



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

Case no:24391/2024

In the matter between:

ADRIAN ANTHONY JOHN MOORS

FIRST APPLICANT

**THE TRUSTEES FOR THE TIME BEING
OF THE DOROTHEA CHARLOTTE MOORS
FAMILY TRUST**

SECOND APPLICANT

HENDRIKA BARENDINA ZONDAGH

THIRD APPLICANT

and

VELDSKOEN CAPITAL (PTY) LTD

FIRST RESPONDENT

VELDSKOEN SHOES (PTY) LTD

SECOND RESPONDENT

ROSS ZONDAGH

THIRD RESPONDENT

NICOLAAS CHRISTOPHER DREYER

FOURTH RESPONDENT

**THE TRUSTEES FOR THE TIME BEING
OF THE DREYER FAMILY TRUST**

FIFTH RESPONDENT

FREYA MARY DREYER

SIXTH RESPONDENT

Case Number: 2025-015315

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF THE
DOROTHEA CHARLOTTE MOORS FAMILY TRUST**

FIRST APPLICANT

**THE TRUSTEES FOR
THE ADRIAN MOORS FAMILY TRUST**

SECOND APPLICANT

and

VELDSKOEN SHOES (PTY) LTD

FIRST RESPONDENT

VELDSKOEN CAPITAL (PTY) LTD

SECOND RESPONDENT

ROSS ZONDAGH

THIRD RESPONDENT

NICOLAAS CHRISTOPHER DREYER

FOURTH RESPONDENT

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

FIFTH RESPONDENT

Coram: BHOOPCHAND AJ

Heard: 3 June 2025

Delivered: 20 June 2025

JUDGMENT

Bhoopchand AJ:

[1] The humble *Veldskoen*, born of the Khoisan, shaped by Dutch hands, and now walking the avenues of the world, carries more than leather and thread. It bears the weight of legacy, of cultures stitched together through time. As this Court considers the dispute at hand, we are reminded: some symbols transcend ownership. A token of history such as this calls not for conflict, but for custodianship, not for possession, but preservation.

[2] The parties seek adjudication on three applications under two cases. In case number 24391/24, the Applicants, Adrian Anthony John Moors (Moors), the Trustees for the time being of the Dorothea Charlotte Moors Family Trust (DCMF Trust), and Hendrika Barendina Zondagh (Hendrika), seek interim interdictory relief (the Interdict Application) relating to certain resolutions taken by the board of the First Respondent, Veldskoen Capital (VC) and the Second Respondent, Veldskoen Shoes (VS), pending the outcome of arbitration proceedings. The directors of the board of VC and VS material to this application include Moors, Hendrika, the Third Respondent, Ross Zondagh (Zondagh), and the Fourth Respondent, Nicolaas Christopher Dreyer (Dreyer).

[3] The Respondents initiated a counterapplication (the Counterapplication) to the Interdict Application and seek to declare Moors and Hendrika delinquent directors, and directing the transfer of the shares of the DCMF Trust to Zondagh, the Fifth Respondent, the Trustees for the time being of the Dreyer Family Trust (DF) trust, and the Sixth Respondent, Freya Mary Dreyer (Freya) and other relief following the directory relief.

[4] The Interdict Application was brought on an urgent basis on 13 November 2024. The counterapplication was filed on 17 March 2025. The Applicants in the counterapplication shall be cited as they are in the Interdict Application. The Court directed on application that the counterapplication would be heard together with the Business Rescue Application. The Respondents sought to strike out certain content of

the Applicants' founding affidavit in the Interdict application by notice dated 6 December 2024.

[5] In case number 2025-015315, the DCMF Trust and the Second Applicant, the Trustees for the Adrian Moors Family Trust (AMF) Trust, applied urgently to place VS under business rescue (the Business Rescue Application). The respondents in this application are VS, VC, Zondagh, Dreyer, and the Companies and Intellectual Property Commission. The last of the Respondents took no part in this application. An application to admit a belated supplementary affidavit by the Applicants was dismissed. The urgency of the applications was no longer in issue. The Court was assigned to hear the matters on a pre-determined date by the Honourable Judge President of the division.

THE INTERDICT APPLICATION

[6] VC is the holding company that owns, funds, and controls VS. The DCMF Trust owns a third of the shareholding of VC. The DCMF Trust secured approximately R18 567 120 for VC and VS between 2021 and 2024, and the financial support of Investec Bank, which has financed the capital and funding through the structure of VC, and on the strength of the DCMF Trust's balance sheet and suretyships. Investec has provided banking facilities to VS. VS began in 2016. Dreyer and Zondagh formed the company.

[7] The Interdict Application concerns the tenure of Hendrika as a director of VS and four round-robin resolutions, two taken on 17 October 2024, and two on 1 November 2024. The first resolution was in the name of VC and drafted to take all necessary steps to remove Hendrika as a director of VS. The second resolution was a shareholder resolution in the name of VS, but signed by VC to notify Hendrika of VC's intention to pass a resolution to remove her as a director of VS. The third resolution was a board resolution of VS resolving to place Hendrika on precautionary suspension and granting full executive control of the company to Zondagh and Dreyer. The fourth resolution, a shareholder's resolution in the name of VS, resolved to remove Hendrika as a director of VS.

[8] The Applicants sought the issue of a *rule nisi* pending the outcome of the arbitration proceedings, which called upon Zondagh, Dreyer, and the DF Trust, the Respondents material to the Interdict Application to show cause why the resolutions should not be set aside and declared invalid. In addition, the interim relief sought to restrain the Respondents from proceeding with the implementation of the resolutions or passing further resolutions to cure the deficiencies in them pending the outcome of the arbitration proceedings. The Court was informed from the Bar that the Applicants restricted the relief they sought to paragraphs 2.2 and 3 of the notice of motion. The Respondents argued the matter on the basis that the inquiry narrows to the procedural validity of the resolution's adoption.

[9] The nub of the Interdict Application, then, is whether proper notice was given to Moors and Hendrika of the intention to adopt the resolutions. Moors presented the Applicant's case in his founding affidavit. He is the shareholder representative of the DCMF Trust. He referred to an additional provision of the October resolutions wherein Dreyer purportedly resolved to appoint Zondagh as a director of VC and VS with immediate effect. As alluded to, Dreyer and Zondagh founded VS. Zondagh had resigned in 2022 from the boards to pursue the expansion of VS into the markets of the United States of America.

[10] The resolutions of 17 October 2024 were based on the provisions of sections, 57,68, 71and s74 of the Companies Act 71 of 2008 (the Act). Section 74 states that except to the extent that a memorandum of incorporation (MOI) of a company provides otherwise, a decision that could be voted on at a meeting of a board of the company, may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication provided that each director has received notice of the matter to be decided. A decision made in the manner contemplated in s74 is of the same effect as if it had been approved by voting at a meeting.

[11] Section 71 allows for the removal of a director by an ordinary resolution adopted at a shareholders' meeting by the persons entitled to exercise voting rights in an election of that director. Before the shareholders of a company may consider the resolution, the director concerned must be given notice of the meeting and a copy of the resolution, at least equivalent to that which a shareholder is entitled to receive,

irrespective of whether or not the director is a shareholder of the company. The director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

[12] The Applicants' attorneys informed Dreyer and Zondagh on 28 October 2024 that they were disputing the lawfulness of the October resolutions. They were also requested not to proceed with the 1 November 2024 meeting. The Applicants were informed on behalf of the Respondents that the October round robin resolutions were valid under s74 of the Act. Notice periods were irrelevant. All that was required was for the resolution to be sent to the directors. Once the round robin gathered the requisite majority of two out of three, it was passed. The resolution to appoint Zondagh was valid under s57 of the Act. The Applicants reminded the Respondents that s74 pays precedence to the MOI.

[13] The resolution of 1 November 2024 that was circulated, was a round robin resolution purportedly passed by the board of directors of the Company in terms of s74 of the Act. It was intended to place Hendrika on precautionary suspension as the Chief Executive Officer (CEO) and employee of the Company with immediate effect. The complaints against her related to poor communication and stock management. A suspension letter was sent to her dated 1 November 2024, wherein all executive authority, operational matters, and signing powers on behalf of the company were removed from Hendrika and Moors and delegated to Dreyer and Zondagh. The latter were empowered to act severally and not necessarily jointly. The resolutions taken on 1 November 2024 related to Hendrika's suspension as CEO, the election of Ross as the new director with effect from 17 October 2024, the vesting of the signing powers and the day-to-day management of the company in Dreyer and Zondagh, and the removal of Hendrika as a director of the company under section 71(1) of the Act.

[14] The Applicants informed the Respondents on 1 November 2024 of the circumstances in which they received the November resolutions. The Applicants disputed the validity of the resolutions, did not consider themselves bound by them, and demanded that the Respondents reverse the decisions.

[15] Moors asserted that the October and November resolutions were invalid and unlawful. They were taken unilaterally by Dreyer and Zondagh without proper notification to Moors. He was not allowed to participate in any discussions about them or given time to consider them. The conduct, he contended, is in breach of the MOI as well as the Act. The company documents that regulate VC and VS provide that any removal of the CEO and managing director is a 'reserved matter' and requires a special resolution by the shareholders. Hendrika was purportedly removed without notice and the passing of a special resolution.

[16] Moors contended that he, as a director, could not be excluded from the management and control of the company. Moors contended that Dreyer and Zondagh took control of the Veldskoen business and denied him, the representative of the DCMF Trust and major funder, and director appointed by it, any insight and involvement in its management, operation, and control. The DCMF Trust's right to appoint a director to the board of VS had been undermined.

[17] Dreyer, answering Moors' averments, responded that the procedural aspects of the decisions taken by the board were irrelevant. The process prescribed by s74 did not require discussions or time to consider. He contended that neither the removal of a director nor the suspension of a CEO is a reserved matter. Moors had never been excluded from exercising his rights and functions as a non-executive director or as a Trustee of the DCMF Trust. The DCMF Trust had not been excluded from exercising its rights as a shareholder of VC. He denied that he or Zondagh ever denied or negated the DCMF Trust's right to appoint a director to the board of VS. To the extent that Moors contended that the DCMF Trust had an express right to appoint a member to VS's board of directors, beyond the general rights of a shareholder, he was invited to disclose the source of this alleged right.

[18] Moors described Dreyer's response as incorrect. S74(1) expressly required that each director receive notice of the matter to be decided. Informed knowledge that a resolution was circulated did not suffice. The statute requires formal notice, which ensures that all directors have a meaningful opportunity to participate in decision making, even when resolutions are adopted outside a formal meeting. Dreyer's allegation that no discussion or time was required misconceived the purpose of s74 of

the Act. The provision is designed to prevent ambush and unilateral decision-making. It ensures that every director receives proper notice so that they can evaluate the proposed resolution, raise objections or engage with their co-directors. Mere awareness is not enough. He was not given proper notice, and failure to do so rendered the resolutions invalid.

[19] The circumstances relating to the October resolutions were that the first was sent to Moors by email at 11:50:24 on 17 October 2024. The email stated: 'Please see attached.' The second of the same date was sent to Moors and Hendrika at 11:51:03, stating 'please see notice attached'. Moors asserts that the second email was not a notice but a purported resolution that was not taken at a duly convened meeting of the board of VC. He was not notified of the meetings, nor was he present at any meeting that purported to authorise either of the October resolutions. He contended that the October resolutions are, on this basis alone, invalid and unlawful.

[20] In answer, Dreyer contended that Moors was aware as early as 10 October 2024 that he was going to suspend Hendrika for performance-related issues. Moors' attorney had written to Ross and himself on 22 and 24 October 2024. The letter of 22 October 2024 acknowledged the steps being taken to suspend Hendrika as CEO and Director of VS, but did not raise any complaint thereto. Neither did the letter of 24 October 2024, despite raising detailed allegations about other issues.

[21] If Moors was not provided with proper notice of the round robin meeting of 17 October 2024, then it follows that the resolutions of 17 October are invalid. If the resolutions of 17 October 2024 are invalid, then those that followed on 1 November 2024 suffer the same fate. It would follow naturally that the *status quo ante* would be restored. The deferred relief initially sought by the Applicants concerning the resolutions would fall away. The Court would then have to pronounce on the further relief sought by the Applicants.

[22] Directors can conduct the business of a company by way of a round robin resolution under s74 of the Companies Act.¹ Section 74 of the Act enables 'a majority of

¹ S74: 'Directors acting other than at meeting –

the directors to pass a round robin resolution to avoid a formal meeting of directors, provided that, if this is to happen, each director has received notice of the matter to be decided'. The proviso enables directors to make an informed decision on the subject matter contained in the resolution.²

[23] Our courts have emphasised the importance of giving notice to directors of a meeting so that the participants are aware not only of the existence of a meeting but of the nature of the business.³ The purpose of the notice is not only to inform directors of the date of the meeting, but also the reason. There can surely be no difference between the importance of a notice where a board meeting is called in terms of s73 of the Act and a notice when the provisions of s74 of the Act are invoked.⁴

[24] The Respondents argued that section 74 did not require notice in advance but simply notice of the matter to be decided on the authority of *Msibithi*.⁵ The Applicants complain that the resolutions were taken unilaterally by Dreyer and Zondagh without proper notification to Moors. He was not allowed to participate in any discussions about them or given time to consider them. *Msibithi* does not assist the Respondents in counteracting the thrust of the Applicants' complaint. To the extent that the Court must pronounce on the resolutions, the notices given for the October resolutions did not comply with the provisions of section 74 of the Act and are invalid. It follows that the November resolutions are also invalid.

Requirements for an interim interdict

[25] What is discernible from the motivation to establish at least a *prima facie* right to obtain the relief sought in the Interdict Application is that the right arises from the Act

(1) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.'

² *CDH Invest NV v Petrotank South Africa (Pty) Ltd & others* (483/2018) [2019] ZASCA 53 (1 April 2019)

³ This principle is of long standing see *African Organic Fertilizers and Associated Industries Limited v Premier Fertilizers Ltd* 1948 (3) SA 233 at 240 (N); *Majola Investments (Pty) Ltd v Uitzigt Properties (Pty) Ltd* 1961 (4) SA 705 (T) at 710-711.

⁴ *CDH* at para 21

⁵ *Msimbithi Investments (Pty) Ltd and Others v African Legend Investment (Pty) Ltd and Others* (628/2023) [2025] ZASCA 61 (14 May 2025) at para 70

and the MOI, and Dreyer and Zondagh contravened the provisions of both these instruments. As a result, Moors was stripped of certain powers he enjoyed, and Hendrika was relieved of her positions as CEO and director. The right was not enunciated, but the Court is persuaded that the Moors and Hendrika do hold the right to seek interim relief. The latter is expressed under the reasonable apprehension of irreparable harm requirement. The Applicants assert that the consequences of Dreyer's and Zondagh's unlawful conduct are not limited to the financial loss that their management of the business may occasion, but also to the harm caused to Moors and Hendrika by being excluded from the company operations and communications with the shoe manufacturer, the banks and the auditors. The context is Dreyer's and Zondagh's conduct and the resultant loss of trust concerning the US company. The Applicants assert that the grant of the relief will not prejudice Dreyer and Zondagh. The management of VS needs to be restored. Should the shareholders seek to constitute the board differently, nothing precludes them from doing so, provided they act lawfully and transparently. The Applicants contend that they have no other alternative remedy.

[26] The Respondents contended that the prohibitory relief sought by the Applicants in prayer 3 of the Notice of Motion constituted 'interim-interim' relief, i.e., one which would operate pending the return date of the rule, when application will be made for the same interim relief under prayers 2.2 and 2.3. The Respondents contended that the procedure is unprecedented, contrived to afford the Applicants two bites at the cherry, or two separate hearings, and is an abuse of process.

[27] The Applicants stated in written and oral argument that they persisted with just paragraphs 2.2 and 3 of the notice of motion. The Court understood this to mean that the Applicants sought an interim interdict restraining the Dreyer, Zondagh, and the DF Trust from proceeding with the implementation of the October and November resolutions or from passing further resolutions to cure the deficiencies in the resolutions pending the outcome of the arbitration proceedings. The Court has dealt with the matter on that basis. The Court accepts that the relief sought in the initial notice of motion is unclear, but it also accepts the Applicant's argument that the matter has evolved since it was first filed.

[28] The last sentence in the preceding paragraph, unfortunately, sounds the death knell for the Interdict Application. If the relief sought is generously interpreted, it still amounts to a wholesale, incoherent amendment as argued by the Respondents. The purported amendment is unclear. Paragraph 3 seeks an interim interdict under paragraphs 2.2 and 2.3 pending the outcome of the application. In his submissions, Counsel for the Applicants did not state that he persisted with the relief sought in paragraph 2.3, i.e., to restore the *status quo ante*. Granting the interim interdict would prejudice the Respondents. Even the narrowed ambit of the relief sought is unclear as to the case they had to meet.

[29] The further aggravating factor concerning this application is that the Applicants required the Court to traverse the voluminous papers without a clear indication of which aspects of the Interim Interdict they intended to abandon. The Applicants did not seek declaratory or any other appropriate relief concerning the October and November resolutions, nor did they ask the Court to find, as part of the relief they sought, that the resolutions were illegal or invalid. They have, of late, abandoned the relief sought concerning the resolutions. Applicant's legal team were obliged to define the relief sought clearly and notify the Court in advance if they intended to abandon large parts of the relief they sought. That they did not do.

[30] The Applicant's heads of argument, filed on 13 May 2025, belatedly narrowed the ambit of the application without a clear indication of whether they intended to pursue any relief relating to the resolutions. The stance taken by the Applicants is incomprehensible. After hours spent considering the papers on the strength of the submission from the Applicant's Senior Counsel, that the Applicants intended to persist with the application, the Court has concluded that the inordinate time spent on this part of the case was an exercise in futility. The proper approach would have been for the Applicants to withdraw the application and tender the Respondents' costs. By the time the application was heard, there was a complete disconnect between the relief sought and the case made out on the papers. Counsel was obliged to forewarn the Court. It is inexplicable why the Applicant's legal team adopted this cursory attitude towards this part of their case.

[31] The Interdict Applicant falls to be dismissed with an adverse costs order, the scale of which shall be duly reflected.

APPLICATION TO STRIKE OUT

[32] The Respondents sought to strike out 36 items in the founding affidavit on the basis that they are either irrelevant matter, argumentative, scandalous and/or vexatious matter, or hearsay or disguised hearsay. The Respondents provided no elaboration of the matter sought to be struck out. If the Respondents expected the Court to trawl through each of the thirty-six impugned items on the skimpy basis presented to try and determine the source of their complaint, then that attitude is deprecated. The Applicants fared no better. There is a notice of opposition and nothing further. The application to strike out is dismissed. Each party is to absorb their own costs.

THE COUNTERAPPLICATION

[33] On 17 March 2025, the Respondents instituted their counterapplication to the interdict application. The range of orders sought included the declaration of Moors and Hendrika as delinquent directors, restraining Moors from interfering in VS's contractual affairs with the First National Bank (FNB) and from holding himself out as an executive director, the appointment of a non-executive director to replace Moors, and compelling the DCMF Trust to sell its shares in VC to the Respondents. The diverse relief is founded under sections 76,77,162, and 163 of the Companies Act.

[34] The purpose of s162(5)(c) is to protect investors against directors who grossly abuse their position, intentionally or by gross negligence, inflict harm upon a company or its subsidiary and act in a manner that amounts to gross negligence, wilful misconduct or breach of trust in performing their functions and duties. or engaging in serious misconduct.⁶ The qualifiers used to describe the applicable type of conduct, namely 'gross', 'wilful', 'intentional', 'abuse' and 'serious', set a high bar to proving

⁶ *Gihwala and Others v Grancy Property Ltd and Others* (20760/14) [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) (24 March 2016) ('*Gihwala*') at para 144

delinquency.⁷ Gross negligence, although short of *dolus eventualis*, must involve a departure from the standard of a reasonable person to such an extent that it may properly be categorised as extreme, a conscious risk taking, a complete obtuseness of mind or a total failure to take care. A lesser standard applied would blur the distinction between 'ordinary' and 'gross' and would lose its validity.⁸

[35] The adjectives used in s162(5)(c) ensure that opportunistic, retaliatory, or simply cynical applications to declare a director delinquent are sifted out expeditiously and efficiently. The rationale is apparent as the consequences for the director are significant. Directors who prove unworthy of this trust are prohibited from holding office.⁹ The delinquent director appreciates that his conduct and reckless attitude could cause the company harm.¹⁰ Extenuating circumstances or the fact that the conduct might have caused the company a loss are irrelevant to this protective purpose.¹¹ If the complaints do not concern instances of the sort of conduct identified in s 162(5), it would follow that the relief sought is unsustainable and therefore without merit.¹²

[36] Hendrika and Moors oppose the application. They argue that the counterapplication is procedurally abusive, factually untenable, and legally misconceived. Moors denies that Dreyer or Zondagh are authorised to represent VC or VS in these proceedings. The resolutions from which they purport to derive their authority were challenged in the interdict application. Zondagh was unlawfully appointed to the board of VS in October and November 2024. The Dreyer Family Trust and Freya Mary Dreyer do not hold shares in VS and accordingly lack standing under s163. Moors was appointed as a non-executive director of VC on 29 September 2020 and of VS from 14 December 2020. Hendrika was appointed as COO of VS in October 2019, CEO of VS on 1 September 2023, and director of VS from 16 May 2022. She was removed on 1 November 2024.

⁷ See *Ex parte Gore and others NNO* [2013 \(3\) SA 382](#) (WCC), at para 34, in the context of a close corporation

⁸ *MV Stella Tingas: Transnet Ltd v Owners of the MV. Stella Tingas and Another* [2003 \(2\) SA 473](#) (SCA), at para 7

⁹ *Gihwala* supra

¹⁰ *Lewis Group Ltd v Woollam and Others* [2017] 1 AllSA 192 WCC ('*Lewis Group*') at para 16

¹¹ *Gihwala* supra at para 144

¹² *Lewis Group* at para 11

[37] It is appropriate at this juncture to introduce the overseas companies associated with the South African group. Veldskoen UK (V UK) is the English company that markets and sells the Veldskoen products in the United Kingdom. Veldskoen Incorporated (VInc) is the parent company that owns Cali Buntu, its subsidiary. Many of the issues in these applications concern the ownership of VInc and Cali Buntu. The Veldskoen products are also marketed in Australia through an independent Australian company.

[38] The pattern of alleged serious misconduct over a period of four months relates to four issues. They are the unilateral suspension and supply of stock to Cali Buntu, the unauthorised instruction to suspend payments from the Investec facility, manufacturing claims against VS, and a strategy to exclude Dreyer and Zondagh from the business. The accusation that Moors and Hendrika manufactured claims against VS is premised entirely upon Moors' actions relating to a subordination agreement.

The suspension of stock to Cali Buntu

[39] The evidence before the Court substantiates the Respondents' claim that the alleged acts of delinquency transpired within a relatively brief period, commencing around June 2024 and concluding with the resolutions to suspend and remove Hendrika as director. At the same time, divorce proceedings between Hendrika and Zondagh were underway. Zondagh had resigned from his directorship about two years prior, and Hendrika's position as CEO was tenuous. Central to the ensuing dispute was the transfer of \$55,700 from Cali Buntu into Zondagh's and Dreyer's bank accounts. Zondagh was unable to satisfactorily explain the transfer, having given differing explanations for it. The ownership of the US companies, VInc and Cali Buntu, also became contentious. There was an assumption that these entities were subsidiaries of VS; however, Dreyer and Zondagh asserted their ownership of the US companies.¹³ Cali Buntu was indebted to VS for approximately R10 million in stock and an additional R3.5 million in loans, with minimal prospects of repayment. To date, Cali Buntu has made payments of roughly R196,000 towards its total debt of about R13 million.

¹³ The most persuasive evidence of this is contained in the recording of the board meeting that occurred on 10 October 2024.

[40] The Court does not intend to report diligently on the reams of allegations made by Dreyer and Zondagh and trawl through each allegation and answer to determine which side must prevail. An overview of the material facts does not point to the delinquency of either Hendrika or Moors, let alone clear the high bar that Dreyer and Zondagh would have had to surmount to prove that Hendrika and Moors were delinquent. The Court shall examine the allegations underlying this application briefly.

[41] Following what has been said earlier, the position was that VS forwarded stock and made loans to Cali Buntu on the representation that Cali Buntu belonged to VS. The amounts involved were substantial, and there was little prospect of any sizeable return on the investment. Very little was done to transfer ownership to VS. Neither Moors nor Hendrika had any fiduciary duty to a US company that was not owned by or a subsidiary of VS. They were directors of the South African company and owed their duties to VC and VS. Moors thus disputed that VInc was controlled by VS. Dreyer and Zondagh exercised sole and exclusive control over the US entity. They had no enforceable reporting obligations to VS, and the Veldskoen Group had no control over the US business. By the end of 2022, VS was meant to acquire the remaining 50% shareholding in Cali Buntu. Dreyer and Zondagh were not the intended beneficiaries through the American company, VInc, owned by them.

[42] Dreyer stated that on 24 August 2024, the board of VC and VS met, with him, Zondagh, Hendrika, and Moors in attendance. They reaffirmed the importance of the Black November and December trading period in the USA and their state of preparedness to exploit the expected surge in sales. They had to ensure an adequate supply of stock from the manufacturer, Hopewell, to Cali Buntu. Moors answered that a meeting occurred on 20 August 2024. The executives of VC and VS were updated on the US operations, and Dreyer was working with the marketing team to prepare for the Black November sales upswing. He denied that comprehensive preparations were undertaken, including the placing of substantial orders with Hopewell. Hendrika managed the planning for Black November as a part of her normal production routine.

[43] Dreyer asserted that towards the end of September 2024, and without any board approval or consultation with Dreyer or Zondagh, Hendrika, with the support of Moors, suspended the supply of stock to Cali Buntu. The two contravened the strategic

decisions endorsed just weeks earlier. Moors denied that he had decided to suspend the stock to the US. Hendrika did. She provided her reasons for doing so, which included the huge debt owed by Cali Buntu and the unresolved issue of the ownership of the US business. Hendrika and Moors owed their fiduciary duty to VS. He supported her decision. The decision was prudent, justified, and an unavoidable commercial response to a situation of significant and unmanageable risk. It was made against the backdrop of the transfer of \$55,700 into the personal accounts of Dreyer and Zondagh, the uncertainty over the ownership of the US business, and the huge debt owed by Cali Buntu to VS.

[44] Dreyer contended that about R4.3 million in US sales was lost. VS forfeited an estimated margin of R440 000 on these sales. The opportunity for Cali Buntu to repay its existing Shopify loan and secure a new credit facility of \$230,000 had been delayed. Shopify is a platform that lets anyone create and run an online store to sell products across the internet and in person. This prevented Cali Buntu from remitting these funds to VS, hindered Cali Buntu from settling approximately 42% of its R10 million debt, and deprived VS of working capital amounting to about R4.19 million. The stock ordered from Hopewell to provision Cali Buntu for Black November and December was cancelled, prompting Hopewell to threaten cancellation of their supply arrangement with VS, a threat averted only by Dreyer and Zondagh's intervention. Dreyer suggested rather incredulously that there was no rational connection between the reasons for suspending the stock to the US and issues relating to the ownership of the entity, or the transfer of funds to Zondagh's account. He contended that if Hendrika and Moors were made aware of the issues of ownership and transfer of funds by the auditors in July 2024, but nevertheless participated in the August meeting, why did they wait till September to act?

[45] Moors addressed the issue, alleging that the US company was financially distressed, if not insolvent. The allegations concerning shareholding and unexplained transactions relating to the US company led to the 'offer event'. The Respondents were placed on terms to remedy their breach. They failed to do so. Moors and Hendrika engaged with Dreyer and Zondagh earlier than September about the issues of ownership and the transfer of funds. There is an email that confirms the engagement on 27 August 2024.

[46] The Respondents contended that Hendrika, Moors, and by extension, the DCMF Trust, contravened six of their statutory directorial duties, and one relating to the shareholder agreement. As for the shareholder agreement, clause 5.2 concerned the growth and generation of profit for the company and clause 20.1 spoke to the utmost good faith and the highest degree of integrity that directors should exercise. The Court finds that Moors and Hendrika acted accordingly as far as this ground of alleged delinquency is concerned. The credible evidence suggests that Dreyer and Zondagh did not. Neither did Moors nor Hendrika contravene any of the statutory provisions identified by the Respondents in the Act, certainly not anywhere the threshold that the Respondents had to surmount to prove delinquency.

Investec

[47] Under this ground, the Respondents alleged that Moors instructed Investec not to release funds from VC's credit facility at the end of September 2024. Zondagh is the sole signatory of this account. The interest payable on this account is paid from the FNB account. In August 2024, there were insufficient funds in the FNB account. Moors sent an email to Dreyer and Zondagh expressing Investec's concerns about the management of interest repayments. Zondagh and Moors formulated a process to deal with the situation. In September 2024, Hendrika negotiated for VC to pay R900 000 to Hopewell from the Investec facility. Zondagh instructed Investec to process the payment. Moors had previously instructed them not to release the funds, and payment was declined.

[48] Moors, in his answer, referred to a reserve fund of R500,000 in the Investec facility designated for specific purposes and asserted that any access to the fund would require prior consultation with him. He would lead any engagement with Investec on behalf of VC. In late September, Investec alerted Moors that Dreyer and Zondagh requested access to the fund, thereby bypassing him. He was duty-bound to inform Investec that VS did not hold the equity in VInc. The latter revelation posed a serious risk to the bank's position. Moors disputed the allegation that there was inadequate communication with Hopewell. He asserted that a standard payment plan allowed VS to settle its account between the 31st and the 7th of each month. The account could not

be paid in full by 7 October 2024. Both he and Hendrika actively managed the situation, and Hopewell was kept fully informed. Moors denied that he had blocked the Investec account or instructed the bank to withhold any payment. He confirmed on 11 October 2024 to Investec that the funds should be released due to operational requirements. He contended further that the correspondence submitted by the Respondents is selective and misleading. The insinuation that a registered financial institution acted unlawfully or beyond its mandate based on an instruction from him was false. He had confirmed the release of the funds with the bank on 11 October 2024 (one day after the meeting when Dreyer and Zondagh indicated that they owned VInc). The latter contradicted the suggestion that he interfered with the facility and confirmed his ongoing management of the relationship with Investec.

[49] Moors contended that Dreyer continued to mischaracterise legitimate management involvement to protect VC and its banking relationship as an obstruction. Moors' action was taken to protect the integrity of the facility and to ensure compliance with the terms agreed with Investec. He did not issue instructions to Investec, but alerted the bank to risks that required resolution by all directors. Investec responded by demanding unanimous director consent.

[50] In reply, Dreyer characterised the content of Moors' answer as the fifth defence raised by Moors. Moors approached the bank without first raising the matter with the board. Dreyer did not address why he and Zondagh approached the bank and sought access to the reserve fund in late September. Dreyer refers to paragraph 64.1 of the founding affidavit in the interdict application to contend that Moors only learnt that VS did not own VInc on 10 October 2024, after Investec had frozen the funds. He does not refer to paragraph 42 of the founding affidavit in that application, where Moors states that it began to emerge in July 2024 that Dreyer and Zondagh had misrepresented VS's interest in, and ownership of Cali Buntu. On 2 September 2024, Dreyer and Zondagh explained the enquiry from the auditors, stating that they established an American company to handle the transaction involving the purchase of Cali Buntu. This explanation, which was copied to Moors, had a reassuring tone to it about the enquiry raised by the auditors. Now fast forward to the meeting of 10 October 2024, which was attached to the Respondents' answering affidavit. The issue of the ownership of VInc was raised by Dreyer, who contended that the US entry had no bearing on VS's annual

financial statements (AFS), other than a note that the South African business is in the process of procuring the US business. Moors asked Dreyer the pointed question: 'The South African business does not own the US business?' Dreyer responded that he and Zondagh owned the US business, which is called VInc. The US business cannot be reflected in a South African AFS. Moors replied that when they invested in the business, the last five years' financials stated that Cali Buntu is 50% owned by VS. It was a material issue.

[51] Moors submitted that Investec acted on its own accord in response to the uncertainty surrounding the board's authority, particularly considering the escalating shareholder dispute. Investec suspended further disbursements from the reserve fund pending confirmation that the VS board was properly constituted and acting with authority. It was neither alleged nor explained how Moors could have compelled Investec, a registered and regulated financial institution with its compliance obligations, to act in a way of his choosing. The bank's actions were prompted by its investigations and uncertainty, not any instruction from him. Moors contended that the counterapplication was a retaliatory response to the two other applications that laid bare Dreyer's and Zondagh's unlawful conduct and the grave financial distress afflicting VS and VC. Rather than seeking legitimate relief, the counterapplication was a tactical manoeuvre to distract from the real issues and intimidate through the spectre of reputational harm and personal consequences.

[52] Moors asserted that he was contacted by Investec when Dreyer and Zondagh tried to access the reserve fund. He felt duty-bound to inform the bank that there were certain ownership issues relating to the US business that remained unresolved. He denied instructing the bank to suspend VC's account. The Respondents assert that Moors acted without board or shareholder approval and in contravention of the established process for managing interest payments on the Investec facility. His unilateral actions not only disrupted internal procedures but also jeopardised the company's ongoing relationship with Hopewell. Moors' conduct was either a deliberate or grossly negligent contravention of his fiduciary duties and role as a non-executive director. As for the Investec issue, Moors' account must prevail.

[53] As Moors' answer indicates that he did not instruct the bank or make any contact with the bank, and that it was Investec who contacted him, there is no basis for the Court to find that he acted in contravention of the statutory or shareholder duties identified. This means that the Respondents have not been able to establish delinquency relating to this ground.

Business Rescue

[54] On the alleged delinquency relating to manufactured claims against VS to institute the business rescue application, the case was largely premised upon the subordination agreements with FNB. Dreyer asserted that Moors endorsed the commitments with the FNB. The agreement prohibited a demand for or acceptance of repayment of the whole or any part of the loan owing to VS, or to commence business rescue of VS. The trusts represented by Moors issued formal demands under s 345 of the Act. The total amount of R14 150 000 was immediately owing, payable and due. The demands were aimed at precipitating a rescue operation under false pretences. The Respondents' attorneys responded, stating that the loans were not due. On 23 January, the Trust's attorneys replied. They denied any subordination of the loans to FNB. On 5 February, Moors and the Trust launched the business rescue application. These contentions were predicated on palpably dishonest statements to the effect that Moors and the Trusts' shareholder loans were due and payable. Moors was dishonest with the Court and perjured himself in order to advance his and the Trust's interests to the detriment of VC and VS.

[55] Moors' answer asserted that the business rescue application was precipitated by the breakdown in the management and governance of VS, the unlawful exclusion of Hendrika and him from the board and a marked deterioration in the company's financial position. Moors contended that the Respondents could not undermine the business rescue process through a collateral attack in this counterapplication based on speculative and unfounded conspiracy theories manufactured to deflect attention from the facts. The Respondents denied under oath that the DCMF Trust, the AMF Trust or Moors had advanced any loans to VS or VC. This was corrected in their supplementary answering affidavit, where they acknowledged that loans in excess of R15 million had been advanced to VS and VC. Moors contended that the Respondents now sought to

acquire the same loans against payment at face value through the relief sought in the counterapplication.

[56] The Court need not look further at the facts informing this ground of alleged delinquency. A quick perusal of the business rescue application refers to the legal exchanges that occurred relating to the subordination agreement. The content deals with the s345 demands and the subordinate agreement as history. The motivation for the business rescue application, which begins at paragraph 47 of the Moors' founding affidavit, is premised upon the financial distress of the company, evidenced by its financials. No further mention of the s345 demands was made in that affidavit. The only debt specifically referred to was that of an unpaid statement of the Chartered Accountant. The application was premised upon s128(1) (f) (ii) and the just and equitable basis for seeking business rescue.

[57] In the circumstances, there is no credible factual basis for alleging delinquency on the part of Moors. The company was insolvent on the financials and on the assessment made by Gray.

The strategy to exclude Dreyer and Zondagh from the business

[58] As for the strategy to exclude Dreyer and Zondagh from the business, the Court has considered the context. Since July 2024, the two material issues that led to the disputes between the directors were the unlawful withdrawals and the uncertainty about the ownership of VInc, the entity that owned Cali Buntu. The Court cannot understand why it would be unforeseeable in these circumstances for other directors to strive to remove the offending directors.

[59] Dreyer alleged that the business rescue application was contrived for the ulterior purpose of facilitating a hostile takeover of the Veldskoen Group by Moors and the Trusts. He alleged that Hendrika had colluded with Moors to engineer this process. By doing this, they were subverting Dreyer's and Zondagh's rightful governance and shareholding. The complaint against Moors and Hendrika is that by misrepresenting the company's financial position and manufacturing a rescue scenario, they have abrogated

their fiduciary duties and abused their powers to oppress and unfairly prejudice the interests of the Respondents.

[60] Moors considered these allegations to be absurd and unsubstantiated. Moors denied any collusion or conspiracy, and no evidence has been placed before the Court to support it. The business rescue application was initiated because VS is in severe financial distress. Investec and FNB had placed the company in breach and reserved their rights to call up the facilities if the breach had not been cured. The legitimacy of Dreyer's and Zondagh's leadership was contested. Moors states that before August 2024, he had little engagement with Hendrika. Any suggestion of collusion was false. The emails relied upon by the Respondents disclose no attempt to mislead the Court or affected persons, nor any suggestion of falsified financials. A business rescue application must establish a reasonable prospect of rescuing the company. Neither is there anything untoward in converting debt into equity. There aren't many ways of restoring a company to solvency. Further capital can be injected, new debt raised, or existing debt converted into equity to reduce liabilities. The alignment of the business rescue practitioner to a plan proposed by the Applicants is not evidence of a conspiracy or a takeover. It is a necessary element of the application. The nominee must agree to the appointment and therefore be supportive of the proposed restructuring from the outset. As for proposing a recapitalisation threshold, the emails reflected a scenario that is being modelled, not a fixed or exclusive plan. Under Chapter 6 of the Act, Dreyer and Zondagh remain directors. They are entitled to table an alternative plan, provide funding and vote on it. Even if Moors believed that Dreyer and Zondagh could not meet the figure he proposed, that did not prevent them from participating. What matters is whether the requirements for rescue under s131 are met

[61] Moors denied that his conduct constituted a breach of the statutory provisions raised by the Respondents. The essence of the Respondents' complaint appears to be that the Applicants wish to exit a dysfunctional relationship and pursue a path without Dreyer and Zondagh. There is nothing unlawful in that. Dreyer and Zondagh want the same outcome. No evidence has been placed before the Court that the Applicants acted dishonestly, oppressively or without regard for the best interests of the company.

[62] The Respondents have specifically failed to address any of the answers in their reply, apart from some oblique mention of them in their construction of the alleged defences raised by the Applicants. There is no merit in this ground of alleged delinquency.

[63] Moors concludes his founding affidavit by contending that the counterapplication is an abuse of the Court's process, and seeks final, far-reaching orders in motion proceedings plagued with foreseeable and material disputes of fact. The Respondents argued that the objective facts demonstrate a pattern of serious misconduct by Moors and Hendrika. The Court is unable to discern the pattern complained of or the objective evidence that supports this contention, apart from conjecture, speculation, and contrived retaliatory inferences drawn from the facts as presented.¹⁴ Moors and Hendrika were acting in the best interests of VS and nothing less. The test for determining whether a director acts in the best interests of a company is subjective, i.e., based on the director's rational belief that is exercised for a proper purpose. The test for rationality and proper purpose is objective. Moors and Hendrika were informed of the issues either directly or indirectly. They believed that their actions were in the best interests of the company. The issues over the transfer of funds and uncertainty over the ownership of the US business indicated that there was a rational basis for their actions. They were directors, and Hendrika occupied a management role. They were empowered to act as they did, and the Court therefore finds that they acted in the best interests of the company.¹⁵ They took reasonably diligent steps when they learnt of the transfer of funds from, and the uncertainty over the ownership of Cali Buntu. The Court need not look at s163 for the measures directed at relief from oppressive, prejudicial, or abusive conduct towards the separate juristic personality of the company.¹⁶

[64] It follows that the application to declare Moors and Hendrika delinquent directors must fail. The Applicants sought an adverse costs order against the Third, Fourth, and Fifth Respondents. The Court agrees that a punitive costs order is warranted against those Respondents and shall order accordingly.

¹⁴ *Knoop NO and Others v Gupta and Others* 2021(3) SA 88 (SCA) at para 166, *Radebe and Others v Eastern Transvaal Development Board* 1988(2) SA 785(A) at 793 C-E, *Makhala v Director of Public Prosecutions, Western Cape* 2025 (1) SACR 275 (CC)

¹⁵ *Visser Sitrus(Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) at paras 74-81

¹⁶ *Louw and Others v Nel* 2011 (2) SA 172 SCA at 186 F

THE BUSINESS RESCUE APPLICATION

[65] The Applicants in this application are the DCMF Trust and the AMF Trust. They are affected persons under s128(1)(a) and 131(1) of the Act. The Respondents are VS, VC, Zondagh, Dreyer, and the Companies and Intellectual Properties Commission.¹⁷ The latter has not participated in this application. Moors deposed to the founding affidavit and Dreyer to the answering affidavits. Michael Gray (Gray) and Johan Potgieter (Potgieter), the financial experts, feature prominently in this application. They provided confirmatory affidavits.

SUBORDINATION OF LOANS AND THE PROHIBITORY CLAUSE

[66] There is a preliminary issue that the Court must determine. The Respondents rely on a clause in a tripartite subordination agreement, prohibiting the Applicants from initiating business rescue proceedings against the company until the FNB's claims are discharged. The Respondents accused the Applicants of being devious by failing to disclose the subordination of their loans in favour of the First National Bank, before relying upon it in demanding repayment under s345 of the Act. The Respondents invoked the clause against the Applicants. While the Applicants conceded belatedly the existence of the agreement, they contended that the clause in question is either *pro non scripto* or contrary to public policy, as it seeks to oust the statutory right of an affected person to approach the Court under section 131 of the Act.

[67] The Court is mindful of the foundational principle of *pacta sunt servanda*, that agreements freely and voluntarily entered into must be honoured. However, this principle, while central to contractual certainty, is not absolute. The Apex Court affirmed that enforcement of contractual terms must accord with public policy, which is infused with constitutional values such as fairness and justice. In the present matter, the clause purporting to prohibit the Applicants from initiating business rescue proceedings seeks to oust a statutory right conferred by section 131(1) of the Act. Enforcing such a clause

¹⁷ The abbreviated citations of the parties are retained for this application.

would undermine the legislative purpose of Chapter 6 and unjustifiably limit the Applicants' access to a remedial process designed to serve the broader public interest.

[68] In determining whether a contractual clause offends public policy, a two-stage test as articulated by the Apex Court is applied.¹⁸ The first stage considers whether the clause was agreed to freely and voluntarily by parties of equal bargaining strength. While there is no evidence of coercion, the inquiry does not end there. The second stage requires the Court to assess whether enforcement of the clause, in the present circumstances, would be unreasonable or unfair. The Applicants are "affected persons" under section 128(1)(a) of the Act and are entitled, as a matter of statutory right, to approach the Court under section 131(1). The tripartite agreement, in the absence of clear language, defined remedies, or objections from the bank, would unjustifiably limit access to a statutory remedy designed to serve the public interest.

[69] The clause, lacking precise definition and enforceable parameters, is vague and overbroad. The Respondents sought to invoke the clause on behalf of VS, the borrower. The Respondents do not have the requisite standing to enforce a restraint that was neither intended for their exclusive benefit nor accompanied by any express enforcement mechanism in their favour. The clause, on its face, is directed at regulating the conduct of the creditor with the bank and the borrower and does not confer a right of objection upon the borrower itself. Moreover, the bank, having been duly notified of the application, has elected not to oppose it.

[70] The Respondents relied on a recent judgment of this division in which the Court declined to pronounce on the validity of a prohibition clause in a subordination agreement, citing the absence of key parties whose rights would be prejudicially affected.¹⁹ The prohibition clause was raised as a point *in limine*. That case is distinguishable. In the present matter, the bank, an original party to the tripartite agreement and the intended beneficiary of the clause, was duly notified of these proceedings and elected not to participate. Unlike the absent parties in the case cited, the bank had a full opportunity to assert its rights and chose not to do so. The *audi*

¹⁸ Barkhuizen v Napier 2007 (5) SA 323 (CC)

¹⁹ Ilitha Group Holdings Proprietary Limited v Sunrise Energy Proprietary Limited and Others (19854/2022) [2023] ZAWCHC 331 (14 December 2023) at paras 17-22

alteram partem principle has therefore been satisfied. The Court is entitled to draw an inference from the bank's silence and to conclude that no prejudice arises from adjudicating the enforceability of the clause. Accordingly, the procedural concerns that animated the earlier decision are not present here, and the Applicants' challenge to the clause may properly be entertained. In the premises, there was no need to join the bank, and the Respondents did not invoke any objection under the Court rules to demand joinder. The Respondents' reliance on the clause is misplaced.

The Application

[71] The application is an urgent application to place VS under supervision, and that business rescue proceedings commence in the manner contemplated under s131(4) of the Companies Act. Under s131(4), the Court has to be satisfied, after considering the application, that the company is financially distressed, the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract, concerning employment related matters, or it is otherwise just and equitable to do so for financial reasons, and that there is a reasonable prospect of rescuing the company. The Applicants have nominated an interim Business Rescue Practitioner under s131(5) to oversee the rescue process.

[72] A financially distressed company, in simple terms, is a company that is struggling to pay its bills and is at risk of going under. It has liquidity trouble in that it is unlikely to pay its debts as they fall due in the next six months, or it has balance sheet insolvency, in that it is likely to become insolvent within the next six months, meaning its liabilities will exceed its assets.²⁰ If a company is constantly borrowing more just to stay afloat, it is in financial distress.

[73] The Applicants assert that VS is in severe financial distress and is factually and commercially insolvent. The application was brought on an urgent basis on 5 February 2025 but was only heard on 3 and 4 June 2025. The financial distress of a company is assessed at the time the application is heard, meaning that the financial information

²⁰ S128(1)(f) defines financially distressed to mean that it is reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

relating to VS may or may not have changed since February 2025.²¹ Dreyer has capitalised on this aspect, suggesting that the Applicant's prediction that the company would be insolvent within two to three months had not come to fruition. The cynicism is not grounded in the evidence. Dreyer was at pains to demonstrate in his affidavits that he and Zondag, with the help of Potgieter, have instituted an intensive business strategy to rescue the company. The Applicant's case for business rescue included both the legs of financial distress as well as reliance on the just and equitable grounds. The Court understands the Applicants' overzealous prediction that VS would be unable to pay its debts in the normal course within a two to three-month period. However, they had already made out a convincing case that VS was in balance sheet insolvency. Dreyer's cynicism about Gray and Moors' prediction raises the question of why six months for both commercial and factual insolvency was included in the definition. Why was it not seven months or one year?

[74] Financial distress encapsulates two options in its definition. The first relates to whether it appears to be reasonably unlikely that the company would be able to pay all its debts as they become due and payable within the immediately ensuing six months, or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

[75] The application was based on four grounds, namely financial distress and insolvency, mismanagement and governance failures, creditor protection and avoidance of liquidation, and reasonable prospects of recovery.

[76] The Applicants argued that VS was both commercially and factually insolvent. Moors asked Gray to conduct a detailed analysis of VS's solvency and liquidity using management accounts. The report filed as an annexure to the founding affidavit was based on information as at 31 December 2024 and obtained from the company's Xero accounting system. Gray deposed to an affidavit confirming the content of Moors' affidavit as it related to him. He states that based on the information attributed to him in the founding affidavit and his assessment of the financial records he compiled, VS was factually and commercially insolvent as of December 2024.

²¹ *Diener N.O. v Minister of Justice* (926/2016) [2017] ZASCA 180 (1 December 2017)

[77] Moors set out the extent of VS's financial distress, referring to Gray's report. Moors recommended Grays appointment following persistent weaknesses in financial controls, governance, and reporting structures. Concerns had been raised about the company's finances and accounting. The financial statements could not be finalised due to missing funds and accounting irregularities. Gray identified serious liquidity constraints, uncollectible debts and misrepresentations in financial reporting.

[78] The Respondents criticised Moors for failing to disclose when Gray was appointed, i.e., 4 August 2024. They referred to his engagement letter, which identified a wide range of accounting, internal control, governance, and financial planning issues, especially in relation to the USA and UK entities. Gray's stated goal was to provide mentoring of the CFO to address finance function weaknesses, improve financial reporting, and ultimately financial results. Dreyer states that every issue identified in Grays letter was Hendrika's responsibility. They are the same issues that the Applicants alleged require rehabilitation under business rescue proceedings.

[79] Moors referred to an email from Gray dated 20 January 2025. Gray observed that the financial results of 2024 revealed a significant deterioration in the financial performance and financial position of the company. Sales had declined by 22%, The company had a net loss of R3 million for two consecutive years. The cash position had declined from a surplus of R1 million in December 2023 to minus R5 million in December 2024. Over three years, there were combined operating and investing cash outflows of R20 million mainly funding losses incurred by Cali Buntu and VUK, financed by an equivalent increase in debt. There was declining sales and escalating losses. He warned that the company's solvency and liquidity were in serious doubt.

[80] He identified several critical issues regarding the company's continued viability, including the recoverability of debtors, accuracy of stock valuation, cash constraints and intercompany balances. Cali Buntu and Rove & Saddle (the Australian company selling the products), owed over R10 million as debtors for stock with amounts outstanding for over one year. Cali Buntu and V UK owed around R5 million in intercompany loans which funded operating expenses. These debts appeared unlikely to be recoverable at all or anytime soon. Numerous small debtor accounts, both receivables and credit

balances, appeared to be incorrect and might require significant write offs. The stock barely turned over twice a year when the industry standard is 5-6 times yearly. Incomplete creditor balances raised the possibility of unrecorded liabilities. The business had no available cash, and all credit lines and overdraft facilities were stretched to their limits. Gray warned that the company may have a shortfall of assets over liabilities of over R15 million, with limited prospects of raising further debt due to its recent financial performance and financial position. He suggested that the directors seek equity investment to shore up the shortfalls.

[81] Dreyer's response was that Gray had obtained these figures from unvetted and unsigned management accounts. Dreyer referred to their attorney's letter cautioning Moors in his reliance on allegations by Gray and both of them on their reliance on unvetted management accounts. The Respondents relied on Potgieter for their financial information concerning VS.

Potgieter's Affidavits

[82] Potgieter's affidavit confirming references to him in Dreyer's answering affidavit is dated 17 February 2025. He is a registered Chartered Accountant practising as such since 2016. He advises Veldskoen as their external CFO. He asserted that VS is not financially distressed. He projected that the company will become profitable in the 2025/2026 financial year. He contended that the Applicants had misrepresented VS's financial position. Moors, Gray, and Hendrika have either intentionally or unintentionally undermined and understated the company's standing. The Applicants unexpectedly recalled loans not immediately due while simultaneously advocating for increased shareholder loans and broad asset write-downs under the pretence of a 'turnaround plan'. His initial analysis of the company's information suggested an attempt at internal sabotage.

[83] Potgieter explained that the Applicants loans had always lacked a fixed repayment schedule and functioned similarly to 'quasi equity', a common treatment for shareholder loans. He alleged that the Applicants intentions included the cancellation of the FNB loans to VS. The view is supported by emails exchanged between Moors, Gray, Hendrika and their legal team discussing the creation of a financial scenario to

justify their business rescue application. This was a reference to a legal strategy email sent by Moors to Hendrika's email address in January 2025 at VS. Dreyer and Zondagh intercepted the email.

[84] Potgieter conducted a solvency and liquidity analysis of VS based on the company's balance sheet as of 31 January 2025. Gray's assessment of the company's negative equity of R21.3 million included R16.3 million for loan and debtor write-offs and a projected loss of R2million for January and February 2025. Potgieter viewed the debtor write-offs as being unwarranted.

[85] Potgieter stated that if the Applicant's loans are subordinated and treated as 'quasi-equity', the group has a positive equity of R7 058 608, and VS has a positive equity of R13 422 138.59 which indicated that it is not insolvent. He had not assessed the value of VS's goodwill but expected it to increase its equity position. The accounts payable balance for VS had decreased over the past three months, with no outstanding debts. The company had arranged payment plans with all creditors and remained a going concern. All company debts were being managed and paid according to agreed payment plans with only minor aged debtors due to disputes. The latter appeared from the aged payables summary in the management accounts as of 14 February 2025. Potgieter considered the Applicants contention that VS undergo business rescue to be motivated by personal differences and ambition rather than genuine concern for VS's welfare. He performed a three-year profit and loss forecast. It demonstrated a strong potential for sustained profitability. VS is expected to experience sustained revenue growth, stable gross profit margins, and improving net profit margins over the forecast period.

[86] Potgieter dismissed Moors allegations about auditors' refusal to sign off on the 2024 financial statements due to concerns about trade debtors and loans to V UK and Cali Buntu as being untrue. Potgieter lamented Moors failure to confirm his allegation from the auditors. Potgieter stated that the auditor's failure to finalise the 2024 financial statements was due to incomplete accounting. The draft financial statements are more accurate than the company's management accounts, it having had the benefit of external scrutiny and analysis.

[87] Potgieter responded to Gray's alleged suggestion that Cali Buntu be liquidated. He regarded the concerns about the ownership of Cali Buntu as a trivial matter. Potgieter contacted the US Accountant who confirmed that VInc owned 100% of the shares in Cali Buntu. No shares in VInc have ever been issued. As far back as July 2023, Zondagh requested the shares be issued in VS's name. The shares have not been issued because the accounting information for Cali Buntu and VInc was not up to date. The final information has been submitted to Iridium and is being processed and should be completed imminently. Once Iridium has this done, the state of Delaware, USA, will be requested to issue shares reflecting 100% ownership of VInc by VS. On 4 February 2025, Potgieter prepared an opinion on the way Cali Buntu ought to be recognised in the AFS. VInc is a 100% subsidiary of VS and should be recorded as such.²² When Cali Buntu was 50% owned, it was classified as a joint venture and thus correctly recorded as such in the financial statements.

[88] The aged debtors amounted to R13.67 million. Potgieter referred to Gray's suggestion that, as the amounts owed to VS by Cali Buntu, V UK and Rove & Saddle are excessively overdue, they should be written off. Potgieter considered the suggestion to be ill-founded as it would deprive the company of substantial income. Gray treated Cali Buntu as ordinary third-party debtors, which they are not. Their status as entities within the group is significant both from an accounting perspective and from the perspective of the group's growth strategy. Cali Buntu's debt amounting to R10 million is the most significant part of the debtor balance. The decision to purchase the remaining 50% in Cali Buntu was made knowing that Cali Buntu had been a loss leader. Cali Buntu was purchased even though it was running at a loss and had existing debt. Turning this around and establishing a market in the US required stock, capital, effort and cash flow. VS loaned R4.77 million for the purchase price of the remaining 50 % of shares. The remaining debt is comprised predominantly of stock that was supplied on credit, intended to fund market entry. While Cali Buntu is a debtor in invoice terms, the loan is a credit, which offsets the balance by R2.8 million, taking the closing balance to R7.22 million. What the latter means is that Cali Buntu owed VS R10 077 107.23, VS also gave Cali Buntu a loan of R2 856 469.30, Cali Buntu's net debt is R7 220 637.93.

²² Dreyer expressed the contrary view on 10 October 2024.

[89] Potgieter was of the view that writing off Cali Buntu's loan would be reckless. He says that whilst the overall balance of Cali Buntu's loan has increased, there have been significant and frequent repayments which will likely increase as the business grows. The Shopify loan facility is repaid by automatic deduction of 17% from all US sales. Potgieter states that when the facility becomes available, it will be paid by Cali Buntu to VS, applied to Cali Buntu's loan account and provide cash flow. The decision to suspend stock led to a loss of approximately \$240,000 in sales. Shopify would have retained approximately \$40 000, which would have paid the existing loan and made the next facility available immediately. The increased turnover would have increased the next facility to approximately \$230 000. This would have been paid to VS, settling a large part of the Cali Buntu loan sooner and providing more working capital. The loss of sales in Cali Buntu produced an equivalent loss of turnover for VS on the stock it supplied, estimated at about R440 000. He alleged that the decision to stop stock was either motivated by malice or demonstrates a deep lack of understanding of the business.

[90] The loan to V UK is also likely to be recovered. In July 2024, an amount of R468 986 was paid, leaving an outstanding amount of R128 543. The suggestion that this loan is written off is irrational. Rove and Saddle of Australia owe R700 000, but these invoices were issued for consignment stock, i.e., stock not yet sold. Hendrika authorised the shipment on these terms.

[91] The balance of the ageing debtors amounts to R2 644 241 and comprises ordinary external third parties in nominal individual amounts. Gray introduced the Nagging Panda system, which monitors and controls aged debt by automatically sending invoices, statements and demands. Gray did not ensure that it worked properly, but that has now been rectified. Potgieter developed a business strategy for 2026, which forecasts a saving or profits between R7.1 million and R9.3 million, and the company trading profitably.

[92] Potgieter addressed key points relating to debtors' collections and sales discounts. He criticised Gray's view that Dreyer shut down the Nagging Panda system when it began revealing glaring deficiencies in their accounting. He says it is a misrepresentation. Gray did not implement the system correctly. Dreyer shut the system

down until it had been properly integrated into the company systems. There was an underestimation of sales by R1 million for that period.²³

[93] As far as creditor and supplier arrangements were concerned, for the period 31 October 2024 and 9 February 2025, VS's aged payables were reduced from R9 241 million to R6.98 million. These included payment plans with the biggest non-stock suppliers like Skynet and FedEx. R1.3 million was paid on their outstanding accounts. The payment plans were in force until the balance was cleared within two months. There is limited flexibility to free up working capital with Hopewell Footwear. On 9 February, they accounted for 73% of the total supplier balance. The Applicants sought to negotiate a 60-day payment plan with Hopewell. Potgieter criticised this as a lack of understanding of the business. Hopewell had made it clear that they would not supply VS on 60-day terms. Hopewell has offered a 2% rebate if payment is made within 30 days of the statement. The company intends to achieve this by August 2025. Based on the purchase history of the last 12 months, this rebate would have resulted in a discount of about R382 000.

[94] A new partnership with TUNL is a key to the company's margins improving in opening markets in the US and the rest of the world. It allows for a cash-on-demand logistics chain for international sales. The purchase price is paid before the product is released. Hendrika allegedly ignored TUNL's previous approach to her.

[95] Potgieter identified obsolete or slow-moving stock of about R1.7 million. He intended to discount this through promotions and sales. Potgieter criticised Moors and Gray's plan to optimise inventory turnover by writing off obsolete stock. The deep discounting they observed was of obsolete stock, which would generate R800 000 if sold this way. Potgieter criticised the alleged shrinking margins in December as a fiction. He contended that sales always taper after November. His 12-month profit and loss analysis indicated a normal decline.

[96] Potgieter identified new clients like Agrimark, the Veldskoen Golf range, Manners Milano, Amazon Global, and Bifi Milano. Potgieter identified cost optimisation strategies

²³ This aspect was covered in the Moors founding affidavit after Gray had identified the R1m as incorrect capture in the accounting systems which exposed the company to possible further liability.

like changing the local courier and freight supplier, reduction in warehouse space and rental. He expected a loan of \$100 000 to be advanced by Shopify when the current cycle ends. His opinion is that the company is not financially distressed. The company's ability to pay its creditors remains intact, and there is no indication of impending insolvency.

Gray's reply to Potgieter

[97] Gray began his association with the Veldskoen Group on 2 August 2024. He identified areas of significant weakness in basic accounting, internal control, governance, and financial planning, especially with the US and UK entities. Veldskoen had been highly reliant on outsourced accounting and limited management reporting, ineffective internal controls, and support of people, systems and processes. This had led to delays in producing accurate and timely accounting reports and delayed audits. This has further detrimentally affected management decisions and control.

[98] He worked with the CEO and Iridium, the company's accountants, to get the books of Cali Buntu and V UK up to date, as this was the main factor preventing the finalisation of the 2024 AFS. The major issue here was the lack of input in the form of bank accounts and supporting evidence from Dreyer and Zondagh. The severe cash constraints that VS was under due to unpaid loans and debts of Cali Buntu and V UK led to the Applicants advancing a further bailout loan of R500,000 in October 2024 to meet a missed payment to a major shoe supplier.²⁴ It became apparent to him that Cali Buntu and V UK were insolvent and unable to repay more than R18 million owed by them to VS. In December 2024, the Nagging Panda debtor's management system was integrated with the Xero accounting system.²⁵

[99] Gray raised the financial distress and potential insolvency of the companies in the Veldskoen group from about December 2024. He repeated this alarm in January 2025. Gray referred to s128(1)(f) of the Companies Act in his analysis of the extent of the company's financial distress. Gray assessed VS's financial position against the

²⁴ This bailout was before the Black November sales that the Respondents claim was sabotaged by the Applicants.

²⁵ The problem prior to December 2024 arose from a lack of integration between the two systems.

International Financial Reporting Standards (IFRS) for small to medium-sized (SME) enterprises (IFRS for SME's). He criticised Potgieter for using the more onerous IFRS standard applied to larger companies. Gray explained that IFRS does not define financial distress but requires disclosure of material uncertainties that cast significant doubt on the entity's ability to continue operating normally, e.g., an inability to service debts, recurring losses, negative operating cashflows. In these circumstances, the entity must consider whether the financial statements should still be prepared on a going-concern basis or another more appropriate basis (e.g., liquidation).

[100] VS's accumulated losses to 28 February 2024 were over R4 million. Gray expected the same loss for the 2025 financial year. Cash flow had been negative, and VS was only able to continue trading due to the funds introduced directly by the Applicants or indirectly by Investec and FNB, both of which are guaranteed or secured by the Applicants. VS has only been able to continue trading under negative cash flow circumstances through the introduction of debt in the form of Applicant's loans. The FNB and Investec funds have flown out of VS and the country in the form of loans and current trading indebtedness to offshore entities, Cali Buntu and V UK. The entities have been under the total control of Dreyer and Zondagh. It is telling that the entities have not had their accounting records maintained, and, according to their last management records produced in May 2024, were hopelessly insolvent and heavily indebted not only to VS but also to third parties such as Shopify.

[101] The major asset on the balance sheets of VS is accounts receivable and loans to these group entities, which are trading at losses, insolvent and unable to pay for the loans and stock sold to them. They have not paid and are incapable of paying. He criticised Potgieter's belief that R194 000 in receipts on more than R10 million in trade debt owing as accounts receivable by Cali Buntu in VS's books was a significant payment, indicating its ability to pay. Potgieter said that the payment came from borrowing from Shopify, and when the next Shopify amount is borrowed (\$200k), this will then be used to pay off a significant amount of VS's debt. Potgieter seems oblivious to the fact that these loans (plus interest) will put Cali Buntu further into financial distress. Potgieter projected profitability in the 2025/2026 financial year. Yet his annexures to his affidavit indicate a company that has been incurring losses for 4 years

and, on the face of it, insolvency (liabilities exceeding assets). Before considering whether assets are fairly valued, he had to consider whether they have negative equity.

[102] Given that over R14 million of debt cannot be repaid by the 'group' entities, which are themselves insolvent, Potgieter wants one to believe that Dreyer and Zondagh will achieve profits. They are the ones who have largely overseen the disastrous results in the US, UK, and Australian markets over the last four years. It is inconceivable how they will now turn the business of the 'group' and the company around in the next twelve months.

[103] Gray referred to Potgieter's attempt at propping up VS using concepts of 'quasi-equity', goodwill, consignment of stocks, and loans, as investments in 'group' entities. Gray believes that Potgieter is on fragile territory on each of these grounds. IFRS for SMEs might classify subordinated shareholder loans as either liability or equity, depending on specific criteria. The key lies in evaluating the 'quasi-equity' concept. Subordination does not inherently convert a loan into equity under IFRS for SMEs. The classification hinges on a contractual obligation to repay the principal, which defines it as a liability. IFRS for SME's typically treats 'quasi-equity' as a liability unless there is no contractual obligation to repay. The latter is not the case for either VC or the loans from the Applicants. Classification as equity is rare. While the loans from the Applicants may be subordinated in favour of FNB as additional security for the VS-FNB overdraft facility, the debt obligation to the Applicants still exists. The liability would no longer be subordinated, once, or rather if or when, the FNB facility was discharged. If the company were to be liquidated for more than the FNB loan, the Applicant's loans would stand before the equity in VS and the group in claims against the liquidated assets.

[104] From an accounting perspective, the subordination does not create equity; it merely defers or back-ranks the debt claim in preference of the FNB first. Even FNB would not count it as equity when assessing their risk. Under IFRS for SMEs, no separate category is formally called 'quasi-equity'. Each financial instrument is classified as equity or liability based on whether there is a contractual obligation to deliver cash or another financial asset. Subordination alone generally does not transform a loan into equity. Compound financial instruments refer to a subordinated loan that has a convertible feature or has other embedded derivatives creating separate

components. IFRS for SMEs may treat it as a compound financial instrument (part liability, part equity). This requires splitting out the equity component if the terms explicitly allow conversion into a fixed number of shares for a fixed amount of cash. Pure subordination, where the debt is repaid after all other creditors are settled, does not by itself meet the test for an equity component. 'Quasi-equity' cannot apply in the instance of the Applicant's loans. 'Quasi-equity' is more of a business term indicating that a debt instrument is so deeply subordinated or has such flexible repayment terms that it behaves more like equity. Banks and investors may label these instruments 'mezzanine' or 'quasi equity', but IFRS for SMEs still requires their classification as liability or equity based on legal or contractual terms.

[105] Gray explained that the determination of solvency and liquidity rests on an interpretation of the financial statements. Subordination clauses make the loan riskier for the lender, yet they do not, on their own, remove the contractual obligation to repay, so classification as equity typically is not permitted under IFRS for SMEs. Disclosure of subordination agreements, the restrictions on payments and the relationship between the parties help users of financial statements understand the nature of the instrument.

[106] Gray then dealt with Potgieter's reference to quantifying the goodwill of the Veldskoen brand. He explained that under IFRS for SMEs, goodwill is initially recognised as the amount by which the cost of the business combination exceeds the fair value of the identifiable net assets acquired. It is amortised over its useful life or ten years if the useful life cannot be reliably estimated. It is only tested for impairment if there are indicators that it may be impaired. Detailed disclosures are required about the amortisation period, method, impairment charges, and any significant judgments involved in determining or estimating the useful life. There is no such investment shown in the balance sheet for any investment in any business combination where the assets are less than the acquisition cost and which, if there were such a case, could be ascribed to goodwill.

[107] Potgieter's handling of the Australian transaction with Rove & Saddle received Gray's attention. Potgieter stated that the stock was sent on consignment, and the invoices were reflected as a debtor in the books. They requested a goodwill discount and stated that the debt would be paid. Gray disagrees that the stock sent to Australia

was on consignment. As no payment was made, normal accounting principles would provide for the debt as being unrecoverable. Gray persisted in recommending that the amount be written off.

[108] On the Cali Buntu debt, Gray referred to Potgieter's analysis showing that only R194 656.64 had been paid against R10 million in debt. Gray criticised Potgieter's view that this payment was significant. Gray then turned to Potgieter's view that the loan account, which appeared to be in credit by R2 856 469.30, should be offset against the accounts receivable customer debt. Gray criticised Potgieter for not considering three factors. There was a loan account from N Akkerman of R1 119 505 that was made to Cali Buntu to facilitate the acquisition of shares of Fun Brands. Potgieter did not consider the \$55 700 (R1 017 500 appropriated by Dreyer and Zondagh or interest chargeable on these loans. There were intercompany loans from V UK to Cali Buntu that are not mentioned and total over R2 million. After considering these, there is no balance to offset against the accounts receivable customer accounts. An investment loan of R4 901 363 should also be impaired because Cali Buntu is insolvent as per the last management accounts by over R10 million (\$500 000). This loan, together with the other loans, should be impaired and written off as assets of the company having no value.

[109] The accounts receivable customer account was also for goods shipped as sales from VS, which under South African Reserve Bank regulations should be paid within six months. Failing payment, the company should request SARB approval for delays in payment. This has not been done, meaning that the debt is immediately payable.

[110] On Potgieter's criticism of Hendrika's decision to stop stock to the US, Gray stated that the management accounts show that over the past three years only R194 656.64 of the R10 271 764.07 in stock sent to Cali Buntu trickled down to VS. To advance another R10 million to get a trickle down of R190 000 (from the Shopify advance) is not a rational business decision.

[111] Gray holds the opinion that the write-off of the R14 259 005 on Cali Buntu is only prudent and accords with the requirements of IFRS for SMEs. He provided a breakdown on how he arrived at this figure. Gray criticised Potgieter further by implying

that Potgieter failed to appreciate the extent of V UK's indebtedness to VS, namely R3 435 845.60, even though it appears in one of his annexures. Potgieter only mentioned the accounts receivable customer balance of R128 543. He failed to mention that V UK is insolvent by an amount of R2 million. Gray believed that a write-off of R3 561 338 on VUK is prudent and in line with IFRS for SMEs.

[112] Gray referred to Potgieter's statement that deep discounting only applied to obsolete stock. Potgieter provided no evidence to support this. Deeply discounted sales are totally speculative and seem to be applied to all stock to raise cash as fast as possible.

[113] Gray concludes that the test of solvency, then, is whether assets exceed liabilities. Based on the balance sheet Potgieter shares in one of his annexures, the shortfall of assets over liabilities is determined by subtracting the net assets per the December 2024 management accounts (R2 822 341), and adding additional impairments (write downs) per the principles of IFRS for SMEs. Gray performed the exercise as follows: Rove & Saddle: R698 598, Cali Buntu: R14 258 006, V UK: R3 565 390, Stock Write Downs: R1 700 000, estimated loss for January and February: R 2 000 000. Gray estimated that the total shortfall of assets over liabilities amounted to R25 144 325.

Objective Evidence

[114] The Respondents argued that the determination of whether a company is in financial distress is a factual enquiry.²⁶ An application for business rescue must establish the grounds for business rescue per the rules of motion proceedings, which generally speaking, require that it must do so in its founding papers.²⁷ The application must be determined under the *Plascon Evans* Rule. Suppose disputes of fact arise on the affidavits in motion proceedings. In that case, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such an order. It may be different if

²⁶ *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* (609/2012) [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) (27 May 2013) (*Oakdene*)

²⁷ *Oakdene* at para 29

the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched, or so clearly untenable that the court is justified in rejecting them merely on the papers.²⁸

[115] The determination of whether a company should be placed under business rescue in terms of section 131 of the Companies Act is fundamentally an objective inquiry. The Court must be satisfied that in granting an order to place a company under supervision and business rescue, the company is financially distressed or that it is otherwise just and equitable to do so. There has to be a reasonable prospect of rescuing the company. This determination is not about who shouts the loudest in the affidavits, but about whether the facts, especially financial and operational, support the statutory threshold. These applications can devolve into personal attacks and rhetorical skirmishes. A Court must filter out the noise, disregard emotive or inflammatory language that doesn't advance the legal merits of the case, and focus on relevant, probative evidence.

[116] Counsel relied upon the *Plascon Evans* rule, the standard of how factual disputes are resolved in motion proceedings, typically favouring the Respondent's version unless the denial is clearly untenable, in arguing their respective cases. Applicant's Counsel repeatedly emphasised that the Respondents had not seriously and unambiguously engaged or addressed the material facts in dispute, and the application should thus be decided on the Applicants' version.²⁹

[117] However, in business rescue applications, the Court is often dealing with expert analysis of financial documents and evidence, which are not always susceptible to the binary "he said, she said" structure of ordinary factual disputes. This Court believes that it may adopt a more evaluative approach in the circumstances, weighing the logic, credibility, and coherence of expert opinions rather than applying *Plascon Evans* rigidly in circumstances where there is little dispute of fact between the experts. They rely on the same set of contemporaneous management and financial accounts, but express

²⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions* [2008] ZACC 13; 2008 (2) SACR 421 (CC) para 8-10

²⁹ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008) at para 13

differences in how they interpret them. The Court accepts that their respective opinions have not been subjected to cross-examination, but neither party asked for the referral of their experts for limited oral evidence or submission to a trial.

[118] The reliable objective evidence in this business rescue application is found in the affidavits of Gray and Potgieter and their expert opinions on the financial documents, not the added commentary from either Moors or Dreyer. Whilst both Chartered Accountants have short tenures with VS, Grey has been there since August 2024, and Potgieter from January 2025. Moors and Dreyer have both relied upon their respective experts on aspects material to this application. In the latter circumstances, accusations of bias, of which there were many, especially from the Respondents, are less relevant. Gray has been a Chartered Accountant for a much longer period than Potgieter. Still, the Court accepted that both have specialised knowledge and skill in a field beyond the Court's ordinary experience. They have the requisite experience and expertise, their opinions are relevant to the issues that have arisen, and they have assisted the Court in making its determination. Applying the *Plascon Evans* rule to their respective affidavits would be contrary to the evaluation of expert opinion, which is based on logical reasoning.³⁰

[119] The Court has considered that their opinions are based on unaudited financials and assumptions or incomplete information, both of which were beyond their control. In the elemental analysis, the Court accepts that Grey's opinions are based on the appropriate accounting standard that should be applied to a company of the size of VS, and he had a longer opportunity to investigate, analyse, and appreciate the challenges applicable to VS.

[120] The Respondent's opposition rests heavily on the opinion of its appointed expert, who purported to assess the company's financial viability using the full IFRS framework. However, the company qualifies as a small to medium enterprise, and the applicable accounting standard is IFRS for SMEs. The expert's reliance on the incorrect framework renders his conclusions methodologically flawed and substantively unreliable. This is not a mere difference of professional opinion. It is a misapplication of

³⁰ *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another (1)* (361/98) [2001] ZASCA 12; [2002] 1 All SA 384 (A); 2001 (3) SA 1188 (SCA) (13 March 2001) at para 36

the governing standard. Even the auditors have recognised the applicable standard as IFRS for SMEs. The Court is therefore entitled to reject the opinion as clearly untenable. In doing so, it does not depart from the *Plascon-Evans* rule, which permits the rejection of a respondent's version where it is palpably implausible or demonstrably incorrect. Moreover, the dispute between the experts is not one of primary fact but of evaluative reasoning. The Court is thus entitled to assess the logical coherence and evidentiary foundation of each opinion and, in this case, prefers the Applicant's expert, whose analysis is grounded in the correct accounting framework and supported by verifiable data.

The 2024 Annual Financial Statement

[121] There is one further financial document that the Court must consider. The Respondents included the audited annual financial statements for VS for the year ending 29 February 2024, rather belatedly. Dreyer alleges that he was advised not to traverse the content until the board meeting that was scheduled for 2 June 2025, which did not occur. The Applicants agreed to the two late supplementary affidavits being filed. They provided an analysis of the 2024 AFS, which had to be rejected as the Respondents objected to its filing. It is unclear why Dreyer or Potgieter, to whom he had access, would not have addressed the content of the 2024 AFS. The Court must interpret the document on face value without the assistance of expert opinion. The AFS has limited value as it relates to the operations of VS between March 2023 and February 2024, and is not current, except that it refers to mitigating factors that are currently being instituted. The 2025 AFS is not before the Court in either draft or audited form.

[122] The 2024 AFS treats VS on the basis that it is a going concern as evaluated, among others, under s3.8 of the IFRS for SMEs. It states that after evaluating approved budgets, cash flow forecasts and other relevant information for at least the 12 months from the date of authorisation of the financial statements, the founding directors are satisfied that preparation on a going concern basis remains appropriate. The Court has had regard to Gray's opinion that predated the filing of the AFS about whether VS should have been assessed as a going concern or an entity in liquidation, given its dire

financial position. A going concern assessment, while relevant, is not dispositive where credible allegations of commercial insolvency have been raised.

[123] The auditors drew attention to the accumulated losses of R13 316 772 and that the company's total liabilities exceeded its assets by R7 816 672. The latter figure was in brackets. The Court assumes that it was subject to further scrutiny by the directors of VS. The AFS states further that as of the date of the report, i.e., 13 May 2025, the company continues to incur losses. The AFS referred to this business rescue application, and contingent liabilities relating to Hendrika's dismissal were recorded.

[124] The AFS alludes to the founding directors (Dreyer and Zondagh), who noted certain mitigating factors relating to shareholder and lender support, capital raising program, and return to profit initiatives. They noted that existing funding facilities remain in place and the ultimate shareholder (the Applicants) has provided written subordination undertakings in favour of the company's senior financing arrangement with FNB. The founding directors stated that the shareholder loan claims would rank behind all present and future obligations to FNB until the company's assets exceed its liabilities and the FNB facility has been fully discharged.

[125] Under the header of the capital raising program, the founding directors state that a structured recapitalisation process already underway is expected to inject additional equity and working capital funding during the 2026 financial year. Existing funding facilities remained in place, and the ultimate shareholder (the Applicants) had provided written subordinated undertakings. A structured recapitalisation is underway and is expected to inject additional equity and working capital funding during the 2026 financial year. The founding directors addressed the return to profit initiatives by stating that management has implemented an expansion plan and cost optimisation measures that, based on approved budgets and secured contracts, are projected to restore profitable operations within the forecast period.

[126] The founding directors believed that the company would realise its assets and settle its liabilities in the normal course of business. The going concern assessment concludes with a grave caution. Should the contemplated funding or operational

improvements not materialise, a material uncertainty would arise that may cast significant doubt on the company's ability to continue as a growing concern.

[127] The latter aspect makes the 2024 AFS relevant to the determination of the relief sought. In addressing the return to profit initiatives, the auditors refer to the expansion plan and cost optimisation measures implemented by management, based on approved budgets and secured contracts. They are expected to restore profitable operations within the forecast period.

[128] The credible evidence is of a company with declining sales and cash flow, net ongoing losses, and solvency and liquidity problems. The recoverability of substantial debt from its UK, US businesses and sales to Australia is slim. The US business, in particular, is heavily indebted to the company in circumstances where the ownership has not been finalised. There are major problems with stock flow, valuation and disposal. Most damning of all, is the financials. The AFS confirms that VS has been factually or technically insolvent since at least 2023. The Court is inclined to lean towards Gray's assessment of the company's shortfall of assets over liabilities to amount to R25 144 325. There is very little credible evidence to support Potgieter's overly optimistic opinions, and the Court rejects it where it differs from that of Gray's. Taking all of the financial information, including the grave concerns expressed in the 2024 AFS, and the expert's opinions into account, the Court finds that the Applicants have succeeded in proving that VS is financially distressed. They have established financial distress under s128(1)(f)(ii) of the Companies Act. VS's insolvency has been a fact for some time, obviating the need to consider whether that event is reasonably likely to occur within the immediately ensuing six months, or whether it is just and equitable to do so for financial reasons. There is also no need for the Court to consider whether the company will be able to pay its debts when they become due. The Court must then proceed to determine whether there are reasonable prospects of rescuing the company.

Reasonable Prospects of Rescuing VS

[129] The primary purpose of business rescue is to enable a 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.³¹

[130] The Respondents contend that they have implemented a turnaround strategy sufficient to obviate the need for formal business rescue proceedings. However, the Court is not persuaded that this extra-statutory initiative, effectively a shadow rescue, offers the procedural safeguards or stakeholder protections envisaged by Chapter 6 of the Companies Act. While the Companies Act does not prohibit informal restructuring efforts, it is precisely the absence of an independent practitioner, the statutory moratorium, and creditor oversight that renders such efforts legally inadequate in the face of demonstrable financial distress. The Court cannot endorse a process that mimics business rescue in form but lacks its substance. To do so would be to permit the circumvention of a carefully constructed statutory framework designed to balance the interests of all affected parties. Accordingly, the Court finds that the Respondents' reliance on an informal strategy does not displace the Applicant's entitlement to relief under section 131(4) (a).

[131] The Applicants submit that there is a reasonable prospect of rescuing VS through a structured business rescue process. It remains a viable enterprise with strong brand recognition and market potential. Still, immediate intervention is required to correct its severe financial mismanagement, restore cash flow, and implement proper financial systems. Their plan caters for immediate financial stabilisation, operational restructuring, debt restructuring and credit negotiations, restoring profitability and growth, and implementing governance and compliance measures. Business rescue promises a better return than liquidation.

[132] The essentials of the Applicant's plans shall be recorded here. They estimate an immediate injection of R5 million into the company and a deferred amount of a further R5 million over the next 12 to 18 months. They intend to recover outstanding debts,

³¹ Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others (136/2022) [2023] ZASCA 34; 2023 (4) SA 78 (SCA) (31 March 2023), at para 23, s128(1)(b)(iii)

especially the R9.9 million owed by Cali Buntu, halt excessive discounting of stock, placate and settle suppliers, and institute rigorous financial reporting systems. They envisage operational restructuring by restoring financial discipline and overseeing cash flow management, producing accurate financial statements, reducing monthly overheads, overhauling procurement processes and ceasing unprofitable international expansions and focusing on high-margin domestic markets to improve revenue. They envisage a restructuring of outstanding shareholder and supplier loans, engaging secured creditors like FNB to negotiate a phased repayment plan, convert a portion of shareholder loans into equity to reduce debt pressure and attract further investment, and prioritise the settlement of key supplier accounts to secure essential inventory. As for the restoration of profitability and growth, they contemplate strict financial oversight mechanisms, focusing on restoring gross profit margins, implementing revised sales strategies, engaging potential investors in exchange for equity, and introducing financial tracking tools to monitor transactions and flag discrepancies before they become financial risks. The governance and compliance measures follow prudent principles that need not be repeated here. The post-commencement finance strategy, alluded to earlier in this judgment, includes the raising of about R15 million, debt restructuring, inventory management, and financial oversight improvements. The Applicants relied on Gray's assistance in developing their plan and his forecasts until 2027. The Applicants submitted that by implementing these measures, business rescue presents a far superior alternative to liquidation and offers creditors a significantly better dividend by preserving the company.

[133] Dreyer relied on Potgieter's opinions and denied the need for business rescue. He claims that the Applicant's plan is, in large part, a carbon copy of his business strategy. He can then have no objection to the Court approving it. Dreyer distinguishes his plan from the Applicants in one respect. The Applicants aim to stop the growth of the business and scale back its operations. The contention cannot be correct. The Applicants are rightfully insecure about the overseas expansion, preferring rather the high-yield domestic market. Dreyer persists in attributing the ills of the company to Hendrika. The Court asked and repeated the unanswered question as to where he and Zondagh, the executive founding directors, were when all the ills of the company attributed to Hendrika were occurring. The Respondent's dirty hands theory must rest.

[134] The Court finds that the Applicants have placed before it a preliminary turnaround strategy, supported by evidence of a committed capital injection and a detailed plan of action. Notably, this plan has elicited a measure of support from the Respondents, albeit in oblique terms. Taken cumulatively, these elements provide a credible and objectively grounded basis for concluding that there exists a reasonable prospect of rescuing the company within the meaning of section 131(4) of the Companies Act.

Appointment of a Business Rescue Practitioner

[135] The Applicants nominated Julian Empedocies as the business rescue practitioner. He has expertise in financial restructuring and turnaround strategies. Empedocies gave written confirmation of his willingness to accept the appointment and provided his curriculum vitae, licence certificate, and consent to act. He has reviewed the financial documents provided to him and confirms that VS is financially distressed and that there is a reasonable prospect of rescuing it through a structured intervention. The Applicants seek that the Court appoint Empedocies as the interim business rescue practitioner under s131(5) of the Act. The appointment will be subject to ratification by the holders of the majority of independent creditors' voting interests at the first meeting of creditors to be held during the business rescue proceedings.

[136] The Respondents contended that Empedocies does not know the inner workings of VS. His appointment will be an entirely unnecessary cost to the business. The Court is satisfied that the Applicants have made out a case for the appointment of Empedocies as the business rescue practitioner under s131(5) of the Act.

[137] The Applicants have succeeded in obtaining the relief sought in the business rescue application. There is no reason why the costs should not follow the cause. The Applicants sought party and party costs with Counsel's fees on Scale C. The Court explained why an interpretation of the scales applicable to advocates' fees permits one Counsel's fees on scale C and the other's only on scale A, where two Counsel are involved. There is no reason for the Court to apply its discretion and deviate from this interpretation. Had the legal team considered transformation initiatives, like appointing a third female Counsel or a Counsel of colour, in the selection or addition of Counsel, the

Court may have been persuaded to grant a more generous cost order. The pool of legal representation in this branch of the law must grow and become more inclusive.

CONCLUSIONS

[138] The Court has considered three applications relating to a common thread of facts weaving through them. The applications concern a homegrown company that has aspired to become a global entity. That aspiration has been tempered by serious allegations relating to the expansion ambitions, culminating in these applications.

[139] In the Interdict Application, the Court accepts that it has been overtaken by the efflux of time since its institution but regrets the lapse in attention to detail and the failure of Counsel to effect the changes to the papers timely and avoid inconveniencing the Court and the Respondents from reading the voluminous papers relating to abandoned and unclear relief. The costs order against the Applicants is warranted as a sign of the Court's displeasure.

[140] The counterapplication seeking to declare two directors delinquent was without merit and considered to be opportunistic, if not cynical. There too, the offending party will be mulcted with the appropriate cost order.

[141] Finally, the business rescue application proved to be meritorious, and the Applicants have succeeded in obtaining the relief sought. The Court makes the order that follows.

ORDER

1. The application under case number 24391/24 is dismissed with costs. The Applicants shall pay the Respondents' taxed or agreed costs on an attorney-client scale.
2. The application to strike out is dismissed. Each party shall pay their own costs.

3. The counterapplication under case number 24391/24 is dismissed with costs. The Third, Fourth and Fifth Respondents shall pay the Applicant's taxed or agreed costs on an attorney-client scale.
4. Under case number 2025-015315.
 - 4.1 The First Respondent, Veldskoen Shoes (Pty) Ltd, is placed under supervision and business rescue proceedings will commence in the manner contemplated under section 131(4) of the Companies Act 71 of 2008 (the Act),
 - 4.2 Mr Julian Empedocias, with identity number 8901295128087, is appointed as the interim Business Rescue Practitioner of the First Respondent under s131(5) of the Act,
 - 4.3 The Third and Fourth Respondents shall pay the Applicants taxed or agreed costs on a party and party scale with Senior Counsel's costs as taxed or agreed on scale C and Junior Counsel's fees on scale A.

BHOOPCHAND AJ
Acting judge
High Court
Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 20 June 2025

Applicants Counsel: G Wickins SC, G Solik
Instructed by Rushmere Noach Attorneys

Respondent's Counsel: J G Dickerson SC, S G Fuller
Instructed by Cliffe Dekker Hofmeyr Inc