby do.

55. What is relevant for the purposes of the leave in terms of section 133 is the setting aside of the BR Plan. In my view this falls on the side of the line of aspects relating to the business rescue itself referred to above. In my view, therefore, it does not require the leave of the court in terms of section 133.

56. If I am wrong in this respect, and that leave is required, I believe that in this matter that question would depend largely and effectively on whether a *prima facie* case is made out for the setting aside of the BR Plan. Therefore, in the circumstances of the findings below, I consider that, were leave in terms of section 133 to be required (which I think it is not), it should and ought to be granted.

The second issue: the interdict sought against filing a certificate of substantial compliance with the business plan

(a) Requirements for an interim interdict

57. It is trite that the requirements for an interim interdict are:

57.1. A *prima facie* right (established but open to some doubt).

57.2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted.

57.3. A balance of convenience in favour of granting the interim relief.

57.4. The absence of any other satisfactory remedy.

58. In addition, the Court has an overriding discretion to refuse to grant an interim interdict.

(b) Whether the interim relief is final in effect

59. Respondents contend that the Proposed Action and appeals may take years to conclude, keeping the Company in a state of limbo which would exist for years which is a final effect.

60. The respondents contend that the interdict sought is final in effect because it will probably maintain the business rescue in place for a matter of years.

61. The business rescue will simply continue and will either come to an end or not at some point. In my view, there is no final effect.

62. Mr Muller stressed that from now the litigation to final appeal could take four or five years. I asked Mr Muller whether this need be considered in context: while this time factor raised by the respondents may be so, it is to be considered in the light of the fact that the BR Plan has been in existence for over four years already with no substantial commercial success and, on the contrary, in my view, has been a failure. I also raised with him that the Proposed Action could be referred to a Judge in terms of Rule 37(8) to promote the effective conclusion of the matter and with a view to procuring a date for hearing as close as possible to within a year. Mr Muller appeared to acknowledge these factors.

63. This time factor inducing finality to the interdict sought raised by the respondents therefore seems to me to not have any merit in the circumstances and, in my view, is not a final effect.

64. Mr Muller referred to two cases establishing the principle of finality in effect as argued by him (Fourie v Uys 1957 2 SA 125 (C) and Capetex Engineering Work (Pty) Ltd v SAB Lions (Pty) Ltd 1968 (2) SA 528 (C)). That principle is trite. These cases concern good examples which illustrate this principle of final effect, involving in Fourie an interdict against ploughing certain land, and in Capetex a final decision as to whether there is a lien. In my view those examples are in contradistinction to what prevails in the instant matter and illustrate that the interdict sought therein is not final in effect.

65. I am therefore of the view that the test to be applied in this matter is that for an interim interdict which, in respect of the right to be protected, is that of a *prima facie* right.

(c) Prima facie right

66. The Applicants' alleged *prima facie* right is in respect of the relief sought in the action for the setting aside of the BR Plan. The main question in this matter is whether a *prima facie* case is made out for that relief.

67. The corollary (or flip-side) of this is that, if an applicant's main case or claim is hopeless, an interim interdict pending the determination of that case will not be granted. One of the respondents' main argument is that the relief proposed by the applicants for the setting aside of the BR Plan to be sought in the Proposed Action is not good in law. Put another way, as this turns on a point of law, that it is excipiable. In this regard the respondents, in my view, correctly, rely on *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC)* in which it was held as follows at paragraph 91:

“A good analogy is when an applicant at risk of harm seeks an interim interdict. When the facts are unclear, the interdicting court must weigh prospects, probabilities and harm. But when the respondent, who is sought to be interdicted, has a killer law point, it is just and sensible for the court to decide that point there and then. The court is in effect ruling that, whatever the apprehension of harm and the factual rights and wrongs of the parties' dispute, an interdict can never be granted because the applicant can never found an entitlement to it.”

(d) Prescription

68. The relief to set aside the BR Plan sought by the Applicants in the Proposed Action relates to events which occurred concerning the adoption of the BR Plan, which occurred on 13 March 2020. This application was launched in December 2023. The respondents note that the events which are relied upon to found the relief sought occurred more than three years before this application was launched (and therefore when it was served).

69. The respondents submit that the relief sought in the Proposed Action, to the extent to which it is competent, relates to claims which have prescribed prior to this application being launched and, it therefore follows, prior to the Proposed Action, which is yet to be instituted, more so in respect of the claims based on the allegation that the BR Plan was induced by fraud.

70. The problem I perceive with these submissions is that what prescribes in terms of the Prescription Act 68 of 1969 is a “debt” and what is sought to be claimed in the Proposed Action (in particular, the setting aside of the BR Plan) is, it appears to me, not a debt.

71. In my view, therefore, the respondents’ case as to prescription fails insofar as the interim interdict is concerned.

(e) The purpose of business rescue

72. In terms of section 128(1)(b)(iii) of the Act, the primary purpose of business rescue is to enable the business rescue practitioner to prepare and implement 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’.

73. The following summary of the nature, purpose and intended duration of business rescue is provided in Henochsberg on the Companies Act:¹

¹ Certain portions of quotations and extensive references to authorities have been omitted.

““Business rescue” is defined as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for: (1) the temporary supervision of the company, and of the management of its affairs, business and property; (2) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession ... and it is temporary and not intended to be a long-term debt management plan: ... or to extinguish the debts of a secured creditor: the development and implementation (if approved) of a plan to rescue the company by restructuring its affairs, business, property, debt, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if that is not possible ... a plan that would achieve a better return for the company’s creditors than the payment they would have received if the company had simply been liquidated immediately. Although the purpose of business rescue proceedings is stated as being “proceedings to facilitate the rehabilitation of a company”, no definition of the term “rehabilitation” is provided in the Act. The term would appear to intimate the recovery of the company to complete solvency (this is reinforced by the use of the words “continuing in existence on a solvent basis” in para (b) (iii), as was the case under the now repealed corporate rescue mechanism of judicial management (contained in the then Chapter XV of the Companies Act 1973). However, in terms of the definition it is clear that if the ultimate rescue of the company is not possible then an outcome that ensures a higher return for creditors than they would have received under liquidation, is also acceptable because if the dividend sought to be achieved in terms of the business rescue plan is realised, the applicant would then be “rescued” as envisaged by s 128 (1) (b) (iii) and (h) as the dividend is better than that which would have been achieved in the case of a liquidation:”

“The Act also envisages a short term approach to the financial position of the company and that the business rescue should be a speedy process: There must be a measure of certainty in the commercial world and creditors cannot be left in a state of flux for an indefinite period: Francis Edward Gormley v West City Precinct Properties (Pty) Ltd 19076/11 (WCC): 18 April 2012 para 11. Where an extraordinary amount of time is taken with the

business rescue, it should not be at the expense of the rights of creditors and the balancing of the rights, to return the company to solvency or to facilitate a better return for creditors and shareholders on the one hand, and the rights of creditors on the other hand, should always be paramount in the ambit of fairness: South African Bank of Athens Ltd v Zennies Fresh Fruit CC and a related matter [2018] 2 All SA 276 (WCC), 2018 (3) SA 278 (WCC) para 38. “It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings – however dubious might be their prospects of success in a given case materially affects the rights of third parties to enforce their rights against the subject company”:” [emphasis supplied]

74. From this passage and the authorities relied upon therein, the following principles can be extracted:

74.1. The purpose of business rescue is to rescue a company or, if that is not possible, achieve a better return for creditors and shareholders than would be the case in liquidation.

74.2. The interests of creditors, amongst other factors, is important in business rescue.

74.3. Business rescue should be concluded expeditiously and should not result in creditors being left in a state of uncertainty for a long or indefinite period of time.

(f) **Whether there has been substantial implementation of the BR Plan**

75. Section 152(8) of the Act provides as follows:

“When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.”

76. The following is stated in Henochsberg in this regard:

“No definition of the term “substantially implemented” has been included under Chapter 6. However, it is submitted that the plan will have been substantially implemented once the business rescue practitioner has taken all necessary steps to satisfy the conditions on which the business rescue plan is contingent, and has completed all his obligations in terms of the provisions of both Chapter 6 and the approved business rescue plan. According to *Arqomanzi Proprietary Limited v Vantage Goldfields (Pty) Limited and Others* [2019] JOL 46430 (MM) para 106 this does not mean that everything that was set out to be implemented was indeed implemented (unaffected by *Arqomanzi (Pty) Ltd v Vantage Goldfields (Pty) Ltd and Others* [2021] JOL 50546 (MM); *Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd* [2022] JOL 56902 (SCA), 2023 (4) SA 568 (SCA)). The threshold the Act provides is substantial implementation, which necessarily implies that although the plan has been substantially implemented some steps may still need to be implemented. However, in *Meatworld Factory CC v ET Trading House (Pty) Ltd and Another* [2019] JOL 45224 (GJ) para 14.8 the requirement of substantial implementation was interpreted to mean that the business rescue plan as approved must have been finally executed. This wide interpretation may not be correct because after compliance with conditions and compliance by the business rescue practitioner with his/her obligations in terms of the business rescue plan, he/she is functus officio and has no role to play in the execution and/or enforcement of the plan. ‘In determining whether the plan has been substantially implemented, the court should adopt a sensible interpretation of the documents placed before it, without attempting to analyse the plan in such detail that the scrutiny under which it is placed results in the

plan having no practical effect and the aims (in s 7 (b) (i) and s 7 (k) are best achieved by affording a practitioner the necessary time and breathing space to return a distressed business to an even keel. This is certainly not suggestive of an open-ended opportunity to turn affairs around. On the other hand, a premature end to business rescue, more often than not, could plunge a business into insolvency rather than achieving an efficient rescue': Airports Company South Africa Ltd v Spain NO and Others [2020] JOL 48363 (KZD), 2021 (1) SA 97 (KZD) paras 30–31 and see s 133 sv Subsection (1) (b) for an application for a court order to compel the business rescue practitioner to act to terminate the business rescue as contemplated in s 132 (2) (c) (ii).” (emphasis supplied)

77. In my view, the legal position relevant to the instant matter includes the following:

77.1. The purpose of business rescue is to restore the solvency of a company or achieve a better return for creditors than in liquidation.

77.2. Substantial implementation occurs when effect has been given to the business rescue plan while the Company and its affairs are under the control of the BR Practitioner. By that I understand that what has been contained in the plan has been substantially implemented. I do not understand it to be the business rescue practitioner putting the plan in place and not being involved at all in the process of its successful implementation.

78. I think that the position in the above sub-paragraph would resolve the apparent tension in the cases between substantial implementation requiring that the plan as approved must have been finally executed, on the one hand, and, on the other, that the plan simply be set up to proceed.

79. One further aspect bears mentioning:

79.1. SARS is owed over R20 million by the Company. With interest, it may be that this figure is possibly somewhere between R30 million and R40 million, although no figures have been provided.

79.2. On the respondents' own version, until this has been resolved, the business rescue cannot be concluded, by which I understand them to mean that until then the business rescue has not been 'substantially implemented'. I raised this with Mr Muller and he appeared to agree.

79.3. On 26 June 2023 the BR Practitioner recorded as follows: "I can confirm that I am currently engaging with SARS in regard to a compromise on the outstanding amounts ... Once I have finalised compromise with SARS, it will pave the way for further investment into the company."

79.4. Further emails were sent in this regard by the BR Practitioner in March 2024, months after this application had been launched. The answering affidavit was signed on 27 March 2024 and the situation with SARS had still not changed.

79.5. In my view, therefore, the business rescue plan has therefore not been substantially implemented some four years after it was adopted. I believe that this was not a conclusion which was contested with any vigour by Mr Muller.

79.6. On 12 August 2024, two days before the hearing of the application, the respondents delivered an application to file a further affidavit, seeking to raise two issues, one of which was that SARS had communicated on 7 June 2024 that it could not now consider a compromise because of a possible future liquidation. This was more than two months ago. No explanation was provided for why the application for leave to file the further affidavit was not launched earlier. The applicants did not object and I allowed the affidavit. Be that as it may, I consider the affidavit in this respect not to be of any assistance to the respondents and, on the contrary, to be something of an own goal amounting to a further perpetuation of the failure to resolve this R30 to R40 million problem which has undermined the business rescue for over four years. Yet,

the respondents, with no regard for the complete lack of progress on this front for over four years, now contend that this application is somehow the only aspect preventing the resolution of this issue. I asked Mr Muller whether the Company needed business rescue from its business rescue and he had no response besides to appear to recognise the irony and incongruity.

80. The respondents contend that the BR Plan has been substantially implemented, save for the SARS issue. They refer to clause 24 of the BR Plan which refers to three conditions for substantial implementation. In my view these conditions are required for substantial implementation, but are not sufficient for it. They are less in content, for example, than the numerous steps contained in clause 14 of the BR Plan. This approach of the respondents also disregards the actual affairs of the Company which are to be managed by the BR Practitioner through the 'breathing space' to a point where the Company and the commercial plan for it in the BR Plan are set on an 'even keel'. As stated in Henochsberg quoted above, 'to return a distressed business to an even keel'.

81. In my view, a position in which the BR Plan has been substantially implemented has not been reached in this matter on the following high-level bases:

81.1. The SARS issue referred to above on the basis of which there has not been substantial implementation of the BR Plan.

81.2. The core purpose of the business rescue was to afford the Company time to achieve certain specified revenue and profit levels: the '*breathing space*' referred to in the cases in which the Company and its affairs are under the control of the BR Practitioner.

81.3. I consider that it must be implicit in this that there would be some material progress in the business of the Company in business rescue (after all it is the *business* which is subject to the *rescue*) and, further, which would be to some material benefit to the creditors who had had their vast claims converted to equity in the Company in terms of the BR Plan (there is no need

to quantify this in principle because there has been no material benefit). As pointed out by the first applicant:

“The business rescue plan contemplated that Cambridge Services would be trading successfully and profitably to the extent that significant dividends would be paid to affected persons ... None of that has occurred ... No tangible benefit has accrued to any of the affected persons of Cambridge Services.”

81.4. This has not been achieved in any respect. It seems to me that the BR Plan has failed miserably for more than four years. One would expect details to have been provided by the respondents in the answering affidavit as to current work in progress and what will likely be earned from it. The averments in the answering affidavit in this regard are, in my view, vague in the extreme with no concrete details, for example, as to actual work or projects in progress or anticipated income streams or even resources and staff employed (besides the fifth respondent).

81.5. In the answering affidavit, the BR Practitioner asserts previous reports attached to the answering affidavit, the latest dated 21 December 2023, but none of them provide any detail in this regard as to operations.

81.6. The revenue and profit projections in the BR Plan have not been achieved in any material respect. Much or even most of the revenue and profit achieved, negligible in the relative context of the lofty projections in the BR Plan, consists of the interest on the loan from fifth respondent in respect of which there is no indication that it was in fact paid and received (I have little doubt that it was).

81.7. I am of the view that there has in fact been an almost complete, if not complete, failure in this regard.

81.8. On the contrary, what the BR Plan has so far achieved is to exonerate, protect and quarantine fifth respondent from claims against him (besides his

liability in respect of his loan from the Company) and possibly also, as argued by the applicants, including liability in terms of section 424 of the Companies Act 61 of 1973, clause 27 of the BR Plan providing as follows:

“Should the Creditors approve the Business Rescue Plan, the payment under the Business Rescue Plan as set out above by way of a capitalisation of loans will be in settlement of their claims against the Company, group company/entity, shareholders and directors and the directors shall be released from any personal sureties entered into up to the date of the filing of the notice of substantial implementation.”

81.9. The other aspect of the further affidavit which was sought to be filed by the respondents two days before the hearing, is to aver income ‘from services rendered for a six-month period’. The details provided are vague, including an averment that after tax profit of R10 million was made. I do not consider this late affidavit to be of any material assistance to the respondents. Mr Hartzenburg submitted that this affidavit illustrates that from 13 March 2020 the company did very little for over four years, effectively passing time with nothing of substance happening to get through the business rescue and that it was only in 2023, when the applicants started making enquiries, and launched this application, that some activity was stimulated. I consider there to be some force in this submission. This was reinforced by an affidavit of the third applicant which was delivered by agreement at the hearing on 14 August 2024 in response to the respondents’ affidavit which was delivered on 12 August 2024 in which various problematic aspects were pointed out, such as the absence of any management accounts, why nothing of substance had been achieved previously and that once a notice of substantial implementation has been filed there would be no real incentive for the fifth respondent to remain with the Company. Even more importantly, no level of detail was provided to justify the projections of very substantial future profits which is effectively a repeat of what was projected and represented almost five years ago. An affidavit of a forensic auditor was also delivered in which it was pointed out that no attempt was made to substantiate the projections with any form of calculation of source documentation.

82. I am therefore of the view that there has not been substantial implementation of the BR Plan and, accordingly, the BR Practitioner may not file a notice of the substantial implementation of the business rescue plan at this stage.

83. That, however, is not the full answer to the issue of a *prima facie* case in this matter. This is because while it may be that the BR Practitioner may not file a notice of the substantial implementation of the business rescue plan at this stage, this does not mean that this will extend until the determination of the Proposed Action. For that relief pending the determination of the Proposed Action, a *prima facie* case must be made out for the relief sought in the Proposed Action as to the setting aside of the BR Plan. That question is considered below.

(g) Whether fraud is a basis competent in law for the setting aside of a business rescue plan

84. The applicants rely on the principle that ‘*fraud unravels everything*’ (*Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1991 (1) SA 648 (A) at 658J – C, *Intongo Property Investment (Pty) Ltd and Another v Groenewald and Others* 2022 (2) SA 543 (WCC) at paragraphs 25 to 27).

85. In response, the respondents argue that fraud, even if established, does not simply result in all the consequences of an action being set aside which must be assessed, citing *Absa Bank Limited v Moore and Another* 2017 (1) SA 255 (CC) at paragraph 39:

“... The maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.”

86. The respondents argue that a case based on fraud for the relief to be sought in the Proposed Action is not legally competent because it can only be granted on the basis of remedies specifically provided in the Act. They argue as follows:

86.1. Section 152(4) provides as follows:

“A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company’s securities, whether or not such a person-

- (a) was present at the meeting;
- (b) voted in favour of adoption of the plan; or
- (c) in the case of creditors, had proven their claims against the company.”

86.2. Henochsberg states in respect of Section 152(4):

“This provision is often referred to as a “cram-down” provision in other jurisdictions, as it binds not only the company to the provisions of the approved business rescue plan but also all the creditors and the holders of the issued security of the company: ... This includes creditors, and/or holders of the company’s securities subject to s 146, whether they were present at the meeting or not but voted against the adoption of the plan, and, in the case of creditors, also those who did not prove their claims against the company. This is a strange provision, as a person who was not present at the meeting cannot vote against the business rescue plan. However, the provision that the business rescue plan will also be binding on eg creditors who were not present at the meeting cannot, it is submitted, also be applicable to known creditors who did not receive notice of the meeting and should only apply to persons who were notified and were entitled to attend but who chose not to do so: ... The application of sub-s (4) is nevertheless subject to s 134 in respect of the rights of a creditor in respect of security over the property of the company (see s 134 sv Subsection (3) but cf ABSA Bank Limited v Du Toit and Others 7311/13, 13 December

2013 (WCC) where this was apparently not considered).” [emphasis supplied]

86.3. This issue was also addressed in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP) at paragraph 59:

“Returning to the question of whether it is permissible for the Bank to challenge the adoption of the plan, it is clear from a reading of ch 6 of the Act that it does not provide a remedy to an affected person to challenge the approval and adoption of a proposed business rescue plan, regardless of whether such approval and adoption are preliminary or final. The adoption of a business rescue plan in terms of s 152 of the Act is pivotal to the business rescue process. Once adopted, the practitioner is required to manage and conduct the affairs of the company in accordance with the plan. The practitioner is responsible for the implementation of the business rescue plan: this task is not left to some other authority. Nor, for that matter, is there any need for court approval of the business rescue plan. Accordingly, once adopted or approved in terms of s 152 of the Act, a business rescue plan forms the foundation of the business rescue proceedings to which all the affected persons are bound, It is binding on the company, on each creditor and on every holder of securities of the company, whether or not that person was present at the meeting, voted in favour of adoption of the plan or, in the case of creditors, had proven their claims against the company. What occurs is a process of 'cramdown' in terms of which creditors are forced to accept a business rescue plan, even against their wishes - thus enabling the business rescue to proceed, despite objections by disgruntled creditors. It is with this object in mind that the legislature saw fit not to provide a disgruntled party with a judicial remedy to seek to set aside the adoption of a business rescue plan. It is, therefore, not open to any ‘affected person’, after the plan has been adopted, to seek to set it aside. Nor is it permissible for an ‘affected person’ to seek to set aside the proceedings of the second

meeting of creditors in terms of which a business plan is adopted.”
(emphasis supplied)

86.4. For the applicants to succeed with such a common law claim they must first establish that the Act permits the reliance on the common law as a basis to set aside a BR Plan.

86.5. In assessing whether a common law ground would constitute the basis for such a claim, regard must be had to the statute. If the statute deals with the matter, either expressly or by implication, then the consequences as set out in the statute apply and the common law would find no application: Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another 2014 (4) SA 521 (WCC) at paragraph 37 and following.

86.6. The provisions of the Act, and in particular section 152(4), set out that a BR Plan adopted at a meeting, firstly, binds all creditors even if they voted against the adoption of the plan and, secondly, that the BR Practitioner is obliged to implement the plan (section 152(5)).

86.7. The Act therefore sets out explicitly that in the event that a business rescue plan receives the required votes, it binds all creditors and the business rescue practitioner is obliged to implement that plan.

87. The respondents contend that there is no preservation of common law rights or remedies in the Act, while its other provisions (notably section 154) indicate that a creditor, upon the adoption of a business rescue plan, loses any right to challenge the adoption of that plan.

88. They also contend that no authority has been cited by the applicants for the proposition that a duly adopted business rescue plan can be set aside on the grounds of fraud. That seems to be correct, but it does not mean that it cannot, but rather that it is a novel question of law.

89. I am inclined to disagree with the respondents' submissions:

89.1. Paragraph 37 of Tuning Fork relied on by the respondents reads as follows (the first sentence of paragraph 38 is included as well for contextual meaning):

“[37] A distinction must, in my view, be drawn between a legal consequence dictated by the terms of a statute and a legal consequence determined by the common law in response to a statutory event. If the statute deals with the matter, whether expressly or by necessary implication, cadit quaestio; the statute applies, regardless of what the common law might otherwise have determined. If the statute does not deal with the matter, the answer must be sought in the common law, even though such answer might be influenced by the character of the statutory event.

[38] In regard to a release from creditors’ claims pursuant to the new compromise procedure, s 155(9) expressly provides that the compromise does not affect the liability of any person who is a surety of the company.”

89.2. In my view, this does not provide what the respondents submit:

89.2.1. The court was dealing with a statutory provision in the business rescue context in relation to a surety which changed the common law position in relation to the effect on the liability of a surety when the principal obligation is discharged (from discharging the surety to not discharging the surety). The court held that once that is the effect of the statutory provision, then the common law position falls away. That, to me, is uncontroversial.

89.2.2. It, however, is not, in my view, what is in issue in the instant matter which involves whether a business rescue plan actuated by fraud can be set aside. The application of fraud as a common law concept is not removed by the Act.

89.2.3. The fact (or legal position) that a validly passed business rescue plan is binding on all creditors means simply that as long as it is in place it is so binding. That is a different issue to whether it can be set aside and on what basis that can happen. The respondents appear to conflate these two concepts.

89.3. I think that the respondents go a step too far in suggesting that a business rescue plan is immune from being set aside on the basis of fraud because it is provided in the Act that the plan is binding (I leave aside other grounds because this case did not concern them).

89.4. Mr Muller submitted that the statutory provision (section 152) must be interpreted to determine whether by necessary implication it includes a remedy based on fraud. I asked him to consider whether the correct perspective should rather not be whether by necessary implication it excludes a remedy based on fraud. In this regard:

89.4.1. In Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A) at 613FG it was held as follows:

“It is trite law, moreover, that statutes in derogation of the common law are to be strictly construed. The common law will be displaced only where the terms of the statute are irreconcilably opposed to the common law. That approach, in the context of the present exception, harmonises with and follows another cardinal principle of our law: that the jurisdiction of the Supreme Court is not to be ousted unless by the express language of, or an obvious inference from, a statute.”

89.4.2. Further in this regard, reference was made in Fey to Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) at 502G:

“... the Court’s jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication.”

89.5. I think that the above (especially the *dictum* in Welkom) resolves the debate on perspective referred to above against that submitted by Mr Muller. In other words, reliance on fraud must be excluded by necessary implication, as opposed to included by necessary implication.

89.6. Mr Hartzenburg submitted that there is no clear indication in the Act of the ouster of reliance on the alleged fraudulent conduct (Fey at 609G-613I).

89.7. Mr Muller submitted that business rescue is a new concept which does not change the common law and therefore the situation is different. In principle, however, I do not think that this detracts from whether fraud as a remedy must be excluded by necessary implication in the statutory provision.

89.8. Further, the respondents’ contention would mean that, even were it to be common cause that the BR Plan was caused to be concluded by means of material fraudulent misrepresentation – even if the business rescue practitioner openly admitted fraud – it would nonetheless remain immune to attack. I believe that such a proposition need only be stated to be recognised as a situation which the law ought not to countenance . Mr Hartzenburg submitted that to interpret s 152(4) of the Act on the basis that once a business rescue plan had been adopted it becomes immune to any and all challenges, even where such challenges are on the basis of fraud in respect of the propriety of the process whereby adoption of the plan was secured, would be tantamount to providing a licence to the unscrupulous to trap creditors and subvert their interests. I tend to agree.

90. In the premise, I conclude that a business rescue plan actuated by fraud may be set aside.

(h) The statutory structure of business rescue plans in the Act and the core and central part played therein by representations

91. I think that it is vital to a proper appreciation of the context in which the alleged misrepresentations were made by first respondent to consider the core and prominent role that representations as to projections and the like play in the business rescue construct. For this reason, the construct of the Act in which these representations are made will be considered and thereafter some observations will be made in regard thereto.

92. The applicable construct in the Act:

92.1. Core and central to the structure of the business rescue construct in the Act and its ability to operate effectively is that representations have to be made to affected persons on the basis of which they must exercise their right to vote in respect of that plan. Especially fundamental are representations as to projections of future income for the next three years.

92.2. Section 150(2) of the Act provides that the business rescue plan must contain all the information necessary to facilitate affected persons in deciding whether or not to accept or reject the plan and that it must be divided into three different parts, with “**Part C – Assumptions and conditions**” providing *inter alia* that such assumptions and conditions must include:

“(iv) a projected -

(aa) balance sheet for the company; and

(bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted.”

92.3. Section 150(3) and (4) of the Act provide as follows:

“(3) The projected balance sheet and statement required by subsection (2)(c)(iv)-

(a) must include a notice of any material assumptions on which the projections are based; and

(b) may include alternative projections based on varying assumptions and contingencies.

(4) A proposed business rescue plan must conclude with a certificate by the practitioner stating that any-

(a) actual information provided appears to be accurate, complete, and up to date; and

(b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.”

92.4. The Act and the business rescue plan establish a decision-making process which must be followed when voting takes place on the adoption or rejection of a business rescue plan. Such plan can only be adopted if more than 75% of the creditors' voting interests voted are in favour of the adoption of the plan and provided further that at least 50% of the independent creditors' voting interests similarly vote in favour of the adoption of the plan (section 152(2) of the Act). The decision-making mechanism is therefore a process involving individual decisions by creditors exercising their voting interests or rights which must reach certain threshold levels as prescribed by section 152(2) of the Act.

92.5. As mentioned above, core and central to this statutory scheme and its ability to operate effectively is that representations are made on the basis of which affected persons vote.

93. Observations:

93.1. As mentioned above, I think that it is vital to a proper appreciation of the context in which the alleged misrepresentations were made by first respondent to consider the core and prominent role that representations as to projections and the like play in the business rescue construct.

93.2. Those representations are the gatekeepers for whether the business rescue should be recommended to proceed, with the gatekeeper in chief being the business rescue practitioner. It is his say-so (particularly in the form of the representations contained in the draft business rescue plan) on which the affected persons rely to cast their votes and which is invariably for all intents and purposes their sole or main source of fundamental information.

93.3. Those representations are grounded in the essential, mandatory (and expected) mechanism in the business rescue construct that the gatekeeper in chief (the business rescue practitioner) conducts a meaningful, thorough and sufficiently in-depth investigation into the affairs of the company in question in order to inform himself/herself to be in a position for him/her (and not someone else) to make representations which he/she is able to make as being correct and which affected persons can use reliably and with confidence to make their decisions in regard to the business rescue.

93.4. I mention this because compliance with this crucial mechanism should not in any respect be reduced to a glib and facile exercise of, largely, repetition of what someone from the company in question, especially one who has a vested interest one way or the other, has told the business rescue practitioner, without the business rescue practitioner having properly and independently satisfied himself/herself as to the correctness and reliability thereof. By independently I mean without effectively relying solely on what someone from the company in question (especially one with a vested interest) has said.

93.5. Absolutely fundamental and crucial, in my view, to this whole exercise, is that affected persons will rely on what the business rescue practitioner represents in the business rescue plan and, crucially, that he/she, as an independent filter between the officer(s) of the company in question (who may, or invariably may, have their own vested interests), has conducted sufficient investigations to place himself/herself in the position to make the representations in question.

93.6. I stress that I believe that it is not only the representations but also the quality, relative independence and reliability of the investigations in regard thereto and informing them which are part and parcel of the representations. The corollary of this is that a business rescue practitioner should not simply take at face value what he/she has been told by the officers of the company.

93.7. I am of the view that this would be greatly magnified in appropriate circumstances, a good example (pertinent to this matter) being where, effectively, one officer of the company is providing the information, has formulated and promoted the proposal in the draft business rescue plan, appears to have much to gain from it and appears to have much to lose without it.

93.8.

(i) The applicants' case as to fraud

94. It is in the above context that applicants' alleged case as to *prima facie* fraud is to be evaluated.

95. Fraud may be committed by a person misrepresenting his/her state of mind, belief or attitude (Rex v Myers 1948 (1) SA 375 (A) at 383 to 384, Vereeniging Consolidated Mills Ltd v Newman and Others 1958 (2) SA 20 (C) at 23AE).

96. "... a dishonest opinion as to a future event may be sufficient to found an action for fraudulent misrepresentation insofar as it falsely reflects the state of mind of the representor ..." (Presidency Property Investments v Patel 2011 5 SA 432 (SCA) at paragraph 28).

97. The applicants contend that the effect of any fraudulent misrepresentations made with regard to a business rescue plan is to impair and corrupt the decision-making process. They contend further that this happened in the instant matter with reference to clauses 14.14 to 14.18 of the BR Plan.

98. Annexures 12 and 13 to the BR Plan contain projected profit and loss statements and balance sheets of the Company for the years 2020 to 2022, respectively. Annexure 14 contains projections of the cash flow of the Company for the years 2020 to 2022. These have been dealt with in the factual exposition above.

99. Part of the allegations to be pleaded in the Proposed Action is that the first respondent in material breach of his certification as contained in the BR Plan, and acting in collusion with the fifth respondent, alternatively aided and abetted by the fifth respondent, incorporated representations (set out in paragraphs 10.5.1 to 10.5.7 of the draft particulars of claim) knowing such misrepresentations and projections and estimates to be false, alternatively in circumstances where neither the fifth respondent, nor the first respondent held any honest belief in the truth and achievability of such representations, projections and estimates, but nevertheless incorporated them into the BR Plan and presented them to affected persons of the Company, including the applicants, reckless as to whether such representations were true or such projections and estimates were based upon facts and/or facts based on realistic and achievable assumptions. It is further alleged that the BR Practitioner, by his conduct, induced affected persons of the Company to vote for the adoption of the business rescue plan.

100. The applicants rely on FirstRand Bank Ltd (t/a Rand Merchant Bank) and Another v Master of the High Court, Cape Town and Others 2014 (2) SA 527 (WCC), Absa Bank Ltd v Moore and Another 2017 (1) SA 255 (CC) and Mosiesa v Master of the High Court, Pretoria 2021 JDR 0135 (GP) as examples of fraudulent misrepresentations grounding a claim. In Mosiesa, a fraudster did not have the requisite authority to pass transfer of a property and, relying on the principle that *'fraud unravels all subsequent transactions'*, this included a subsequent sale to bona

fide purchasers. In Moore, Absa was not directly implicated in the fraud perpetrated by third parties on the Moores but its mortgage bond was nonetheless set aside.

101. The applicants contend that, as in FirstRand, the misrepresentations would have impaired the decision-making process and the resultant voting by creditors.

102. Part of the relief sought in the draft particulars of claim is the setting aside of the BR Plan and its adoption on the basis of fraud. The applicants contend that the vote in favour of the BR Plan was actuated by fraudulent misrepresentation. Collusion between first respondent and fifth respondent is pleaded as part of one of the alternatives pleaded, but I am of the view that it is necessary for that to be considered for the purposes of this application as to whether a case based on fraud and/or fraudulent misrepresentation is made out. This is because, as illustrated by the extract underlined and italicised above, and with reference to the authority cited above in this section, a claim is based on the following:

102.1. The first respondent in material breach of his certification as contained in the BR Plan;

102.2. aided and abetted by the fifth respondent;

102.3. incorporated representations in circumstances where neither the fifth respondent, nor the first respondent, held any honest belief in the truth and achievability of such representations, projections and estimates, but nevertheless incorporated them into the BR Plan and presented them to affected persons of the Company, including the applicants.

103. The facts, considerations and contentions relied upon by the applicants for their submission that they have established a *prima facie* basis for the relief ultimately to be sought in the Proposed Action are very wide ranging and include:

103.1. The applicants were significant creditors of the Company having secured judgment against the Company on 30 April 2019.

Loans to directors being a cause of the Company's problems

103.2. The loans:

103.2.1. The fifth respondent, along with Von Holdt and Botha, secured large loans of money from the Company totalling together more than R230 million.

103.2.2. These loans were on terms which were on any basis extraordinary both in their size and the favourable terms enjoyed by the borrowers. Notably, the loans were only repayable after the lapse of some 15 years and were unsecured.

103.2.3. There is no evidence that any of the borrowers repaid any of the loans or even portions of the loans.

103.3. The inherent probabilities dictate that the granting of such loans by the Company to the fifth respondent, von Holdt and Botha must have impacted upon the solvency and liquidity of the Company.

103.4. On the applicants' version, such loans were prejudicial to the Company and were calculated to subvert the interests of the Company's creditors, including the applicants.

103.5. On the first respondent's and the fifth respondent's version, the loans were motivated by an effort on behalf of the Company to secure and retain the services of the fifth respondent and those of von Holdt and Botha, so-called 'Marlin' loans.

103.6. The motivation advanced by the respondents for the granting of such extraordinary loans to the fifth respondent and Von Holdt and Botha is not borne out by the facts and objective circumstances:

103.6.1. There were no contractual undertakings binding them to the Company, despite the vast and favourable loans.

103.6.2. Von Holdt and Botha have long since left the employ of the Company.

103.6.3. The applicants are presently engaged in action proceedings against Von Holdt and Botha (Rocket Capital) to recover the monies disbursed by the Company to them, as a result of having taken cession of the Company's claims against them when the applicants sought to execute the judgment they secured against the Company.

103.7. The AFS of the Company do not bear out the first and fifth respondents' version of the terms of the loan(s) by the Company to the fifth respondent

103.7.1. The only audited AFS of the Company were those for the 2017 year (which incorporated figures for 2016). The director's report which formed part of those AFS was signed by the fifth respondent on 18 October 2018. The auditors' report by Mazars was similarly signed and dated 18 October 2018.

103.7.2. In the 2017 AFS, the balance of the fifth respondent's loan account in the Company was stated to be R69 485 000. In note 7, the terms of the loan are described in the following terms:

"The loan is unsecured and bears interest at the SARS official rate of interest for individuals per annum (2016: SARS official rate of interest). The loan is repayable on demand. The loan is not expected to be settled in the forthcoming 12 month period."

103.7.3. In none of the Company's other AFS are the terms of repayment of the loan by the Company to the fifth respondent set out in

the terms alleged by the first respondent and the fifth respondent. Save for the 2018 and 2019 AFS, in note 6 of which it is stated that the loan was *'not expected to be settled in the forthcoming 12 months period'*, the remaining AFS do not state what the terms of repayment of the fifth respondent's loan to the Company were.

103.8. The terms of repayment of the fifth respondent's loan are relevant to a consideration of the Company's cashflow as well as its solvency and liquidity. All of the Company's AFS were signed by the fifth respondent in his capacity as a director of the Company. The inconsistent statements made in the documentation concerning the terms of repayment of the fifth respondent's loan to the Company, are also relevant within the context of making an assessment of whether the representations relevant to this matter could have been honestly made.

103.9. No agreements were put up by the first or fifth respondents showing any contractual commitment by the fifth respondent, Von Holdt or Botha to remain employed by the Company, more especially because of the loans of money to them by the Company.

103.10. There is no documentary evidence produced by the first or fifth respondents confirming that the loan by the Company to the fifth respondent *'falls due on 30 June 2034'*, as is stated in Note 'D' at page 11 of the BR Plan.

103.11. The vast amounts and favourable terms of the loans carry with them a red flag as to the cause of the Company's financial problems.

Ascendis and the cause of financial distress

103.12. The first respondent, in paragraph 5.2.7 of the BR Plan, gave a description of the causes of the Company's financial distress which was linked to the collapse of the share price of Ascendis Health. He said:

“The impact of the loss of value on the Company’s indirect investment in Ascendis as a result of the events between December 2016 and 30 November 2019 was R2,7 billion.”

103.13. The only evidence of any actual loss suffered by the Company as a result of a collapse of the Ascendis Health share price is the realised losses of R21 639 000 and R1 848 000 in the 2019 and 2018 AFS of the Company.

103.14. There is no evidence in the Company’s AFS that it had large holdings of Ascendis Health shares.

103.15. The large amounts of money diverted to the fifth respondent and to Von Holdt and Botha (Rocket Capital) cannot be excluded as being related to the financial distress of the Company experienced during 2019.

103.16. An inference is to be drawn that the fifth respondent, in collusion with Von Holdt and Botha, was engaged in a pattern of conduct whereby they diverted monies from the Company to themselves, over a number of years up to 2018, ostensibly as long-term loans, in circumstances where they had no intention to repay such monies, to the detriment of creditors, and in circumstances in which the Company became heavily insolvent.

Auditors

103.17. In paragraph 4.1.7 of the BR Plan it is stated that Mazars were the auditors of the Company, yet the AFS of the Company from 2019 to 2023 were not audited. This raises the obvious question as to why not, the corollary of which is how reliable the information provided by the fifth respondent could be considered to be.

The interests of the fifth respondent

103.18. With the fifth respondent being aware that the applicants had secured judgment against both him and the Company, there was a material risk that

the applicants or other creditors of the Company would take steps to liquidate the Company. Such risk would also have been evident to the first respondent.

103.19. The first respondent when formulating the BR Plan would have, and in fact did have, as one of his objectives the protection not only of the Company but also the fifth respondent.

103.20. It is against that background that the performance and profitability projections incorporated by the first respondent into the BR Plan should be considered.

103.21. The motivation would be to put forward projections which would appeal to the creditors of the Company but at the same time would also result in the protection of both the Company and the fifth respondent.

The representations (especially the projections)

103.22. The first respondent gave a resoundingly positive resumé of the fifth respondent's achievements and skills in the field of mergers and acquisitions in clause 14.14 of the BR plan. It was also against that background that the first respondent proceeded to provide the earnings and profits forecasts in paragraphs 14.15 to 14.21 of the BR Plan, as read with annexures 11 to 14.

103.23. In Part C of the BR Plan, the first respondent was obliged to deal with a number of specific things, including the effect of the plan on the number of employees of the Company and their terms and conditions of employment (section 150(2)(c)(ii) of the Act) and a notice of material assumptions on which the projections were based (a balance sheet and statement of income and expenses for the ensuing three years: section 150(2)(iv) of the Act). Apart from the projections as set out in annexures 11 to 14 of the BR Plan, the first respondent did not include a separate notice of material assumptions on which the projections were based.

103.24. The significant variance between the projections included by the first respondent in the BR Plan and the Company's performance and profitability is sought to be explained by him by the advent of the Covid 19 pandemic. At this stage, a definitive finding on this aspect of the matter is not required to be made which will be a triable issue in the Proposed Action. At a *prima facie* level the following appears:

103.24.1. By the time the first respondent published the BR Plan (5 March 2020), the Covid 19 disease had already received publicity in the media.

103.24.2. On 12 March 2020, the World Health Organisation (WHO) had declared the disease a pandemic.

103.24.3. On 15 March 2020, the Covid 19 pandemic was declared a national disaster in terms of the Disaster Management Act 57 of 2002.

103.24.4. On the probabilities, the first respondent must have been aware of the developments concerning the Covid 19 pandemic, both before 13 March 2020 and at the time when the meeting of affected persons took place to consider the BR plan.

103.24.5. He could not have been oblivious to the potential risk of the pandemic impacting negatively on the business environment generally, at least.

103.24.6. Yet, the first respondent appears to have allowed his optimistic projections in the BR Plan to stand unqualified.

103.25. The magnitude of the failure of the Company to reach the levels of projected performance is indicative of impropriety and the absence of an honest belief in the achievability of the projections. In this context, a representor in the position of the first respondent would have an onerous

responsibility to refrain from making representations to affected persons where there are novel or unfamiliar circumstances which could influence the outcome of what is projected.

103.26. Where the representor himself/herself cannot with confidence know or predict the impact of novel circumstances, it would be fraudulent to make representations and projections of the performance of the business in the future, more especially where such projections are optimistic (Rex v Myers, Vereeniging Consolidated Mills).

103.27. The absence of any assertion by the first respondent that he consulted independent experts to guide and advise him (as opposed to simply following the projections of the fifth respondent, a party with a heavy vested interest in pushing for business rescue) and to explain that he became aware of the Covid 19 pandemic before the BR Plan was considered on 13 March 2020, once again is at best for the first respondent, indicative of some indifference on his part in formulating and especially, presenting, the projections on the Company's future performance and profitability.

103.28. Regard being had to the provisions of paragraphs 14.1 and 27.1 of the BR Plan, the inherent probabilities further suggest that the first respondent was committed to advancing and protecting the interests of the fifth respondent.

103.29. What the applicants seek to protect and secure in these proceedings is their status as creditors of the Company. That would entitle them to apply for the liquidation of the Company on the basis that it is unable to pay its debts. If the BR Plan were to be set aside, the debts owing by the Company to its creditors at the relevant time would be enforceable.

103.30. The tool of investigative interrogations in terms of sections 415 and 417, read with section 418 of the 1973 Act, is only available in respect of a company which is liquidated and is unable to pay its debts. The applicants wish to pursue that in order to recover not only monies of the Company which

had been disposed of in terms of the ostensible loans to the fifth respondent and Von Holdt and Botha, but also assets and funds acquired with the monies thus lent to the fifth respondent and Von Holdt and Botha for the benefit of the creditors of the Company, including the applicants.

104. The respondents point out that the applicants did not raise allegations of fraud at the time that they were prepared to vote on the BR Plan and contend that to seek to set it aside many years later, on the grounds of fraudulent representations causing the adoption of the BR Plan by the creditors over four years ago, itself compels a particularly critical eye to be cast over the allegations. In my view, while this may be so, the facts are what must be considered and this consideration does not detract materially therefrom.

105. The respondents point out that it is trite that a party relying on fraud must plead and prove it clearly and distinctly, and that fraud is not readily inferred, relying on Courtney-Clarke v Bassingthwaighe 1991 (1) SA 684 (Nm) at 689G, Gilbey Distillers & Vintners (Pty) Ltd v Morris NO 1990 (2) SA 217 (E) at 225J-226A and Loomcraft Fabrics CC v Nedbank Ltd & Another 1996 (1) SA 812 (A) at 817GH). The respondents contend that the applicants have not passed that threshold, even on a *prima facie* basis.

106. In my view, on the facts, key aspects to consider in respect of whether there is a case to be met for fraudulent misrepresentation, include (somewhat laboriously, instances of the knowledge of the BR Practitioner which I consider to have been established on a *prima facie* basis are pointed out expressly where applicable, the reason for this being that I consider it to be important to a consideration of his state of mind):

106.1. The BR Practitioner knew that the Company had made vast losses for the years preceding the business rescue (as also pointed out by Chapman). The BR Practitioner knew that it was therefore not Covid-19 which caused loss making to start. This question, and that in respect of Ascendis, are considered further below.

106.2. The BR Practitioner knew the terms of the BR Plan in regard to fifth respondent:

106.2.1. The BR Practitioner knew that fifth respondent was exonerated from liability for the debts of the Company for which he had stood surety. Depending on the interpretation of clause 27 of the BR Plan, he may have also been exonerated from any personal liability, such as in terms of section 424 of the 1973 Act.

106.2.2. The BR Practitioner knew that fifth respondent's continued long term involvement was vital to any prospects of success of the BR Plan which had been proposed by the fifth respondent.

106.2.3. The BR Practitioner knew that, despite this, no contractual commitment to the Company was procured from fifth respondent, aggravated by the fact of the considerable advantage of the BR Plan to fifth respondent and when his involvement was considered vital to the success of its business rescue. In this regard the BR Practitioner stated in his answering affidavit: "It was clear to me that the involvement of the Fifth Respondent was vital ..."

106.2.4. The BR Practitioner knew that the BR Plan bore material advantages for fifth respondent, all based on the projections of very substantial future revenue and profit.

106.2.5. The BR Practitioner knew that the fifth respondent stood to gain substantially from the BR Plan and had every motivation to do what he could for it to be approved.

106.3. The loans to directors:

106.3.1. The BR Practitioner knew that the Company had ostensibly lent extraordinarily large amounts of money, the balance exceeding R250 million, to the fifth respondent, Von Holdt and Botha

(Rocket Capital) in circumstances where the fifth respondent was at all times a director of the Company and its CEO, and Von Holdt and Botha, members of the management of the Company.

106.3.2. The BR Practitioner knew that the terms of these loans were unusually favourable to the borrowers, with notably long repayment dates, and with no security being put up by the borrowers.

106.3.3. The BR Practitioner knew that the averred motivation for the generous terms of the loans, namely, to secure their loyalty to the Company, was not accompanied by any contractual commitment on the part of the borrowers to remain employed by the Company for any extended period of time. The BR Practitioner knew that the Von Holdt and Botha had left the employ of the Company seemingly well before the alleged repayment dates in respect of the monies borrowed by them from the Company.

106.4. The respondents' contend along the lines that, because the effects proper of Covid-19 had not yet set in, the projections cannot be criticised for not having taken the fact of Covid-19 into account:

106.4.1. I consider this to be a highly problematic aspect for the BR Practitioner's case in regard to the interdict.

106.4.2. The BR Practitioner knew that the BR Plan was dated 5 March 2020, which coincides with the date on which the first Covid 19 case was reported in South Africa. The Covid 19 disease was declared a pandemic by the World Health Organisation on 12 March 2020, the day before the BR Plan was approved.

106.4.3. The BR Practitioner knew that Covid-19 and the real prospect of economic uncertainty was a reality in March 2020 when the BR Plan was adopted.

106.4.4. The BR Practitioner knew that at the time when the proposed BR Plan was considered by creditors on 13 March 2020, the risks posed by the Covid 19 pandemic were well known.

106.4.5. The BR Practitioner knew that the projections and representations did not take the possible serious consequences of Covid-19 into account. That was his case. In this regard, the respondents submitted that “The BRP has explained that the projections did not anticipate or take into account the serious economic consequences which flowed and the fact that the business environment in which the Company would operate was severely affected.”

106.4.6. The BR Practitioner knew that by March 2020 the whole world was facing grave uncertainty in the face of the likelihood of a pandemic setting in.

106.4.7. I consider that, if there was a failure to consider the possible or likely serious effects of the looming pandemic, it would be an aggravating factor and a serious deficiency in the investigations and the preparation of the BR Plan on the part of the BR Practitioner.

106.5. The failure of the Company to realise the optimistic projections of the performance and profitability of the Company, in business rescue, on the facts, appears not to be explicable merely by the advent of the Covid 19 pandemic, certainly over such a prolonged period. No case is made out for this.

106.6. The averred impact of the collapse of the Ascendis Health share price:

106.6.1. The BR Practitioner knew that one of the reasons given by the respondents for the Company’s woeful failure to achieve the projections was the decrease in the value of its holdings in Ascendis shares.

106.6.2. The BR Practitioner knew that he was advised of this by the fifth respondent.

106.6.3. The BR Practitioner knew that such holding was, however, negligible. The respondents aver other entities that also held Ascendis shares, but details were not provided nor is the effect thereof on the Company.

106.6.4. The BR Practitioner knew that in paragraph 5.2.7 of the BR Plan, it is alleged that the impact of the loss of value on the Company's indirect investment in Ascendis as a result of events between December 2016 and 30 November 2019 was R2.7 billion.

106.6.5. The BR Practitioner knew that the only losses in this regard recorded in the Company's AFS, were the losses of R21 639 000 and R1 848 000, as shown in the Company's AFS for 2019 and 2018, respectively. As large as they may be, these amounts are not material when compared to the amounts of money diverted from the Company and ostensibly lent to the fifth respondent, Von Holdt and Botha (Rocket Capital), the liabilities to the applicants and Chapman and the vast losses incurred by the Company.

106.7. The BR Practitioner knew that the terms of the BR Plan, and more especially paragraphs 14.1 (conversion of debt to shares) and 27.1 (indemnification of the Company and the fifth respondent against creditors' claims), at face value, appear generous and unusually favourable to especially the fifth respondent.

106.8. The BR Practitioner knew that the fifth respondent must have been aware of the risks to which the Company and also the fifth respondent were exposed at the time to creditors of the Company taking steps to liquidate the Company and to recover the monies which the Company had lent and disbursed to the fifth respondent along with Von Holdt and Botha (Rocket Capital).

106.9. The BR Practitioner knew that he did not consult independent experts to guide and advise him in regard to the projections.

106.10. The BR Practitioner knew that he effectively relied solely on and followed the projections of the fifth respondent, a party with a heavy vested interest in pushing for business rescue. He glibly states in the answering affidavit that “After receiving information from the Fifth Respondent, I formed the view ... In my discussions with the Fifth Respondent and as a result of the information set out in the BR Plan dated 5 March 2020, I formed the view that business rescue was appropriate and there was a prospect that the company could be saved.”

106.11. The BR Practitioner knew that the projections and the business rescue proposal were those of the fifth respondent, paragraph 14.1 of the BR Plan providing as follows:

“In order to generate return of significant value to the creditors, an income structure (together with forecasted (sic) earnings) **has been proposed by the director**, as set out in section 14.15 – 14.18 of this proposal.” [emphasis added]

106.12. The factors in paragraphs 81.2 to 81.9 are material to the overall issue addressed in this paragraph 106.

107. Mr Hartzenburg submitted as follows:

107.1. The facts illustrate that the first respondent relied exclusively on information provided by the fifth respondent. For example, on the first respondent’s own version, he relied in developing the business rescue plan on his interactions with the fifth respondent. Paragraph 14.1 of the BR Plan quoted above is material in this respect.

107.2. Factors set out in paragraph 106 above should have raised red flags for the first respondent in regard to relying effectively only on fifth respondent.

107.3. The BR Practitioner is not an investment expert. Third party advice should have been obtained, a factor which is aggravated because of the fifth respondent's interests.

107.4. The BR Practitioner failed to investigate. No such investigation was explained by the BR Practitioner and no independent advice taken. He effectively relied solely on the fifth respondent.

107.5. The inference to be drawn in the absence of any explanation as to investigations is that the BR Practitioner had 'closed his eyes' and simply accepted what the fifth respondent had fed him.

107.6. It is therefore a triable issue whether the BR Practitioner had in fact formed an honest opinion as to the achievability of the projections or rather just followed them blindly.

107.7. It is therefore a triable issue whether he incorporated representations into the BR Plan in circumstances where neither he, nor the first respondent, held any honest belief in the truth and achievability of such representations, projections and estimates, but nevertheless incorporated them into the BR Plan and presented them to affected persons of the Company, including the applicants.

107.8. It is therefore a triable issue whether his certification of those representations incorporated into the BR Plan were made without being able to reach a reasonable conclusion on their truth and achievability, and therefore whether the fact of that certification was an act which could not have been honestly effected.

108. Some four and a half years after the adoption of the BR Plan, nothing material has been achieved in respect of the revenue and profit projections. There is also the

unresolved SARS issue referred to above. This is in stark contrast to the BR Plan which was concluded on the basis that the Company would have over R200 million in equity by 2023:

“It is expected that at the end of 2023 the equity balance will exceed R200m and the equity value to be north of that (Annexure 13).”

109. Chapman made what I consider to be some telling observations in his affidavit filed as an affected person:

109.1. “I abstained from voting. My abstention stemmed from a lack of certainty regarding the plan’s potential benefits, compounded by my position as a layperson who was not fully informed about its potential negative implications.”

109.2. “It has become evident that the business rescue plan offers no substantial benefit or payment to any of the affected persons, including myself, and is simply a smokescreen to disguise the company’s inability to make reparations. The business plan appears to serve merely as a delay tactic rather than providing a genuine solution for affected parties.”

109.3. “I abstained from voting. My abstention stemmed from a lack of certainty regarding the plan’s potential benefits, compounded by my position as a layperson who was not fully informed about its potential negative implications.”

109.4. With regard to Covid-19, “... the company was already experiencing financial difficulties and failing to achieve profitability even before the onset of the pandemic. Consequently, the invocation of COVID-19 as an excuse is entirely unsubstantiated and lacks credibility.”

109.5. With regard to the projections, “... I am convinced that these proposals and payments will not be realized and appear to be illusory in nature with their purpose being to simply mislead stakeholders.”

110. After the institution of this application, the fifth respondent contacted Chapman after many years of non-communication to solicit his support for the BR Plan which Chapman declined.

111. The respondents contended that it was evident when the BR Plan was adopted that a liquidation of the Company at that stage would have resulted in no benefit whatsoever to creditors of the Company, including the applicants. The applicants contended that a liquidation brings with it the machinery of the Insolvency Act 24 of 1936 ("the Insolvency Act") and that of the 1973 Act referred to above. This is a well-known advantage to creditors in the context of insolvency. The advantages of, for example, enquiries in terms of section 417 and 418 in terms of the 1973 Act are that the Company may have claims against third parties, including the fifth respondent and the enquiry will assist them in attempting to follow the trail of the money. Mr Muller submitted that the applicant could liquidate on the basis of the just and equitable ground and call for an enquiry without setting the BR Plan aside which is unnecessary. The problem I perceived with this submission, was that such an enquiry is only available when a company is unable to pay its debts, but the BR Plan wiped out all of the debt of the Company. There cannot be an inability to pay debt which does not exist. I raised this with Mr Muller and we considered the AFS from the period of the business rescue which reflect this and do not show any inability to pay debts. They in fact reflect equity.

112. The respondents contend that the "... significant elapse of time is significant in respect of the relief sought by the Applicants." They also contend that "... the real motive for this application is for the Applicants to frustrate the BR process in order to obtain an advantage in asserting their claims either against the Company or various third parties. In this regard it is not without significance that the Applicants have existing judgments and cessions in respect of certain of the Company's claims which do not require the BR to be terminated in order to be pursued." Similar considerations to those in the above paragraphs apply to this contention.

113. In my view, a claim based on fraudulent misrepresentation to set aside the BR Plan is actionable on a *prima facie* basis.

Irreparable harm

114. First respondent has indicated that he intends to file a notice of substantial implementation of the business rescue proceedings. If he does so, that will finally (or perhaps more correctly, irreversibly) complete the conversion of the claims of erstwhile creditors against the Company into equity. For the reasons explained, erstwhile creditors will then have lost their status as creditors for the purposes of liquidating the Company and of seeking further redress through the winding-up process. That outcome is, in my view, permanent and irreparable.

Balance of Convenience

115. As has been found above, the BR Practitioner, in my view, is not yet in a position to file a notice of substantial implementation of the BR Plan. It can therefore not suffer any prejudice at this stage.

116. With an interim interdict being in issue, should circumstances change and warrant a variation or discharge of any interim interdict granted, the respondents will be in a position apply therefor.

117. The respondents contend that, in the event that the interim interdict is granted, the business rescue, with the Company trading, will continue until the determination of the Proposed Action which will be for years, which runs against the balance of convenience being in favour of granting the relief sought. In my view, bearing in mind that the business rescue proceedings have been on the go for almost five years (the Company was placed in business rescue with effect from November 2019) this does not seem to be an assertion of any merit.

118. On another level, it may well be that the only thing keeping fifth respondent with the Company is that the business rescue is not finalised. The BR Practitioner himself stated in his answering affidavit that at the time the business rescue was being considered there "... was nothing stopping the Fifth Respondent from resigning which would have meant that the business rescue process would fall flat."

Nothing on the papers suggests that this has changed. In fact the content thereof suggests the contrary, the BR Practitioner stating that the fifth respondent is reluctant to remain with the Company if business rescue continues for years and “if he chooses to leave the company there is little which could be done.” I do not see any reason for the converse applying – that once the business rescue is finalised by means of the filing of the notice of substantial implementation he will leave the Company which is 49% owned by third parties. As stated by first applicant: “With there being no contractual obligation on the fifth respondent to continue to render services to Cambridge Services with a view to generating income and profits, the likelihood is that the Company will not continue trading.” The applicants point out that the notion of securing loyalty in this way was illusory in the absence of contractual commitments, bearing in mind the previous departure of Von Holdt and Botha.

119. If the respondents are proved correct in due course that the relief sought in the Proposed Action will fail and it does, then the Company will continue as they suggest.

120. The respondents are at liberty to seek to refer the matter to a Judge in terms of Rule 37(8) to promote the effective conclusion thereof and to seek to obtain an accelerated date to be allocated for its hearing with a view to having the matter heard within approximately a year. In the context of the nearly five years which have passed already in business rescue, complaints in respect of a further year or two tend to attract questions as to their credibility (the factors raised by the respondents having being applicable throughout).

121. The respondents contend that the Company and its shareholders (being the erstwhile creditors) will be prejudiced if an interim interdict is sought for the following reasons:

121.1. The creditors of the Company who have acquired shares in it would be placed in a situation in which that acquisition could be overturned at a date, years from now, and the payment of dividends to those shareholders in terms of the BR Plan would be placed in jeopardy. My view is as follows: This is a risk of litigation. After over four years of no dividends and none predicted in

the near future this is not a very weighty consideration. I do not regard this aspect as legally relevant or material prejudice.

121.2. It is conceivable that those entities would no longer be shareholders of the Company. Their claims would presumably be resurrected with the possibility that any dividends paid to them arising from the BR Plan would have to be set aside. My view is as follows: The question of dividends is addressed in the above sub-paragraph. Further, the entities in question have all had notice of this application and have not opposed and they will receive notice/service of the Proposed Action. I do not regard this aspect as legally relevant or material prejudice.

121.3. The R2 million which has been invested in the Company will have to be dealt with and, presumably, returned. That amount was invested in the Company in terms of clause 14.8.4 of the BR Plan in which a third party, being Cambridge Capital (Pty) Ltd took up shares in the Company. My view is as follows: This is in all probability a related company and the amount involved is negligible in the context of this matter. I do not regard this aspect as legally relevant or material prejudice.

121.4. The Company will continue to operate while in business rescue. That continued status makes it difficult for the Company to operate. An interdict would make matters worse. It would have to be disclosed to third parties that agreements entered into could be set aside at a later date, years from now. My view is as follows: The considerations in the above sub-paragraphs apply. I do not regard this aspect as legally relevant or material prejudice.

121.5. The Fifth Respondent, who is integral to the success of the Company, has indicated that he is not prepared to remain involved in the event that business rescue was to continue for years. My view is as follows: I have dealt with this aspect in the above paragraph. I do not regard it as legally relevant or material prejudice.

121.6. There are three other companies in the group which are also in business rescue and which are intricately intertwined in the Cambridge Services business rescue plan which has now been substantially implemented. The nine steps involved in the implementation of the BR Plan were carefully implemented in that sequence in order to extinguish the claims from group creditors in the correct order and the steps resulted in the preservation of the significant tax losses in the Company running into several hundred million Rand which otherwise would have been lost. My view is as follows: I do not understand the gravamen of this aspect and do not regard it as legally relevant or material prejudice.

122. I am therefore of the view that the balance of convenience favours the granting of an interim interdict.

Lack of alternative satisfactory remedy

123. The first respondent has indicated that he will file a notice of substantial implementation of the business rescue proceedings. Respondents contend that there is a damages claim as an alternative. However, such a claim cannot restore the applicants as creditors with all of the rights and consequences which follow from that. It also does not appear that such damages can readily be calculated.

Discretion

124. In my view, the findings in this judgment warrant against the exercise of a discretion in the respondents' favour to refuse the grant of an interim interdict and there is no need to traverse that material any further.

Conclusion

125. The rule *nisi* issued on 22 May 2024 will be partially confirmed and made final in the form of an order as set out below, save in respect of two aspect as to costs and that no leave in terms of section 133 is required to be ordered.

Costs

126. Costs will be reserved for later determination, save as set out below.

127. Mr Muller submitted that, should the section 133 leave issue be decided against the applicants and the interim interdict be granted, then a portion of the costs of this application which the court considers proportionately applicable to the section 133 leave issue appropriate in the circumstances of the matter should be paid by the applicants, with the balance of the costs to be reserved. When asked what proportion he considered appropriate, he said that was best left in the hands of the court. When asked whether he considered that the court take a robust approach, he affirmed this. I asked Mr Hartzenburg for his view on Mr Muller's suggestion and he confirmed that he agreed therewith. I am amenable to proceed on the basis suggested. Having found against the applicants on the section 133 leave issue, this basis of costs is to be invoked. While the section 133 issue consumed a fairly substantial portion of the papers, heads of argument and oral argument, it was significantly less than 50%. It played a much more minor role in the papers (leaving side factual aspects which would overlap both issues which I think should be part of the costs which stand over). I assess, on a robust approach, that 20% of the costs of the application be apportioned to this issue and applicants will be ordered to pay such costs accordingly, with the balance to be reserved.

128. The respondents contend that the costs occasioned by the postponement of this matter on 22 May 2024 when the rule *nisi* was issued and those on 7 March 2024, which stood over for later determination, stand on a different footing.

129. In respect of the hearing on 7 March 2024, the respondents contend that the applicants should not have set the matter down in the unopposed motion court in what is known as the Third Division of this court. However, at that stage the delivery of a notice of substantial implementation may have still been in issue. When the matter was postponed, the Court ordered that the application be postponed to the semi-urgent roll but that costs would stand over for later determination. As questions in relation to substantial implementation arose and will arise in the Proposed Action, I

am of the view that these costs should stand over to be determined in the Proposed Action.

130. In respect of the costs incurred in respect of the date of set down of 24 May 2024 (I think that this should also include 22 May 2024 which is the actual date when the rule *nisi* was issued):

130.1. The respondents contend that the applicants were always aware of the fact that notice of the application had to be given to the affected parties who were cited as the fourth respondent and that the applicants made no attempt to give notice to those parties or to identify them specifically when the application was launched.

130.2. The respondents have correctly pointed out that in terms of the BR Plan all creditors of the Company had their claims converted to equity. Accordingly, the applicants were always able to inspect the Company's register of shareholders in order to ascertain the identity of the affected parties and their addresses. It is apparent that prior to the application being launched and subsequently the applicants did not avail themselves of their rights in terms of the Act to inspect the Company's share register.

130.3. Accordingly, the Applicants failed to identify those parties despite being able to do so. The respondents in their answering affidavit pointed out those aspects and also attached a copy of the Company's share register which reflects the names and addresses of the shareholders which are affected parties. That affidavit was delivered on 23 March 2024 and it appears that subsequently the applicants did nothing to identify or to serve this application on those affected parties.

130.4. When the applicants' heads of argument were delivered on 3 May 2024, mention was made that the applicants would seek limited relief (on 24 May 2024) in keeping with the applicants' intended amended notice of motion which was subsequently delivered on 14 May 2024. Despite the content of those heads of argument and the apparent difficulties with the relief

sought in the notice of motion, the applicants did not seek to amend that relief formally until 14 May 2024.

130.5. The applicants failed to ensure that that occurred and were forced to seek the issue of a rule *nisi* which resulted in wasted costs being incurred. The rule *nisi* was extended by order on 22 May 2024 while the matter had been set down for 24 May 2024. Accordingly, this aspect implicates the costs on both 22 and 24 May 2024.

130.6. The applicants will be ordered to pay the costs associated with the set down and postponement of the matter on 22 and 24 May 2024.

Order

131. Provision for ‘any related relief’ will be made in the order where reference is made to the action to be instituted, because I apprehend there to be a prospect that the action actually instituted will likely extend beyond the question of the setting aside of the BR Plan, as is the case of the Proposed Action.

132. It is ordered as follows:

1. Leave is granted to the applicants in terms of Rules 4(2) and 5(2) to serve the applicants’ combined summons in an action, in which the applicants intend to claim an order setting aside the business rescue plan dated 5 March 2020 in respect of the Company, Cambridge Services (Pty) Ltd (*‘Cambridge Services’*), and its adoption on 13 March 2020 (“the Action”), and any related relief, by electronic mail on all affected persons of Cambridge Services at the email addresses furnished by the first respondent’s attorneys to the applicants’ attorneys in accordance with the order of this court in this matter on 22 May 2024.

2. Pending the final determination of the Action, the first respondent is interdicted and restrained from filing a notice of substantial implementation of

the business rescue plan approved and adopted by the creditors of Cambridge Services on 13 March 2020 in terms of s 132(2)(c)(ii) of the Act.

3. The Action is to be instituted (by which is meant, for the purposes of this paragraph of this order, issued by this court and served on the first and third respondents) within one calendar month from the date of this order, failing which the interdict in paragraph 2 of this order will *ipso facto* lapse.

4. The costs of this application are reserved for decision in the Action, save that the applicants are ordered to pay, jointly and severally:

4.1 the wasted costs associated with the set down and postponement of the matter on 22 and 24 May 2024; and

4.2 20% of the remaining costs of the application.

A Kantor
Acting Judge of the High Court

Appearances:

For Applicant: Adv. CJ Hartzenberg SC
Adv. R Randall

Attorney: KM Attorneys and MacRobert Attorneys

For Respondent: Adv. Jeremy Muller SC
Adv. D Van Reenen

Attorney: Guthrie Colananni Attorneys