

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case Number: **2025-067947**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

In the matter between:

MasterCard Foundation

Applicant

And

Africa Founders Ventures NPC (in business rescue)

First Respondent

Barry Claude Urban N0

Second Respondent

Companies and Intellectual Property Commission

Third Respondent

Nedbank Ltd

Fourth Respondent

The Standard Bank of south Africa Ltd

Fifth Respondent

Investec Bank Ltd

Sixth Respondent

JUDGMENT

Johann Gautschi AJ

[1] In this opposed urgent application the Applicant seeks orders setting aside a resolution of the First Respondent to commence business rescue proceedings, provisionally winding up of the First Respondent and ancillary interdictory relief. The application is opposed by the First and Second Respondents (also collectively referred to as the Respondents).

[2] The application was launched as an urgent application on 14 May 2025.¹ It was initially enrolled for hearing in the dedicated Insolvency Court 5 June 2025, but was struck off the roll for lack of urgency and for non-compliance with the Practice Manual of the Gauteng Division, Pretoria. The following week the matter came before me in the dedicated Insolvency Court on Thursday, 12 June 2025, following a special allocation direction by the Deputy Judge President granted on 6 June 2025 pursuant to the applicant's request on that day. The urgency relied upon by the Applicant was a meeting in terms of section 151 of the Companies Act to approve a Business Rescue Plan which had been convened by the Business Rescue Practitioner (BRP) of the First Respondent for 11 AM the following day, Friday, 13 June 2025, at which meeting the Applicant would not be permitted to vote because the BRP refused to recognise the Applicant as a creditor.

[3] On 12 June 2025 after a limited argument on urgency² the parties, appreciating the practical difficulty of hearing an application in which some 1,400 pages had been filed and still obtaining a considered judgment before the meeting scheduled for the following morning, agreed to postpone the hearing of the application to 27 June 2025 with costs reserved and to the meetings of the First Respondent to be postponed to 7 July 2025. Those dates were agreed to allow me a reasonable time after the hearing to prepare judgment.

¹ The claimed basis for urgency is dealt with below.

² Striking off the previous week for lack of urgency does not constitute *res judicata*. See LUNA MEUBEL VERVAARDIGERS (EDMS) BPK v MAKIN (t.a MAKIN'S FURNITURE MANUFACTURERS) 1977 (4) SA 135 (W)

[4] At commencement of the hearing on 27 June 2025, having had an opportunity of considering the papers, I indicated to counsel that I regarded the matter to be urgent and would hear the application on its merits. The merits of the application then became the focus of argument which lasted some 7 hours, whereafter I reserved judgment indicating that I would issue judgment in the course of the following week.

Main issues

[5] The answering affidavit of the First and Second Respondents deposed to by Mr Urban, the business rescue practitioner (BRP), submitted that the application was materially defective for various reasons which can conveniently be grouped into the following grounds of opposition.

[6] Firstly, the **urgency issue**. They submitted that the application was not urgent.

[7] Secondly, the ***locus standi issue***. They submitted that the Applicant was not a creditor of the First Respondent as envisaged in section 128 (1) (a) (i) of the Companies Act, 71 of 2008 (the Act) at the time when business rescue proceedings commenced on 2 April 2025 and consequently was not entitled to notice of the resolution and a sworn statement under Section 129 (3) (b) of the Act. Ancillary thereto they submitted that the Applicant's alleged contingent contractual claims and/or alleged proprietary claims arising from the Grant Agreement did not trump the continued implementation of the business rescue proceedings and the statutory ranking of creditors under section 135 of the Act. This ancillary issue involved a challenge to the legal opinion of Prof Oosterhof on the interpretation and legal consequences which flow from payments made by the Applicant to the First respondent in terms of the Grant Agreement.

[8] Thirdly, the **interdictory relief issue**. They challenged the Applicant's right to the claimed interdictory relief.

Background context – chronology of events

[9] Those issues need to be considered in the light of the following background facts and chronology of the events which gave rise to this application.

[10] The Applicant (the Foundation) is a non-share capital Corporation established under the laws of Canada, registered as a charity with the Canada Revenue Agency and having its principal place of business in Toronto, Ontario, Canada. It was founded in about 2006 by MasterCard International Inc, the global payment and technology company to advance charitable causes relating to financial inclusion in education and thereby improve the living of those living in poverty, including in Africa.

[11] The First Respondent (AFV) has been in business rescue since 27 March 2025 when a resolution of its directors taken on 26 March 2025, signed on 27 March 2025 was registered with the Third Respondent (the Commission) on 27 March 2025. It is a non-profit company duly incorporated and registered in terms of the company laws of the Republic of South Africa with its registered address in Johannesburg, Gauteng.

[12] In December 2022 the Foundation and AFV a written grant agreement (the Grant Agreement, in which AFV is defined as the “*Organisation*”) in terms of which the Foundation was to provide total grant funding of US\$106,500,698 in a series of periodic tranches to AFV for exclusive use in specific charitable activities that further the Foundation’s charitable purposes. The Term of the agreement began on 10 January 2023 and was intended to expire on 10 January 2028.³ Clause 2.1 read with Schedule B of the Grant Agreement specified those charitable activities as “*Activities*” which constitute a “*Program*”.

[13] Clause (a) of Schedule A to the Grant Agreement) (read with Section 1.2 of the Grant Agreement) provides that AFV was established as a non-profit company under the Companies Act, 71 of 2008 for the following purposes:

³ clause 8.1 read with Schedule A of the Grant Agreement

“the provision of funding for small, medium and micro-sized enterprises in Africa and which funding is –

provided for the benefit of all is widely accessible to small, medium and micro-sized enterprises;

provided on a non-profit basis and with an altruistic or philanthropic intent; and not intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the Company.

The provision of welfare and humanitarian activities relating to community development for poor and needy persons and anti-poverty initiatives, including training for unemployed persons with the purpose of enabling them to obtain employment, including the provision of training, support or assistance to emerging micro-enterprises to improve capacity to start and manage businesses, which may include the granting of loans and/or grants as well as such other financial and/or non-financial support, on such conditions as may be determined by the Board from time to time and within the ambit of the Income Tax Act.”

[14] Clauses 2.1 (e) and (f) of the Grant Agreement provide

“(e) The Parties acknowledge that each disbursement to the Organisation in terms of the Grant constitutes a gift that is a qualifying disbursement under the Income Tax Act (Canada). The organisation acknowledges that the Grant must be applied exclusively for charitable activities that further the charitable purposes of the Foundation.

(f) The Party shall comply with all the requirements that apply under the Income tax Act (Canada) in respect of the Grant.”

[15] The Grant Agreement provides that⁴ *“(b) The Agreement may be terminated by either Party without cause by giving not less than ninety (90) calendar days’ written notice to the other Party.”* and that in the event of termination:

“(a) the Foundation shall not be responsible for making any further payments to the Organisation respect of the Grant;

⁴ clause 8.2 (b)

(b) with respect to any portion of the Grant, including any property purchased or acquired with the Grant, that has not been used or expended in accordance with the terms of this Agreement, as well as any funds held by the Organisation that were received as repayment of principal, interest or other form of return on investment from Program-Related Investments made to this Agreement (the “Remaining Grant”), the Organisation shall, at the option of the Foundation:

(i) transfer the Remaining Grant, or such portion thereof that the Foundation directs, to a successor organisation identified by the Foundation, on such terms as the Foundation may direct;

(ii) return to the Foundation the Remaining Grant, or such portion thereof that the Foundation directs;

(c) with respect to any Program-Related Investments that are outstanding at the time of termination, which for greater certainty include any outstanding charitable loans made by the Organisation to Programme Participants, the Organisation shall, at the option of the Foundation, transfer or assign such program -related investments to:

(i) a successor organisation identified by the Foundation, on such terms as the Foundation may direct; or

(ii) the Foundation;

(d) the Organisation shall forthwith return to the Foundation all funds and property transferred to it which have been used for purposes in a manner other than as described in this Agreement;

(e) the Organisation shall forthwith provide a full written statement of accounts of its use and expenditure the Grant; and

(f) the Organisation shall forthwith return to the Foundation all property, documentation, or confidential information which is the property of the Foundation.”

[16] Clauses 3.1, 3.2 and 3.3 of Schedule E to the Grant Agreement provides as follows relating to the use and return of capital assets:

“3.1 To the extent that the Organisation uses the Grant to purchase, obtain, create or construct any capital assets (such assets referred to as “Capital Assets”), the Organisation covenants that it will use any such Capital Assets

in strict accordance with the Activities described in the Agreement and with the charitable purposes of the Foundation.

3.2 For the duration of the useful life of any Capital Assets:

- (a) the Organisation shall not convert any Capital Asset into other property or for uses that are not recognised as charitable under Canadian Law;*
- (b) the Organisation shall, by no later than December 31 of each year, deliver a written report to the Foundation confirming the ongoing charitable use of such Capital Assets during the reporting period; and*
- (c) the Organisation shall not sell or dispose any Capital Assets unless it has received prior written approval from the Foundation.*

3.3 In the event that any Capital Asset cannot be used for its intended charitable purposes, the Organisation shall notify the Foundation promptly. The Foundation may direct the Organisation to either:

- (a) sell the Capital Asset and transfer to the Foundation the Foundation's pro rata share of any proceeds from such sale. In determining the portion of the proceeds payable to the Foundation pursuant to this section, the Organisation shall return a percentage of the proceeds that is equivalent to the percentage of the cost to purchase, obtain, create or construct the Capital Asset that was contributed by the Foundation pursuant to the Agreement;*
- (b) transfer the Capital Asset to another organisation upon instruction of the Foundation, on such terms as the Foundation directs; or*
- (c) refund to the Foundation any funds of the Foundation used by the Organisation to purchase, obtain, create or construct the Capital Asset."*

[17] With regard to misappropriation of funds, clauses 8.5 and 8.6 of Schedule E to the Grant Agreement provide as follows:

"8.5 The Organisation shall take all appropriate steps to prevent and shall inform Foundation immediately of any known or suspected misappropriation of the Grant or fraud relating to the activities contemplated in the Agreement.

8.6 When misappropriation of funds is reasonably suspected, the Foundation has the right to suspend any payments under the Agreement and to require the Organisation to cease using and preserve payments already received that have not been spent or committed in accordance with the Agreement, with immediate effect. The Organisation shall co-operate fully with

the Foundation in respect of any investigation into misappropriation of funds or fraud. Where, at the Foundation's sole discretion, misappropriation or fraud is determined by the Foundation to have occurred, the Foundation may terminate the Agreement with immediate effect and may require the Organisation to take all steps required to recover funds subject to misappropriation or fraud for return to the Foundation."

[18] Conflict resolution is provided for as follows in clause 13 of Schedule E to the Grant Agreement:

"13.1 In the event that a dispute between the Parties arising out of or related to the Agreement is not resolved in private meetings between the Parties within 60 (60) calendar days of notice by one Party to the other of a dispute, then without prejudice to or in any other way derogating from the rights of the Parties as set out in the Agreement, and as an alternative to such person instituting a lawsuit or legal action, such dispute or controversy shall be settled by a process of dispute resolution as follows:

(a) The dispute or controversy shall be submitted to a panel of three mediators, whereby each Party shall appoint one mediator, with two mediators so appointed jointly appointing 1/3 mediator. The three mediators will then meet with the Parties in question to mediate a resolution between the Parties. The number of mediators may be reduced from three or two upon agreement of the Parties. The mediation shall be conducted and administered by the International Centre for Dispute Resolution (international division of the American Arbitration Association) in accordance with its International Mediation Rules.

(b) If the Parties are not successful in resolving disputes through mediation, then any controversy or claim arising out of or relating to the Agreement, or the breach thereof shall be determined by arbitration administered by the International Centre for Dispute Resolution (international division of the American Arbitration Association) in accordance with its International Arbitration Rules, supplemented by the 2010 International Bar Association Rules on the Taking of Evidence. All proceedings relating to arbitration shall be kept confidential. The decision of the arbitrator shall be final and binding and shall not be subject to appeal on a question of fact, law

or mixed fact and law. The arbitrator shall decide the merits of the dispute in accordance with the substantive laws of the province of Ontario and the federal laws of Canada to the exclusion of any private international law rules. The dispute shall be decided by a single arbitrator, who shall not be any one of the mediators referred to above.

(c) All costs of the mediation and arbitration shall be borne equally by the Parties to the dispute. The place of mediation and arbitration shall be Toronto, Ontario, Canada. The language of the mediation and arbitration shall be English.” c

[19] Clause 14.1 of Schedule E to the Grant Agreement provides that “*The Agreement is governed by the substantive laws of the Province of Ontario and the federal laws of Canada to the exclusion of any private international law rules.*”

[20] During 2023 pursuant to the Grant Agreement the Foundation transferred US\$19,150,160 to AFV for the purpose of carrying on specified Activities during the 2023 calendar year. The transfer was acknowledged in a written Designation for Periodic Transfer signed by the Foundation and AFV⁵ which stipulated that the funds were to be applied in accordance with the Grant Agreement and strictly on the agreed terms of the Designation for Periodic Transfer.

[21] During 2023 AFV submitted an exchange control application to the Standard Bank of South Africa Ltd (SBSA) as an authorised dealer of the South African Reserve Bank (SARB) to obtain exchange control approval for the return of the Remaining Grant to the Foundation in Canada upon termination of the Grant Agreement. The application was approved by the SARB initially for one year and subsequently for an extended period until 10 January 2028, the date upon which the Grant Agreement was due to expire through effluxion of time in the absence of early termination.

[22] During 2024 the Foundation transferred a further amount of US\$23,116,869 to AFV for the purpose of carrying on specified Activities for the 2024 calendar year.

⁵ annexure FA 3.1 to the founding affidavit

Also those funds were to be applied in accordance with the Grant Agreement and strictly on the agreed terms of the Designation of Periodic Transfer signed by the Foundation and AFV.⁶

[23] Following an exchange of correspondence in July 2024, the Foundation during or about August 2024 became aware that AFV had utilised some of the Grant funding for its rebranding to “54Collective” which had not been approved or agreed to by the Foundation. In his 22 July 2024 correspondence Mr Hailu, the Foundation’s Executive Director: Impact, Research and Learning (the deponent to the founding affidavit) had requested an understanding of the rationale and motivation for changing and developing the new brand, of the budget for the rebranding and requested an understanding of the connections between 54Collective, AFV, Utopia and Founders Factory Africa (FFA). He explained: *“In this regard, AFV was created to ensure that its charitable programming was at all times separate from FFA’s for-profit activities. FFA is a company that is run by the same key individuals as AFV. FFA engages in for-profit activities including activities under the “Utopia” brand. Utopia brand includes several entities and contains venture capital funds including Utopia Capital Management Ltd.”*

[24] In his 7 August 2024 email he explained the concerns which he had raised regarding the proposed rebranding. He said that the Foundation did not approve the rebranding as proposed. He raised a concern on the use of Grant funds for rebranding activities, noting, *inter alia*, his concern about *“the potential for-profit activity being associated with the brand linked to the charitable Programs and the goodwill associated with these Programs being transferred to non-charitable activities. – – If the new branding becomes closely associated with the Programs rather than just AFV, a reputational link could endure after the Programs conclude”*.

[25] In the founding affidavit Mr Hailu explained the significance and consequences of the rebranding as follows. *“In these circumstances, the Grant funding had been applied by AFV for the rebranding to “54Collective” but was not approved by the Foundation. The rebranding is being used for the benefit of third*

⁶ annexure FA 3.2 to the founding affidavit

parties. The for-profit company, FFA, and the Utopia appear to be using the same 54 Collective brand and benefiting from the grant funding applied to the rebranding. This raises concerns that the Foundation's grant has been utilised for purposes that are not consistent with the Grant Agreement. While other remedies may also exist, the Foundation has a contractual claim against AFV for recovery of the rebranding cost unlawfully expended by it, which AFV admits. As things stand, the most effective way of doing so would be through a formal winding-up and an investigation by the liquidator, who would have statutory powers that the BRP does not have."

[26] Eventually, in a letter dated 1 October 2024,⁷ AFV acknowledged the error in pursuing the rebranding and stated that it was considering the appointment of a dedicated risk and compliance officer to prevent a recurrence.

[27] Some months later, in an email dated 17 February 2025, AFV explicitly confirmed its willingness to repay the rebrand cost.⁸ That email was a response to the 14 February 2025 email from Philip Milley, the Foundation's Director, Legal and Compliance, Canada, in which he stated:

"Hi Bongani,

Thank you for the meeting today. You requested a summary of the Foundation's position as to why AFV is obligated to pay the funds spent on the 54 Collective rebranding campaign.

The Grant Agreement provides, in section 8.3 (d), that upon termination AFV must forthwith return to the Foundation all funds and any property transferred to it which had been used for purposes or in a manner other than as described in the Agreement. The re-branding campaign was never contemplated in the Agreement or in the approved budgets.

The Agreement also provides, in section 4.3 (b) (i) that the Grant cannot be provided, transferred or otherwise made available, directly or indirectly, to the Utopia Fund (the "Fund"), any investor in the Fund, or any related or affiliated entities, with the exception of the payment of certain services costs to you CM. The Foundation views the use of the Grant for the re-branding campaign, which clearly benefits the Fund, is inconsistent with this provision.

⁷ annexure FA to the founding affidavit; caselines 001-184

⁸ annexure FA 8 to the founding affidavit, caselines 001-184 to 185

AFV also failed to consult appropriately and obtain approval from the Foundation for the re-branding, and for the public use of the Foundation's name in the context of the re-branding, as required under the Agreement.

For the foregoing reasons, the use of the Grant for the rebranding did not comply with the terms of the Agreement and AFV is obligated to repay the grant funds spent on the rebranding campaign.”

[28] The First and Second Respondents provided no credible response to the foregoing. The submission in paragraph 236 of the answering affidavit that the correspondence exchanged was without prejudice and inadmissible is not borne out by the contents of these two emails. It was not pursued in argument and is manifestly without substance.

[29] In the interim, by letter dated 25 October 2024⁹ the Foundation requested copies of all books and records relating to the use and expenditure of the grant, details regarding AFV's head office and other locations where AFV maintains its books and records and detailed accounting of costs incurred due to the 54 Collective rebranding. It also demanded that AFV repay the Foundation the rebranding costs and stated that the Foundation would not issue any further periodic transfers until it was satisfied with AFV's responses to the request for information.

[30] After AFV on 10 and 12 November 2024 provided access to some, but not all Documentation requested, the Foundation appointed Deloitte to inspect AFV's books and records which commenced in December 2024. This included reviewing, *inter alia*, AFV's financial records and the integrity of AFV's accounting records through read-only access granted in AFV's accounting system, Xero.

[31] The founding affidavit states that Deloitte made some preliminary observations, namely:

“35.1 AFV has not produced audited financial statements for the 2023 and 2024 fiscal years. For the 2023 fiscal year, AFV has submitted draft financial statements. According to AFV's auditor, PricewaterhouseCoopers, South

⁹ founding affidavit paragraph 32, annexure FA 5.1

Africa (PwC), the audit was delayed for the reasons set out in 35.4. However, the draft 2023 financial statements remain unaudited by PwC and no draft 2024 financial statements have been produced. According to AFV, there is a concern that AFV is not a going concern as a result of the termination of the Grant Agreement. I also make the point that absent up-to-date financial statements, management accounts, and reliable financial information, the Board of Directors and BRP could not have formed an opinion that any prospect exists for AFV to be rescued (or as the case may be, not rescued);

35.2 after the Deloitte investigation commenced, AFV passed almost 2000 adjusting journal entries in its books of accounts. These included:

- (a) over 700 debits and credits posted to the accounts of AFV between 12 March 2025 and 14 March 2025, impacting the 2023 financial years; and*
- (b) over 1000 adjusting journal entries made between 5 March 2025 and 20 March 22 five impacting the 2024 financial year;*

35.3 there are several adjustment entries and subsequent reversals, but the aggregate impact on individual accounts is currently unknown;

35.4 PwC attribute the adjusting journal entries to (i) AFV's inadequate adoption of the International Financial Reporting Standards for Small and Medium-Sized entities (IFRS), stemming from an apparent lack of financial competency within its financial function; and (ii) failing to account for transactions in separate books of accounts for different legal entity;

35.5 whether this correct remains to be seen but the books and records, the adjustments, the comments of PwC and the conduct of AFV all call into question the accuracy and reliability of the entries in the books and records of AFV;

35.6 notably, the adjusting journal entries in the 2023 and 2024 fiscal years have resulted in a change to the balances in the grant income accounts in Xero. Those balances now differ from the total funds disbursed per the signed Designation for Periodic Transfer schedules already attached as "FA3.1" and "FA3.2". If the adjusting journal entries are correct, as stated by AFV's auditors, PwC, then AFV misrepresented the balance of the grant income and has failed to account, whether in accordance with the Designation for Periodic Transfer schedules or at all, for the Grant funding;

35.7 *hundreds of bank statements of banking accounts held in the name of AFV were provided to Deloitte (excluding duplicates). A preliminary review of those bank accounts reveals that there are certain suspicious transactions in some of these bank accounts. For example, an aggregate amount of US\$4.59 million (converted from South African Rands using the exchange rate applicable at the date of the balance) was transferred by AFV from the bank accounts held at SBSA with account number 0[...] to FFA, which is a for-profit company. The Foundation would not have agreed to this, as to do so would have dire regulatory consequences in light of its charitable status;*

35.8 *Based on the most recent bank statements received by Deloitte from AFV, there was an aggregate amount of approximately US\$6,174,499 held in the following bank accounts as of the statement dates noted in the table below. (Table omitted)."*

[32] On 30 January 2025 the Foundation delivered to AFV a notice of termination for convenience of the Grant Agreement pursuant to clause 8.2 (b) of the Grant Agreement.¹⁰ The notice informed AFV, *inter alia*, of the termination of the Grant Agreement effective 90 calendar days from 30 January 2025. It also drew attention to clause 8.3 of the Grant Agreement relating to the consequences of termination, recording that the Remaining Grant must be transferred by AFV to the successor identified by the Foundation or return to the Foundation. The notice also requested AFV to provide a list of commitments and employees, conduct an inspection of Activities, and repay US\$689,931.46 to the Foundation for the irregular rebranding campaign within 30 days.

[33] Following the 17 February 2025 letter referred to earlier in which AFV confirmed its willingness to repay the rebranding costs, the Foundation sent a further letter dated 19 February 2025 to AFV addressing the repayment of rebranding costs, close-out cost, Program loans and return of the Remaining Grant.¹¹

[34] In a letter dated 25 February 2025 AFV stated that while it believed an orderly winding up is possible, it cannot comply with all the requests made by the

¹⁰ annexure FA 5.2 to the founding affidavit

¹¹ annexure FA 9

Foundation in its 19 February 2025 letter. AFV stated that it is not in a position to make immediate repayment to the Foundation of the AFV's rebranding costs, as doing so would constitute reckless trading for purposes of the Companies Act and an undue preference to and collusive dealings with creditors under the Insolvency Act, 1936.¹²

[35] On 20 March 2025 Gowling WLG (Canada) LLP, the Canadian law firm acting for the Foundation addressed a letter to Sithole, CEO of AFV, addressing concerns raised by Deloitte regarding the adjustment journal entries in AFV's books on of accounts and AFV's subsequent restriction of Deloitte access to their accounting software, zero. The letter demanded that AFV ceases modifying the books of account, restores Deloitte's access and preserves all accounting records and meta data.¹³

[36] On 8 April 2025, Mr Urban, the BRP sent an email to Deloitte informing it that he is the appointed business rescue practitioner for AFV and expressed his willingness to assist in the Deloitte investigation.¹⁴

[37] On 9 April 2025 the BRP sent an email to Mr Hailu advising that AFV had commenced business rescue proceedings on 1 April under Chapter 6 of the Companies act, that AFV would cease all operations and would be wound down. That was the first time that the Foundation had been informed by AFV or any of its representatives of business rescue proceedings that had commenced.

[38] The Foundation then instructed attorneys DLA Piper to come on record in South Africa. On 10 April 2025 DLA Piper sent a letter to the BRP referring to the 8 April 2025 letter to Deloitte's and the 9 April 2025 letter to Mr Hailu. It requested, *inter alia*, the notice of the board resolution commencing business rescue and the effective date of the business rescue, including the sworn statement of facts relevant to the grounds on which the board resolution was founded.¹⁵

¹² annexure FA 11

¹³ annexure FA 14

¹⁴ annexure FA 16

¹⁵ annexure FA 18

[39] The events which followed and led to the launching this application were set out in the founding affidavit, the pertinent portions of which are quoted below:

56 On 14 April 2025, DLA Piper addressed further correspondence to the BRP. It recorded that AFV had no form of revenue other than the grant income received previously from the Foundation; that the BRP intended to wind down the business of AFV in the business rescue proceedings, and that the notice of the resolution commencing business rescue and other required documents were not delivered to the Foundation prior to the BRP's email on 11 April 2025. DLA Piper requested a meeting to discuss the business rescue proceedings. A copy of the correspondence is attached as annexure "FA 20";

57 No reply was forthcoming and so on 15 April 2025, DLA Piper addressed follow-up correspondence. The BRP confirmed that he could meet with DLA Piper on 16 April 2025.

58 On 16 April 2025 at 09 is: 00 (South African time), Kirsty Simpson, Naidu and Lemont Shondlani (Shondlani) of DLA Piper met with the BRP, Gribnitz and the BRP's attorney, Conrad Gothe of Gothe Attorneys (Gothé). The discussions included the following:

58.1 The BRP and Gribnitz confirmed that their intention is to wind down the business of AFV and cease its operations. They stated that various work streams had already commenced as part of the wind down. For example, one work stream was to ensure that AFV complied with the Financial Centre Intelligence Act, 2001 (FICA) and with best practice guidelines for non-profit companies issued by the Financial Action Task Force (AFV had apparently not complied with this best practice when transferring grant funding to other jurisdictions). Another was to take legal advice from senior counsel on whether, based on South African law, the Foundation is a creditor of AFV (the advice received by BRP was that the Foundation is a concurrent creditor of AFV);

58.2 Gribnitz indicated that the wind down process would be finalised and explained in the business rescue plan, which will include all financial and operational details. He undertook to share a note of the work streams after the meeting, which the BRP did. A copy thereof is attached as "FA 21";

58.3 when asked what the anticipated expenses and costs of the business rescue proceedings would be, Gribnitz provided the following high-level estimate in BRP's presence:

- (a) approximately US \$1,200,000 for employees' costs (around US \$490,000 per month);
- (b) approximately US \$500,000 for property -related costs including the closure of offices;
- (c) approximately US \$1 million for "program payables and wind down assumptions"-he could not explain what these were; and
- (d) approximately US \$400,000 to US \$500,000 for business rescue costs including the BRP's fees and professional fees, which he said may increase if more work streams arise;

58.4 Gribnitz and the BRP stated that they are taking control of the assets of the AFV and intend to realise the value thereof. Those assets are situated in various countries and include numerous laptops, television screens, office equipment and furniture and the like. They stated that all payments from the bank accounts must be approved by the BRP;

58.5 the BRP stated that he had already engaged with the employees of AFV on the termination of their employment, advising them that the business of AFV has been shut down. He asked whether the Foundation would agree to the employees being paid an ex gratia additional payment, which is what the employees had apparently requested;

58.6 the BRP indicated that all the funds in AFV's bank accounts originated from the grant provided by the Foundation in terms of the Grant Agreement. Gribnitz indicated that the costs associated with winding down would be funded from these existing funds in AFV's Bank Accounts. The BRP did not object;

58.7 Gribnitz stated that once the BRP fees, the employees and other creditors of AFV are paid, there may be about US \$1 million that can be returned to the Foundation;

58.8 Gribnitz and the BRP stated that they wanted to work with the Foundation and that DLA Piper could contact them "any time";

58.9 DLA Piper stated that they would take instructions on the information conveyed and revert. The BRP acknowledged that challenges in DLA Piper

taking instructions quickly, given that the Foundation's offices are based in Canada and the various religious and statutory public holidays.

59 *However, before DLA Piper could take instructions and revert to the BRP, at about 15:52 (SA time) of that same afternoon of the 16 April 2025, I received the notice of a creditor's meeting in terms of section 147 of the Companies Act (**Section 147 Meeting**), for 09:00 (SA time) the very next day, 17 April 2025. DLA Piper also received the notice at a similar time. The notice was dated a week earlier, 10 April 2025.*

60 *The Foundation was not given timeous notice of this Section 147 Meeting. The BRP did not mention the imminent creditors meeting during his meeting with DLA Piper on 16 April 2025. This is despite the BRP having acknowledged that the foundation was a creditor of AFV in the meeting and DLA Piper giving an opportunity at the start of the meeting to comment on the status of the business rescue. A copy of the notice is attached hereto as annexure "FA 22".*

61 *At about 19:00 on 16 April 2025, DLA Piper sent an email to the BRP stating it had been given late notice of the meeting, that was difficult to obtain urgent instructions from the Foundation and that the lead attorney in the matter was travelling and unable to attend the meeting. They requested that the meeting be postponed to 24 April 2025. Text and WhatsApp messages were also sent to the BRP but no reply was forthcoming.*

62 *At 7:31 on 17 April 2025, the BRP responded by way of email. He stated that he did not work 24 hours a day and had only seen the email in the morning. He did not mention the text and WhatsApp messages sent. He refused to postpone the meeting. A copy of the email string is attached as "FA 23".*

63 *The Section 147 Meeting therefore continued on 17 April 2025. The Foundation was represented at the meeting by senior counsel as well as by Naidu and Shodlani of DLA Piper. During the meeting, the BRP confirmed the following:*

63.1 *the purpose of the business rescue proceedings is to wind down AFV's business. Ultimately, AFV would be left without any assets and liabilities;*

63.2 *there are no reasonable prospects of restoring AFV to solvency, as it would take too long for AFV to secure new funding substantial enough to*

rescue itself. However, the BRP believed that the better return to creditors may result from business rescue;

63.3 the last unaudited financial statements of AFV are from the 2023 fiscal year. The Arno management accounts;

63.4 the BRP confirmed that, in fact, he did not have access to AFV's Bank Accounts because the Banks refused to grant him access after he provided them with documents to verify his appointment as the BRP. He also confirmed that no payments are being made from the Bank Accounts without his approval.

64 Senior counsel representing the Foundation noted that the business rescue proceedings are not intended or designed for an informal one. The BRP requested the judgment to which reference was made and in which it was held that business rescue is not intended for informally winding down a company.

65 After the Easter weekend, on 22 April, DLA Piper sent a letter to the BRP. A copy thereof is attached as annexure "FA 24". In the letter, DLA Piper:

65.1 recorded that the business rescue of AFV is inappropriate and on the version of the BRP, aimed at the informal winding down of AFV, which is not a permissible goal of business rescue. The BRP was expressly referred to the relevant authority;

65.2 requested that by no later than close of business on Thursday, 24 April 2025:

(a) the BRP confirmed in writing that he will terminate the business rescue proceedings;

(b) the BRP and AFV undertake to not use the funds held in the Bank Accounts for any purpose whatsoever, not to dispose of any assets of AFV and not to terminate or transfer the Program crêpe related Investments, other than with the prior written consent of the Foundation;

(c) the BRP in AFV undertake to hold the funds in a separate interest-bearing accounts; and

(d) by no later than close of business on Friday, 25 April 2025 the BRP issues and files the notice of termination of the business rescue proceedings.

66 During the afternoon of 24 April 2025, Gothe addressed correspondence to DLA Piper on behalf of the BRP. He recorded that the

BRP refused to take steps to terminate the business rescue proceedings or provide the requested undertaking. It is telling that the BRP advanced no reason why he deemed himself not bound to the authorities referred to by the Foundation. A copy of the email is attached as "FA 25".

67 *As stated above, the Foundation sought legal advice, both in Canada and in South Africa, as well as an independent expert opinion on the Canadian law position from Prof Oosterhoff. The advice was sent to DLA Piper on Sunday, 3 May 2025. The Foundation sought advice from its South African advisers in this regard and then instructed DLA Piper on Thursday, 8 May 2025 to proceed with drafting and instituting this application.*

68 *In the meantime, the Grant Agreement terminated on 30 April 2025. AFV did not return the Remaining Grant and assets, as it was required to do in terms of the Agreement.*

69 *Also on 30 April 2025, the Foundation, via its attorneys of record addressed correspondence to the banks. Copies of the letters are attached as "FA 25.1" to "FA 25.3". In that correspondence, the facts relating to the Grant Agreement and the business rescue proceedings were explained to the Banks. The Foundation stated that it intended to institute this urgent court application to, inter alia, interdict AFV from utilising the funds in the Bank Accounts pending the outcome of a dispute. The Foundation requested that the banks do not permit AFV or the BRP to transfer any funds out of the Bank Accounts until the final determination of this urgent court application.*

70 *The response from Nedbank and Investec, sent 2 May 2025 and 5 May 2025, was that the banks could not freeze or block the Bank Accounts unless a court order so directing is issued.*

71 *In the meantime, on 3 May 2025 I sent a letter to AFV and the BFP in which the Foundation declared a dispute in terms of clause 13 of Schedule C to the Agreement. A copy of the letter is attached as "FA 26". I invited AFV to engage in negotiations in terms of that clause.*

72 *In terms of the Agreement, following the declaration of the dispute, the parties are required to embark on the agreed process in terms of clause 13 of the Grant Agreement, titled "Conflict Resolution". This involves a 60-day process of negotiation. Should the dispute not be resolved by negotiation, the parties must submit to a structured mediation process and failing that, the*

dispute is to be resolved by way of arbitration in Canada. Any arbitration award will then need to be enforced in South Africa. While the dispute could (and should) be resolved quickly at any of these stages, it may well take several months (or even longer) to resolve the dispute.

73 In the meantime, the stated intention of the BRP and/or AFV is to utilise the Remaining Grant for unauthorised purposes.

74 In addition, on 8 May 2025, the BRP sent me a purported notice in terms of section 136 (2) (a) of the Companies Act. He stated that “having regard to the nature of the five issues raised” in the declaration of dispute, namely the details of the dispute that the Foundation is declared, he invokes the right to suspend all “remaining obligations” of AFV in relation to the Grant Agreement for the duration of the business rescue proceedings. He stated that these include but are not limited to those forming the subject-matter of the dispute declared by the Foundation. A copy of the letter is attached as annexure “FA 27”.

75 I deny that the BRP has the power to suspend the “remaining obligations” under the Grant Agreement or if he has such power, that the 8 May notice is enforceable or permissible, as:

75.1 The BRP’s conduct is not just and reasonable. It is mala fide and an abuse.

75.2 the Grant Agreement terminated on 30 April 2025. The BRP does not specify which clauses of the Grant Agreement he perceives as “remaining obligations”. He provides no explanation, whether proper or otherwise as to why he has taken this action;

75.3 The purported suspension of the “remaining obligations” will not and is not aimed at rescuing AFV from financial distress or enabling AFV to become a successful concern. The BRP intends to wind down AFV and has already taken steps to that end. Rather, the BRP’s conduct is aimed at undermining the Foundation’s title interest and rights to the Remaining Grant, in favour of himself and possibly other creditors. This is an attempt to thwart the rights of certain holders of title interests and/or creditors in business rescue, in favour of others. To the extent that the section 136 of the Companies Act is interpreted to allow this conduct, the section would be rendered unconstitutional pursuant to section 25 of the Constitution;

75.4 *In any event, the business rescue resolution is a nullity and falls to be set aside, which is the same fate of the purported exercise of power by the BRP;*

75.5 *Insofar as the notice is aimed at the conflict resolution clause, the Foundation has exercised the right to resolve the dispute in terms of section 13 of Schedule E of the Grant Agreement. That right was exercised prior to the BRP purporting to suspend the contractual terms giving rise thereto. I submit that any party suspend cannot be invoked after the right is exercised;*

75.6 *In any event, section 136 of the Companies Act was not intended to apply to dispute resolution clauses in agreements. A contention to the contrary is incongruent with section 133 of the Companies Act, being the moratorium on legal proceedings. To the extent that section 133 is interpreted to allow the suspension of a dispute resolution clause in an agreement, section 133 would be in contravention of section 34 the Constitution and unconstitutional;*

75.7 *The Foundation has a title interest in respect of the Remaining Grant (including both the assets and the grant funds), which in terms of section 134 of the Companies Act, is statutorily protected. The conduct of the BRP disregards this protection of the Foundation, and acts to its prejudice.*

76 *The Foundation has therefore been compelled to institute this application and seek the relief set out in the notice of motion.”*

Urgency issue

[40] I find that this matter is manifestly urgent as is apparent from the chronology of events set out above. Moreover, given that I proceeded to hear this matter on its merits as explained above, there is no need to dwell further on the issue of urgency.

Locus standi issue

[41] At the heart of the *locus standi* issue is the First and Second Respondents’ denial that the Foundation was a creditor of AFV and therefore an “*affected person*” as defined in section 128 (1) (a) (i) of the Act which provides that “(a) ‘*affected person*’, in relation to a company, means – (i) a shareholder or creditor of the

company;”. That denial was submitted to be the justification for not complying with the provisions of Section 129 (3) of the Act. That submission is devoid of merit for reasons set out below.

[42] The Foundation was undeniably a creditor, at very least by reason of its claim for repayment of the rebrand cost, AFV having explicitly confirmed its willingness to repay those costs in the 17 February 2025 email referred to in paragraph 27 above.

[43] Moreover, I am in agreement with the submissions of counsel for the Foundation that the Foundation was also a prospective creditor in respect of the Foundation’s claim for return of the Remaining Grant,¹⁶ thus also qualifying as having a “*voting interest*” for purposes of voting at meetings of creditors, whether as a pre-commencement or post-commencement creditor.¹⁷

[44] For purposes of qualifying as a creditor, in my view it matters not whether the Foundation’s claim for return of the Remaining Grant (which became due on 30 April 2025 when the 90 day notice period expired) constituted a contractual claim or a proprietary title pursuant to a Quistclose trust as opined by Prof Oosterhoff. The true legal nature of the claim will ultimately be resolved by way of an arbitration award in the dispute resolution process in Ontario, Canada, referred to in paragraphs 71 and 72 of the founding affidavit quoted above.

[45] The Respondents submit that the Foundation’s alleged contingent contractual claims and/or alleged proprietary claims arising from the Grant Agreement do not trump the continued implementation of the business rescue proceedings and the statutory ranking of creditors under section 135 of the Act. That is not correct. The existence of the above referred to conflict resolution provisions in clause 13 of Schedule E to the Ground Agreement, as quoted in paragraph 18 above, is not in dispute. Nor can it be disputed that in terms of Clause 14.1 of Schedule E to the Grant Agreement “*The Agreement is governed by the substantive laws of the*

¹⁶ *Du Plesses v Protea Inryteater (Eiendoms) Beperk* 1965 (3) SA 319 (T); *Choice Holdings Ltd v Yabeng Investment Holding Company Ltd* [2001] 2 All SA 539 (W)

¹⁷ relying on *Mashwayi Projects (Pty) Ltd and Others v Wescoal Mining (Pty) Ltd and Others* 2025 (3) SA 441 (SCA); *Rogal Holdings (Pty) Ltd v Victor Turnkey Projects (Pty) Ltd and Others* 2022 JDR 1031 (GP) at paras 21 to 23; see too *Sundays River Citrus Co (Pty) Ltd and Others v Lonetree Citrus CC and Others* 2025 (1) SA 529 (ECG), [47-53] and fn 119

Province of Ontario and the federal laws of Canada to the exclusion of any private international law rules“.

[46] Disputes arising from the Grant Agreement are in terms of the Grant Agreement are to be resolved by international commercial arbitration in terms of the aforementioned clause 13. That being so, as was found by the SCA at paragraph [20] in Industrial Development Corporation of South Africa Limited v Kalagadi Manganese (Pty) Ltd.¹⁸ “[20] – – *The business rescue proceedings are clearly not a basis for disregarding or bypassing the arbitration agreement*”. The business rescue proceedings cannot “trump” the Foundation’s rights arising from the Grant Agreement. As was further stated by the SCA¹⁹ this would be “– – *effectively an injunction against the exercise of the applicant’s contractual rights. This relief must be sought in the correct forum – the contractually agreed arbitration process.*”. Consequently, for purposes of the winding up, the status and nature of the rights asserted by the Foundation will, in my view, ultimately be determined by whatever award emanates from the arbitration tribunal when enforced in a South African Court.

[47] The respondent submits that the BRP’s above-mentioned 8 May 2025 notice in terms of Section 136 (2) (a) of the Act suspends all “*remaining obligations*” of AFV in relation to the Grant agreement for the duration of the business rescue proceedings.

[48] I do not agree. Section 136 (2) (a) of the Act provides that “– – *during business rescue proceedings, the practitioner may – (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and (ii) would otherwise become due during those proceedings*”. A dispute resolution clause does not provide for an “*obligation*” which becomes “*due during those proceedings*”. Throughout it governs the mechanism for resolving disputes.

¹⁸ (661.2024) [2025] ZASCA 70 (30 May 2025)

¹⁹ *supra* at paragraph [21]

[49] The suspension of an obligation which would otherwise become “*due*” during business rescue proceedings would give “*breathing space*” to facilitate achieving the purpose of business rescue proceedings, namely, of rescuing the business.²⁰ The arbitration proceedings will not give rise to any enforceable obligation becoming “*due*”. An obligation determined by an arbitration award will only become enforceable when that award is enforced by a court of competent jurisdiction. In this context it needs to be borne in mind that Section 133 (1) of the Act provides that “*During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum except-(a) with the written consent of the practitioner; (b) with the leave of the court and in accordance with any terms the court considers suitable; – –*”. Notably, the moratorium on legal proceedings against a company in business rescue provided by Section 133 specifically refers to “*legal proceedings*” i.e. court proceedings and “*enforcement action*”. It does not prohibit commencement or proceeding with dispute resolution proceedings.

[50] Section 129 of the Act provides as follows for giving notice to creditors of business rescue proceedings:

“129. Company resolution to begin business rescue proceedings.-(1)
Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.

(2) A resolution contemplated in subsection (1)-

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

²⁰ See *Limbouris and Others v Du Toit NO and Others* 2025 (1) SA 247 (WCC).

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must-

- (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and*
- (b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.*

(4) After appointing a practitioner as required by subsection (3) (b), a company must-

- (a) file a notice of the appointment of a practitioner within two business days after making the appointment; and*
- (b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.*

(5) If a company fails to comply with any provision of subsection (3) or (4)-

- (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and*
- (b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.”*

[51] Section 129(3) of the Act provides that business rescue proceedings in respect of a company may be commenced by way of resolution, but it provides strict requirements to publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person within five days, and to include with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded.

[52] The required notice and sworn statement should have been provided by 4 April 2025 which is 5 business days after the resolution was registered on 27 March 2025. But the Foundation was not given notice in the manner prescribed by Section 29 (3) and no sworn statement was provided to it.

[53] Although non-compliance does not result in an automatic nullity, the Supreme Court of Appeal held in Panamo Properties (Pty) Ltd and Others v Nel and Others NNO 2015 (5) SA 73 (SCA) that non-compliance caused the resolution to lapse and become a nullity, rendering it liable to be set aside. However, such non-compliance did not automatically terminate business rescue proceedings. A court was required to set the resolution aside.²¹

[54] In the light of the foregoing and particularly that at the meeting on 16 April 2025 the BRP acknowledged that the Foundation is a creditor of AFV, the persistence in disputing the *locus standi* of the Foundation, in my view, amounts to an abuse and is indicative of *mala fide* conduct and blatant disregard for the law.

[55] In my view the resolution putting AFV into business rescue lapsed and is a nullity and Foundation is clearly entitled to an order setting it aside.

Winding up

[56] The evidence of AFV's insolvent circumstances as appears from the aforementioned background facts and chronology of events shows on the overwhelming probabilities that AFV has no "*reasonable prospect*" of its business being rescued or of being returned to solvency. In such circumstances and in the light of clear authority quoted in the heads of argument of counsel for the Foundation,²² I am of the view that the conduct of the BRP in persisting with business rescue proceedings constitutes an abuse and blatant disregard for the law, given, *inter alia*, what was conveyed to him by senior counsel at the 17 April 2025 meeting²³ and what was further conveyed to the BRP by DLA Piper in its 22 April

²¹ Panamo at paragraphs 28-29

²² Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) Ltd and Others 2013(4) SA 539; *African Banking Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA)

²³ as recorded in paragraph 64 of the founding affidavit quoted above

2025 letter.²⁴ There was, in my view, no justification for the BRP attempting a so-called “quasi--liquidation” i.e. an informal wind-down by the sale of assets.²⁵

[57] Moreover, given knowledge of AFV’s acknowledged liability for repayment of the re-brand costs and of the 30 January 2025 notice of termination of the Grant, exacerbated by the absence of financial statements as confirmed by the BRP at the 17 April 2025 meeting as stated in paragraph 63 of the founding affidavit quoted above, it is incomprehensible how the directors could have thought that the business had reasonable prospects of being rescued such as to justify the resolution to commence business rescue proceedings taken on 26 March 2025.²⁶

[58] Given my finding that the resolution must be set aside, I am of the view that the Foundation is correct in submitting, on the authorities provided, that it is just and equitable for AFV to be wound up²⁷ having regard, inter alia, to the fact that it is undisputedly insolvent.²⁸

[59] Allied to this, there is in my view also no merit in the Respondents’ reliance on the general moratorium under section 133 of the Act to prevent winding up.²⁹

Interdictory relief issue

[60] Given that I shall grant an order setting aside the business rescue proceedings and that the BRP’s stated intention is to proceed with the realisation

²⁴ as recorded in paragraph 65 of the founding affidavit quoted above

²⁵ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012(2) SA 423 (WCC) para 25.

²⁶ *Mintails South Africa (Pty) Ltd v Mintails Mining SA (Pty) Ltd and Others* 2022 (4) SA 238 (GJ).

²⁷ *Alderbaran (Pty) Ltd and Another v Bouwer and Others* 2018 (5) SA 215 (WCC) at par 48; *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ) at para 115 to 131.

²⁸ *The Standard Bank of South Africa Ltd v C & E Engineering (Pty) Ltd and others; C & E Engineering (Pty) Ltd v The Standard Bank of South Africa Ltd* (unreported, Keightley J, case numbers 18085/20; 16611/20) [2020] ZAGPJHC 255 (14 August 2020)

²⁹ *Moodley v On Digital Media (Pty) Ltd and Others* 2014 (6) SA 279 (GJ)

and utilisation of assets as AFV and failed to provide the undertaking requested by DLA Piper in its 22 April 2025 letter³⁰, the Foundation has in my view made out a strong *prima facie* case supported by clear balance of convenience which favours the granting of an interim interdict. Consequently, I am of the view that I should grant the interdictory relief as claimed.

Costs

[61] The Foundation seeks a punitive costs order against AFV and the BRP *de bonis propriis* on the grounds set out in paragraphs 128 to 134 of the founding affidavit which read as follows:

“129 If AFV (and not the BRP) is compelled to pay the costs of this application, that is tantamount to the Foundation receiving no costs order at all, as the funds held by AFV constitute the Remaining Grant and the return of which in full and without set off of any costs, as I have already stated, the Foundation is entitled.

130 In addition, the basis for this request is the mala fide conduct and blatant disregard for the law by the BRP, as an officer of the court.

131 The BRP is of the opinion that AFV cannot be rescued within the meaning of section 128 of the Companies Act. He is therefore enjoined in terms of section 141 (2) (a) of the Companies Act to take steps to terminate the business rescue and place the company in liquidation. He refuses to do so.

132 in addition, despite being a senior business rescue practitioner, the BRP stated that he was not aware of the judicial authority conveyed to him for the legal position that the business rescue cannot be utilised to informally wind down the company.

133 The BRP was then provided with the correct legal position in regard to the purpose of business rescue proceedings, including reference to the legal authority for that legal position, as well as an opportunity to take steps to terminate the business rescue. He chose not to do so. No reasons were given

³⁰ see paragraph 65 of the founding affidavit as quoted above

by the authorities are not applicable to AFV and its business rescue. This approach is unreasonable and mala fide.

134 The BRP has abused the business rescue procedure in the framework of the Companies Act. For example, by issuing the notice dated 8 May 2025 purporting to suspend the “remaining obligations” of the campground Agreement, in contravention of the Companies Act and with an ulterior motive.”

[62] In my view the above-mentioned grounds are well-founded and appropriately justify claiming a punitive costs order against AFV and costs *de bonis propriis* against the BRP. Accordingly I am of the view that an order as sought should be granted.

ORDER:

[1] I direct that the usual forms and procedures provided for in the Uniform Rules of Court are dispensed with and this matter is directed to be heard on an urgent basis in terms of rule 6 (12) of the Uniform Rules of Court.

[2] The resolution to commence business rescue proceedings in respect of the First Respondent on 26 March 2025 and as reflected in the signed resolution dated 27 March 2025 is declared to be a nullity and is set aside.

[3] The First Respondent is directed to be provisionally wound up.

[4] A rule nisi is issued calling upon all persons with a legitimate interest to show good cause, if any, on 11 August 2025 why the First Respondent should not be finally wound up.

[5] The applicant is directed to:

- a. Serve a copy of this order on the First Respondent at its registered address.
- b. Serve a copy of this order on the employees of the First Respondent and any trade union that may represent them.
- c. Furnish a copy of this order to the Master of the High Court.
- d. Furnish a copy of this order to the South African Revenue Service.
- e. Publish this order once in the Government Gazette and in the Star newspaper.

[6] It is directed that pending the final determination of the disputes declared by the Applicant 3 May 2025 against the First Respondent in terms

of the Grant Agreement entered into between them dated 21 December 2022 (Disputes):

a. the First and Second Respondents are interdicted from disposing of any assets of the First Respondent and from transacting on the following bank accounts (collectively, Bank Accounts) in any manner whatsoever, without the prior written consent of the Applicant or an order of this Insolvency Motion Court:

- i. Investec. Ref Investec 6[...]. Account No. 1[...]
- ii. Investec. Ref Investec 6[...]. Account No. 1[...]
- iii. Standard Bank. Ref S[...]. Account No. 0[...]
- iv. Standard Bank. Ref S[...]. Accounts No. 0[...]
- v. Standard Bank. Ref S[...]. Account No. 0[...]
- vi. Standard Bank. Ref S[...]. Account No. 0[...]
- vii. Standard Bank. Ref S[...]. Account No 4[...].
- viii. Standard Bank. Ref S[...]. Account No. 4[...]
- ix. Nedbank. Ref Nedbank 2[...]. Account No 0[...].
- x. Nedbank. Ref Nedbank 7[...]. Account No. 1[...].
- xi. Nedbank. Ref Nedbank 0[...]. Account No. 0[...].
- xii. Nedbank. Ref Nedbank 1[...]. Account No. 7[...].

[7] The 4th to 6th Respondents are interdicted from permitting the First and/or Second Respondent, or any other party, to transact on the Bank Accounts, without the prior written consent of the Applicant or an order of this Insolvency Court.

[8] It is directed that the provisions of paragraph 6 (including subparagraphs) shall operate with immediate effect, as an interim interdict, pending the final determination of the Disputes.

[9] Directing that the provisional liquidator or final liquidator of the First Respondent with the power to institute and defend legal proceedings may approach this Insolvency Court on 5 court days notice to the Applicant to seek relief in regard to the order granted in terms hereof.

[10] It is directed that the Second Respondent pays the attorney-client costs of this application, including the costs of two counsel on scale C, *de bonis propriis*.

Johann Gautschi AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv A Subel SC

Adv J Blou SC

Instructed by: DLA Piper South Africa (RF) Inc

Ref: Ms K Simpson, Kirsty.Simpson@dlapiper.com

Tel: 011 302 0802

For the First and Second Respondents:

Adv JJ Brett SC

Adv JG Smit

Instructed by: Conrad Gothe Attorney

(087 8022013)