



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

(1)	REPORTABLE: YES/NO	(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED		
SIGNATURE		DATE	

[Handwritten signature] *4/11/2025*

Case Number: 48987/2020

In the matter between:

ALICE AMANDA MARE N.O.

Applicant

(In her capacity as the Business Rescue Practitioner
for Seacrest Investments 153 (Pty) Ltd)

and

PIETER HENDRIK STRYDOM N.O.

First Respondent

SOLOMON STANLEY ISAKA BOIKANYO

Second Respondent

(In their capacities as trustees of the Apie Van
Noordwyk Family Trust)

In re:

PIETER HENDRIK STRYDOM N.O.

First Applicant

SOLOMON STANLEY ISAKA BOIKANYO

Second Applicant

(In their capacities as trustees of the Apie Van
Noordwyk Family Trust)

and

SEACREST INVESMENTS 153 (PTY) LTD

First Respondent

(In Business Rescue)

ALICE AMANDA MARE N.O.

Second Respondent

(In her capacity as the Business Rescue Practitioner
for Seacrest Investments 153 (Pty) Ltd)

HEIDIE BARNARD

Third Respondent

**THE FIRST RESPONDENT'S AFFECTED
PERSONS**

Fourth Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Fifth Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

COETZEE AJ

INTRODUCTION:

[1] This is an application for leave to appeal by the Business Rescue Practitioner (“BRP”) of Seacrest Investments 153 (Pty) Ltd (“Seacrest”), Ms Alice Amanda Mare N.O., against the judgment delivered by this court on the 3rd of June 2025. In that judgment, the court set aside the resolution adopted on 16 September 2020, under section 129 of the Companies Act 71 of 2008, to place Seacrest in business rescue. The court further ordered Seacrest, the BRP (in her personal capacity), and Ms Heidi Barnard (Seacrest’s director) to pay the costs of the application on an attorney-and-client scale, jointly and severally, the one paying the others to be absolved.

[2] The BRP now seeks leave to appeal to the Full Court of this Division, alternatively to the Supreme Court of Appeal. The First and Second Respondent [the trustees of the Apie van Noordwyk Family Trust, (“the Trust”)], who were the successful in the main application opposes this leave to appeal.

THE TEST FOR LEAVE TO APPEAL:

[3] Leave to appeal may be granted only if the Court is satisfied that the appeal would have reasonable prospects of success, or there is some other compelling reason why the appeal should be heard (Section 17(1)(a) of the Superior Courts Act 10 of 2013). This is a stringent threshold. There must exist a sound, rational basis for concluding that another court could arrive at a different conclusion on the matter. Put differently, the prospects of

success should not be speculative; they should be real and not remote (see *S v Smith* 2012 (1) SACR 567 (SCA) para 7; *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) para 6).

BACKGROUND:

[4] The main application was brought by the Trust under section 130(1)(a) of the Companies Act 71 of 2008, to set aside Seacrest's own resolution commencing business rescue. The relevant background can be summarised as follows:

[4.1] Court-Ordered Sale: On 10 February 2020, a settlement agreement was made an order of court in separate litigation. In terms of that order, the Trust was authorised to sell Seacrest's only significant asset, an immovable property, and to retain the proceeds in full and final settlement of the Trust's claims against Seacrest. Ms Heidi Barnard, as the sole director of Seacrest, signed that settlement agreement on the company's behalf, confirming her authority as Seacrest's director and the company's consent to the arrangement.

[4.2] Business Rescue Initiated: Shortly before the court-sanctioned auction sale could take place, Ms Barnard passed a resolution (on 16 September 2020) placing Seacrest in business rescue under section 129 of the Act. She simultaneously appointed Ms Mare as the BRP. This step had the effect of forestalling the auction that was about to occur under the court order.

[4.3] **Property Sold Without Notifying the Trust:** During the business rescue, the BRP developed and implemented a business rescue plan. In the course thereof, the same immovable property was sold to the very purchaser that the Trust had originally secured, but now for the price of R3.4 million. Importantly, the BRP did not notify or involve the Trust in this sale, despite the Trust's obvious interest in being a creditor with a court order entitling it to the proceeds. The sale went through, and the property was transferred, effectively sidestepping the earlier court order.

[4.4] **Seacrest's Sole Shareholder and Director:** Throughout these events, Ms Barnard held herself out as the controlling mind of Seacrest. In her affidavit of 16 September 2020 (filed in the business rescue proceedings), she stated unequivocally that she was the only director and member of Seacrest. The Business Rescue Plan prepared by the BRP likewise recorded Ms Barnard as the sole shareholder of Seacrest. In short, Ms Barnard alone represented the company in all relevant transactions.

[4.5] **Allegations of Abuse of Process:** The Trust's case in the main application was essentially that Seacrest's business rescue was a sham, a stratagem by Ms Barnard to escape the consequences of the court order and to keep the sale proceeds for the company (and indirectly for herself), rather than paying the Trust. The business rescue yielded no benefit for creditors at large; on the contrary, it imposed additional costs. The BRP's own bill of costs (attached to the Trust's supplementary replying affidavit) reflected substantial fees and expenses, suggesting that the business rescue was conducted in a grossly prejudicial manner to the insolvent estate. It is common cause that the BRP failed

to account properly to the Trust and excluded the Trust from any participation in the process, despite earlier accepting (in her court filings) that the net proceeds of the property *“will be paid to [the Trust]”*. These circumstances led this Court to set aside the section 129 resolution and to order punitive costs against the BRP personally.

[5] It is against that outcome that the BRP seeks leave to appeal.

GROUND OF APPEAL:

[6] The BRP’s grounds for leave to appeal are numerous, but can be summarized in the following main complaints:

[6.1] Section 133 Moratorium: The Court allegedly failed to consider the prohibition in section 133(1)(b) of the Companies Act, which requires court approval before legal proceedings may be commenced or continued against a company under business rescue. The BRP argues that the Trust ought to have obtained leave of the court before launching the section 130 application, and that the court’s judgment is fatally silent on this point.

[6.2] Trust’s Status as Creditor/Affected Person: The BRP contends that the court erred in treating the Trust (and its trustees) as “affected persons” of Seacrest, for purposes of section 130. It was argued that the 10 February 2020 settlement order did not create a debt owing by Seacrest to the Trust. The order merely mandated the Trust to sell the

property and retain proceeds against its claim in other litigation, and since Seacrest was not a party to that case, the order could not have turned the Trust into Seacrest's creditor.

[6.3] Order Not Binding on Seacrest: In a related point, the BRP submits that because Seacrest was not cited in the case that led to the settlement order (under case no. 7520/2018), no binding obligations were imposed on Seacrest by that order. It was argued that one cannot lawfully make an order against a party not before the court; therefore, Seacrest had no legal obligation arising from that order, and it never agreed to waive any rights or claims against the Trust.

[6.4] No Lawful Cause for Trust's Actions (*Parate Executie*): The BRP argues that the Trust had no lawful cause (*causa*) to sell Seacrest's property or keep the proceeds. In her view, the Trust's reliance on the special power of attorney (granted under the settlement order) amounted to an impermissible *parate executie*, effectively self-help without a judgment or execution process, which is unlawful, especially in respect of immovable property.

[6.5] Corporate Authority and Unanimous Assent: The BRP contends that the court misdirected itself by finding that Ms Barnard (the third respondent a quo) could lawfully act on behalf of Seacrest under the principle of "unanimous assent". The BRP points out that Seacrest's shareholder was the Barock Trust (not Ms Barnard in her personal capacity), and that a formal shareholders' resolution was required to authorize the sale of Seacrest's sole asset. Because no such resolution was passed in terms of sections 112

to 115 of the Companies Act, the BRP maintains that the sale and the settlement agreement lacked proper corporate authority, and the principle of unanimous assent did not apply on these facts.

[6.6] Business Rescue Practitioner's Powers (Section 136(2)): The BRP submits that, in terms of section 136(2) of the Companies Act, she had the power during business rescue to suspend or cancel any obligation of Seacrest. She suggests that she was entitled to suspend Seacrest's obligation (if any) to perform in terms of the settlement agreement. Consequently, so her argument goes, the Trust needed leave of the BRP or the court to proceed with its application, in line with the moratorium of section 133(1), and its failure to obtain such leave was overlooked by the Court.

[6.7] Notice to All Affected Persons: The BRP asserts that the Trust did not comply with section 130(3)(b), which requires that a copy of a section 130 application be served on every affected person. In particular, the trustees of the Barock Trust (Seacrest's shareholder) were not given notice. The BRP argues that this omission violated the shareholders' right to participate and should have either nullified the proceedings or at least led the Court to postpone the matter to ensure proper notice.

[6.8] New Matters Raised in Reply: The BRP contends that the Trust was improperly allowed to introduce new allegations and relief in its reply and in supplementary affidavits. Specifically, the Trust only sought a punitive costs order against the BRP in her personal capacity in a supplementary replying affidavit (dated 16 May 2024), after the BRP had

already delivered her answering affidavit in the main case. Because the BRP had been cited only in her representative capacity, she argues that this amounted to the Trust “making out a case in reply,” which is not permitted by the rules of motion proceedings unless the BRP was given a chance to respond.

[6.9] Audi Alteram Partem and Personal Costs Order: Tied to the above, the BRP argues that it was procedurally unfair to saddle her with a personal, punitive costs order. She says she was not properly joined as a party in her personal capacity and was not given a fair opportunity to respond to the serious allegations of misconduct made against her. She also notes that the Court did not give her additional time to file a report or affidavit under section 130(5)(b) (which allows a business rescue practitioner to respond to the company’s financial state and prospects of rescue). In her view, these procedural missteps warrant another court’s interference with the personal costs order.

[6.10] Error in Calculating Remuneration – New Evidence: Lastly, the BRP disputes the finding that she received remuneration in excess of R2.2 million. She maintains that this figure is incorrect and that, in fact, she only received R345 000 in fees. With the application for leave, she submitted a reconciliation of her fees and asks that this new evidence be admitted on appeal. She argues that the Court’s adverse view of her conduct was influenced by what she believes is a mistaken figure.

[7] In addition to the above grounds, the BRP’s counsel suggested that even if prospects of success on the merits are uncertain, there are compelling reasons to grant

leave in order to clarify certain legal issues, such as the interplay between sections 130 and 133 of the Companies Act, the notice requirements to shareholders in business rescue challenges, and the proper procedure for personal costs orders against officers like business rescue practitioners.

DISCUSSION:

The Section 133(1) Moratorium

[8] Section 133(1) of the Companies Act imposes a general moratorium on legal proceedings against a company that is under business rescue, except with either the consent of the BRP or the leave of the court. The BRP argues that the Trust needed such leave before it could launch the section 130 application to set aside the business rescue. In the court's view, this argument is misconceived. Proceedings under section 130 of the Act, which allow affected persons to challenge the very commencement or validity of business rescue, are *sui generis* and are not considered to be legal proceedings "against the company" in the ordinary sense. They are proceedings about the status of the business rescue itself. Our courts have consistently held that a company cannot use the section 133 moratorium as a shield to prevent a lawful challenge to the business rescue process or the practitioner's appointment. To hold otherwise would render section 130 nugatory and allow an illegitimate or unmeritorious business rescue to go unchecked.

[9] In *Moodley v On Digital Media (Pty) Ltd* 2014 (6) SA 279 (GJ) at paras 9–11, for example, the Court made it clear that an application to set aside a business rescue resolution is not the sort of litigation that the moratorium was intended to block. Similarly, in *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd* [2015] ZAKZPHC 21 at paras 11–15, and more recently in *Limbouris and Others v Du Toit NO and Others* [2024] ZAWCHC 213 (para 50–51), courts have held that section 130 challenges can proceed despite section 133. The rationale is straightforward: section 133 aims to give a company breathing space against claims on the merits, not to insulate an abuse of the business rescue process from judicial scrutiny.

[10] The BRP's reliance on *Arendse v Van der Merwe NO* 2016 (6) SA 490 (GJ) (at 501D–H) does not change this outcome. In *Arendse*, an application for leave under section 133(1)(b) was considered in a particular factual scenario, but that case did not involve a direct section 130 challenge to a resolution. It does not establish that every section 130 application must first be preceded by a section 133(1)(b) leave application. Indeed, the Supreme Court of Appeal has implicitly approved the view that section 130 applications fall outside the moratorium (*Cloete Murray v FirstRand Bank Ltd* 2015 (3) SA 438 (SCA) and *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd* 2017 (4) SA 51 (SCA) both proceeded without any suggestion that leave under section 133 was required). Accordingly, the court is satisfied that the Trust did not need prior court leave to bring its application, and the failure to specifically address section 133(1)(b) in the judgment is not a ground that another court would consider as giving rise to a different outcome. There is

no reasonable prospect that an appeal court would find that the entire proceeding was a nullity for want of a section 133(1)(b) leave.

The Trust's Standing as an Affected Person (Creditor)

[11] The BRP contends that the Trust was not a creditor of Seacrest and thus not an "affected person" entitled to invoke section 130. This argument cannot succeed. The starting point is the 10 February 2020 court order. Whether or not Seacrest was formally cited in that case, the order explicitly authorised the Trust to sell Seacrest's property and to keep the proceeds in settlement of its claim. Ms Barnard, as Seacrest's director, signed the settlement agreement that gave rise to that order; in doing so, she bound Seacrest to the arrangement. It is trite that a court order, even if perhaps erroneously granted, is binding and enforceable until it is set aside by a court of competent jurisdiction (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494H–J; *Airports Company SA Ltd v Big Five Duty Free (Pty) Ltd* 2019 (2) SA 185 (CC) para 93). Seacrest never took steps to set aside or appeal the February 2020 order. Therefore, at the time Ms Barnard initiated business rescue in September 2020, that order stood and the Trust had a legitimate entitlement to claim the proceeds of the property.

[12] Moreover, the BRP herself acknowledged the Trust's claim. In her answering affidavit in the main case (and documents attached thereto), the BRP admitted in substance that the net proceeds of the property sale were to be paid over to the Trust. In other words, even the BRP understood that the Trust was effectively a creditor of Seacrest.

Under the Companies Act, an “affected person” in business rescue includes a creditor (section 128(1)(a)). By virtue of the court order and the BRP’s own concessions, the Trust was correctly regarded as a creditor and thus an affected person with standing to bring the section 130 application.

[13] The BRP’s argument that the settlement order did not create a debtor–creditor relationship with Seacrest is overly technical and divorced from the realities of the case. The Trust had provided value (foregoing its claims in exchange for the property sale proceeds) and had a clear, court-sanctioned right to those proceeds. Whether one labels this a “debt” or not, it was unquestionably an obligation of Seacrest in the broad sense, an obligation that the BRP chose to disregard by placing the company in business rescue and selling the property without paying the Trust. There is no prospect that an appellate court would hold that the Trust lacked standing under these circumstances.

The Effect of Not Citing Seacrest in the Settlement Order Case

[14] It is true that Seacrest was not a cited party in case no. 7520/2018, which produced the settlement order. The BRP argues that no lawful order could bind Seacrest since it was not before that court. Superficially, this has some logical appeal, but it ignores the crucial fact that Seacrest (through Ms Barnard) consented to the arrangement by signing the settlement. The order of 10 February 2020 was by agreement. Ms Barnard’s signature as director gave the High Court the assurance needed to make the order applicable to Seacrest’s property. In law, a person who consents to an order cannot later collaterally

attack it on the basis that they were not formally cited, consent heals that procedural irregularity, if it was one. Furthermore, Ms Barnard was not only the director but also effectively the sole shareholder of Seacrest, as reflected in the business rescue plan. The Trust and Ms Barnard clearly treated the arrangement as binding on Seacrest. Seacrest took the benefit of that order (the Trust stopped pursuing other legal remedies based on that settlement). Having received the benefit, Seacrest (and Ms Barnard) could not later approbate and reprobate by denying the burden.

[15] In any event, the Trust's standing does not hinge on whether the order was binding in a *res judicata* sense on Seacrest. As explained, the factual reality and the BRP's own admissions recognized the Trust's right to payment. The purpose of business rescue is to balance and protect the interests of *all* affected persons (including creditors). Here, to exclude the Trust from the category of "affected persons" would be to countenance a grave injustice and an obvious abuse: a shareholder-director could escape an obligation by unilaterally placing a company in rescue and then arguing that the very creditor she cut out is a stranger with no say. Our courts would not interpret the Act to permit such an outcome. I am satisfied that another court would agree that the Trust had standing, and that the settlement order, far from being irrelevant, was central to understanding the parties' rights and obligations.

The Alleged Lack of a Lawful Cause for the Trust's Actions

[16] The BRP's fourth ground of appeal asserts that the Trust's reliance on the special power of attorney (granted under the settlement order) amounted to an unlawful *parate executie*. A *parate executie* is an extra-judicial sale of a debtor's property without the oversight of a court, typically based on an agreement in advance that a creditor may sell the property on default. Such clauses or actions are generally prohibited, especially for immovable property, because they bypass the courts and the debtor's protections.

[17] In this case, however, the Trust's authority to sell the property came from a High Court order. It was not a private, self-help remedy exercised in the shadows; it was expressly sanctioned by a court of law. Thus, the sale arranged by the Trust was the opposite of a *parate executie*, it was done under judicial supervision and approval. The suggestion that the Trust engaged in impermissible self-help is therefore unfounded.

[18] Furthermore, the Trust's actions were in execution of a compromise that Seacrest (through Ms Barnard) had agreed to. It was a lawful transaction confirmed by a court order. If the BRP believed that order was somehow irregular or invalid, the appropriate course would have been to challenge it directly, not to label compliance with a court order as "unlawful". There is no prospect of another court finding merit in this argument.

Unanimous Assent and Corporate Formalities

[19] The BRP argues that the court erred in holding (or implicitly finding) that Ms Barnard could act on Seacrest's behalf under the doctrine of unanimous assent, thereby

dispensing with formal corporate approvals normally required for selling a company's major asset. The context here is that Chapter 5 of the Companies Act requires certain special resolutions when a company disposes of the greater part of its assets (sections 112–115). Typically, a shareholders' resolution would be necessary. In Seacrest's case, the shareholder was the Barock Trust, represented presumably by trustees (possibly including Ms Barnard herself, though this was not fully ventilated). No formal shareholders' resolution authorising the sale of the property was obtained before the settlement agreement.

[20] The principle of unanimous assent, as discussed in cases like *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) and *Simcha Properties 6 CC v San Marcus Properties (Pty) Ltd* [2011] 1 All SA 287 (SCA), holds that if all shareholders who have a right to vote on a particular matter give their informed consent to a decision, that unanimous consent can cure any failure to observe formal meeting procedures or resolutions. In a company with a single shareholder (or where one person effectively holds all the shares), the law will not elevate form over substance. If the sole shareholder assents to a transaction, the absence of a paper resolution is not fatal.

[21] In the present case, Seacrest was, for all practical purposes, a one-person company. Ms Barnard was the only director and was treated as the sole shareholder in the business rescue documentation. The Trust itself knew of no other shareholder; indeed, the Trust's founding papers attached a share certificate indicating the Barock Trust as shareholder, but Ms Barnard was the active mind and will behind that trust in relation to

Seacrest. She personally signed the settlement agreement agreeing to the sale. That was effectively the act of the only interested shareholder.

[22] Even if one were to insist on strict compliance with sections 112 to 115, any complaint about the lack of a formal shareholder resolution is an internal issue for the company and its shareholder to raise. It is not something the BRP (as an officer of the company) can use to invalidate what was essentially an unanimously agreed transaction. In any event, by proceeding with the business rescue and selling the property, the BRP herself did exactly what the settlement agreement contemplated, she just directed the proceeds elsewhere. It is improper for the BRP to argue that the Trust's sale mandate lacked authority when her own sale of the property was done without any shareholder resolution (aside from the very agreement Ms Barnard had signed).

[23] In summary, the facts show that Ms Barnard's unanimous assent as the sole shareholder/director was present for the settlement agreement. The technical argument about corporate formalities has no realistic prospect of success on appeal. No court is likely to find that the sale approved by a sole shareholder-director is void merely for want of a written resolution, especially when that sole decision-maker later attempted to do the same sale through business rescue.

Section 136(2) and the Suspension of Obligations

[24] The BRP's reliance on section 136(2) (which allows a business rescue practitioner to suspend or cancel part of an agreement during business rescue, with certain exceptions) is misplaced in this case. Firstly, the BRP never actually exercised any purported power to suspend Seacrest's obligations under the settlement order, nor did she apply to court to cancel that obligation. Section 136(2) is not self-executing; it requires the practitioner to actively decide to suspend or cancel an obligation, and in the case of cancelling, to obtain court approval if the other party does not consent. The BRP did not do this with respect to the Trust's rights. Instead, she proceeded as if the Trust's involvement did not exist.

[25] Secondly, by the time the matter came to court (in the main application in 2024 and the hearing in March 2025), the business rescue had long since terminated (it ended in November 2020 when the plan was implemented and the property transferred). Section 136(2) operates *during* business rescue proceedings; it cannot be used after the fact to somehow retrospectively erase obligations or justify actions that were completed without court sanction. The question in the main case was whether the business rescue should have been commenced at all, and whether it was used for an improper purpose. The BRP's invocation of section 136(2) does not answer that question.

[26] Finally, even if section 136(2) could theoretically have been invoked to suspend the Trust's rights under the settlement, that would have required a proper process (notice to the Trust and perhaps a court application for cancellation). None of that happened. Therefore, the existence of section 136(2) as a legal provision provides no "get-out-of-jail"

card for the BRP on the facts of this matter. There is no prospect that an appeal court would find that the Trust was barred from approaching the court because of section 136(2).

Notice to Shareholders (Section 130(3)(b))

[27] Section 130(3)(b) of the Act requires that an applicant under section 130 must serve the application on the company and the Companies and Intellectual Property Commission and notify each affected person of the application. “Affected persons” include shareholders (section 128(1)(a)(i)). In this case, the Trust undoubtedly knew that Seacrest’s shareholder was the Barock Trust (as was revealed in the papers). It is common cause that the Trust did not formally notify the trustees of the Barock Trust of the section 130 application. The BRP argues that this omission should have been fatal to the proceedings or at least should have led the court to postpone the matter to ensure notice to all affected persons, as was suggested in *Alderbaran (Pty) Ltd v Bouwer* 2015 (2) SA 263 (GJ) at 272G–273C.

[28] However, not every procedural lapse mandates a nullity or a postponement. Section 130(3)(b) serves an important purpose, but the court retains a discretion under section 130(5) to adjourn the proceedings or make an appropriate order if it appears that there was a failure to notify an affected person. In the present case, the person behind the Barock Trust was, by all indications, Ms Barnard herself. She was the one who would have been notified as the representative of the shareholder. In fact, Ms Barnard was not only notified of the application, but she was also a respondent and filed an answering

affidavit (albeit essentially aligning herself with the BRP's position). Ms Barnard actively participated and was represented. She ultimately indicated she would abide by the court's decision.

[29] Given that the sole director and the de facto representative of the shareholder was before the court, the lack of a separate formal notice to the Barock Trust did not prejudice the outcome. No other person came forward claiming to be unaware of the proceedings or deprived of an opportunity to be heard. This is unlike the *Alderbaran* case (cited by the BRP) where certain affected parties were entirely absent and the court was concerned about their rights. Here, the interests of the shareholder were effectively before the court through Ms Barnard.

[30] The court considered this issue in the main judgment and found that it would be unduly formalistic to derail the application on that basis. I remain of that view. An appeal court would likely exercise its discretion similarly, especially when setting aside the business rescue was plainly in the interests of justice. There is thus no reasonable prospect of another court finding that the proceedings should have been dismissed or postponed due to the notice issue, given the circumstances.

New Matter in Reply and Procedural Fairness

[31] The BRP complains that the Trust introduced new material in its reply and supplementary affidavits, most notably, the request for a personal, punitive costs order

against the BRP. It is trite that in motion proceedings an applicant must make out its case in the founding affidavit and cannot remedy defects by raising new grounds or relief in reply (see *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H–636C; *Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 369A–E). Introducing new matters in reply is not ordinarily allowed, because the respondent has no automatic right to answer it.

[32] In this case, it is true that the initial notice of motion did not explicitly seek a cost order *de bonis propriis* (payable by the BRP personally). That issue arose after the BRP's answering affidavit revealed the full extent of the BRP's conduct. The Trust then filed a supplementary replying affidavit in May 2024, squarely accusing the BRP of malfeasance in the conduct of the business rescue and asking for a personal punitive costs order. Ideally, the Trust should have sought to amend its notice of motion or obtained leave to introduce this relief formally. However, what transpired thereafter is crucial: the BRP was aware of this request for many months before the hearing. The BRP specifically briefed counsel to address the merits of a personal cost order. The parties filed written heads of argument and presented oral submissions. The BRP never sought leave to file a further affidavit to rebut the new allegations regarding her conduct and fees, even though procedurally she could have asked for that indulgence in terms of Uniform Rule 6(5)(e). She did not apply to strike out the new matter, nor did she ask for a postponement to deal with it. In fact, by the time of the hearing, the BRP was fully engaged on the issue, she simply chose to contest it on the existing record rather than expanding the record.

[33] In these circumstances, the complaint of unfairness loses force. Our courts have often said that the rule against new matter in reply is not an inflexible one; the overarching question is whether the late introduction of new material has caused prejudice that cannot be remedied. Here, any potential prejudice to the BRP could have been remedied by the BRP herself taking steps to place her version of events on record. She elected not to do so, likely for tactical reasons. She cannot now claim that she was ambushed.

[34] The Constitutional Court's caution in *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) about affording parties a fair opportunity to be heard before making personal cost orders was adhered to in substance: the BRP was on notice and had the opportunity to respond. The fact that she did not file a specific "personal capacity" affidavit is a consequence of her own choice. There is accordingly no prospect that an appellate court would conclude that a procedural unfairness occurred warranting interference with the cost order. At most, another court might note that the process was less than ideal, but given the BRP's awareness and participation, it is unlikely to set aside the order on this basis.

The Personal Punitive Costs Order

[35] Personal costs orders against fiduciaries or officers (such as liquidators, trustees, or business rescue practitioners) are indeed treated with caution. They are justified only in exceptional circumstances, typically where the individual acted in bad faith, was grossly negligent, or conducted themselves in a way that is vexatious or highly unreasonable.

The BRP argues that the order against her was neither just nor equitable, particularly since she says she had not yet filed the formal report contemplated by section 130(5)(b) when the order was made, and because she was not cited by name in her personal capacity from the outset.

[36] After reviewing the record, the court remain convinced that the punitive costs order against the BRP personally was warranted. The undisputed facts showed that the BRP:

[36.1] Excluded a major creditor (the Trust) from the business rescue proceedings entirely, failing to even notify them of the property sale.

[36.2] Disregarded a binding High Court order, effectively thwarting its operation without seeking to have it varied or set aside.

[36.3] Failed to account properly for the administration of the estate, even when called upon to do so.

[36.4] Claimed exorbitant fees (on her own version at the time of the hearing), which would have drastically reduced the residue available for any creditors.

Such conduct goes beyond mere technical oversight; it points to a deliberate and reckless misuse of the business rescue mechanism for an ulterior purpose. It exhibits a personal failure on the part of the BRP to uphold the standards expected of an officer of the court

in insolvency-like proceedings. In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paras 142–151, the Constitutional Court affirmed that a personal cost order (even on a punitive scale) is justified when a litigant's behaviour demonstrates a flagrant disregard for the judicial process, as a means to protect the administration of justice and prevent future abuse. Similarly, the Supreme Court of Appeal in *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 54, held that it is appropriate to make a public official pay costs from their own pocket where they have acted improperly or unreasonably in the conduct of litigation.

[37] The BRP's actions, as evidenced on the record she herself helped create, fell into that exceptional category. Importantly, she had fair warning that a personal costs order was sought and had ample opportunity to explain her conduct. She chose not to meaningfully do so. In these circumstances, the Court finds no reasonable prospect that an appeal court would conclude that this Court exercised its discretion improperly or erred in principle in making the cost order.

BRP's Remuneration and the "New" Evidence

[38] In the judgment of the main application, the Court noted (based on the BRP's own itemised bill) that her remuneration and fees appeared to exceed R2.2 million. The BRP now says this was wrong and that she only actually received R345 000, attaching a "reconciliation of fees" to her leave to appeal papers. She seeks to introduce this as new evidence on appeal to correct the record.

[39] The general rule is that an appeal court decides a case on the record that served before the court *a quo*. It will allow new evidence on appeal only in very exceptional circumstances, and then only if the evidence is weighty, material, and could not have been obtained with reasonable diligence before the trial (the classic test from *S v De Jager* 1965 (2) SA 612 (A) at 613C–D). The onus is on the applicant to satisfy these requirements.

[40] The BRP's "new" evidence does not meet this standard. First, this reconciliation is a document the BRP could easily have produced earlier. It is based on her own records. There is no explanation why it was not put up in the main proceedings when her fees were challenged by the Trust. In fact, the Trust specifically raised concerns about her fees in the supplementary replying affidavit (attaching her bill). The BRP had every opportunity to clarify or dispute the figures then. She did not.

[41] Second, the reconciliation is unsworn and not independently confirmed. It appears to contradict her formal bill of costs. This raises questions about its reliability. An appeal court is unlikely to admit such material, which was available all along and merely seeks to relitigate an issue of fact. The Supreme Court of Appeal in *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation)* 2018 (4) SA 433 (SCA) emphasized that a court considering leave to appeal should disregard new facts that were not before the court *a quo*, as allowing them would encourage litigants to hold back evidence for a second bite at the cherry (see para 6 of that judgment).

[42] In any event, even if the BRP were correct that she only *netted* R345 000, that does not exonerate her conduct. The primary issue was not the quantum alone, but the manner in which the business rescue was conducted and the disregard for the Trust's rights. Thus, this ground of appeal, whether viewed as a factual challenge or as an attempt to adduce new evidence, does not raise a reasonable prospect of a different outcome.

THE MERITS OF THE MAIN JUDGMENT:

[43] Although the application for leave was focused on alleged errors and procedural issues, it is important to stand back and look at the merits of the main judgment. Leave to appeal should not be granted if the appeal court is unlikely to disturb the main findings. In the main case, the court concluded that Seacrest's business rescue was initiated for an ulterior purpose, namely, to undermine the Trust's court-sanctioned rights, and that there was no genuine attempt or reasonable prospect to rescue Seacrest as a viable company. Seacrest had no ongoing business, no employees, and no income or realistic rescue plan beyond selling the sole asset (which was going to happen anyway) and distributing the funds away from the Trust. This was a textbook example of an abuse of the business rescue process. The Court's decision to set aside the resolution was grounded on the fact that the company had no reasonable prospect of being rescued and that the resolution was taken for a fraudulent or malicious purpose, or on factual grounds that did not exist. The facts spoke for themselves and aligned with the principles set out in cases like *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)*

(Pty) Ltd 2013 (4) SA 539 (SCA), which held that a company must have a reasonable prospect of rescue, something more than a speculative hope, to justify business rescue proceedings (see paras 29–30 of that judgment).

[44] There is no sound reason to believe another court would disagree with these conclusions. In fact, the BRP's grounds of appeal do not seriously fault the core finding that the business rescue was untenable on its merits; they mostly raise technical or procedural points. Even if one of those points were arguable, an appeal court would still weigh whether it makes any difference to the substantive justice of the case. Here, all signs indicate that the main outcome was correct and just.

COMPELLING REASONS FOR AN APPEAL?

[45] The BRP suggested that, apart from prospects of success, there are "compelling reasons" to grant leave, such as clarifying the law on the interface between section 133 and section 130, the notice requirements, or the standards for personal cost orders against BRPs. While development of the law can indeed be a compelling reason, I do not believe this case genuinely presents novel issues requiring appellate guidance. The law on those points is largely settled by existing precedent, as discussed above. Any nuanced factual twist here does not merit the time and expense of an appeal, especially when the result of the case is so clearly dictated by established principles. In short, the matter does not raise questions of public importance or legal uncertainty that would, on their own, justify a further hearing in a higher court.

CONCLUSION:

[46] Having considered all the grounds of appeal individually and cumulatively, the court is not persuaded that there is any reasonable prospect of success on appeal, nor any compelling reason to grant leave. The points raised by the BRP either have no merit in law, are contradicted by the undisputed evidence, or would not affect the outcome even if answered in her favor. Another court would not come to a different conclusion on the main issues.

[47] It follows that the application for leave to appeal must fail. In line with the usual principle that costs follow the result, and there being no special circumstances suggested to order otherwise, the BRP must bear the costs of this application.

ORDER:

[48] The application for leave to appeal is dismissed with costs.



L COETZEE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 November 2025.

Appearances:

On behalf of the Applicant:	Adv. N. Strydom
Instructed by:	Kruger & Co. Inc.
On behalf of the Second Respondent:	Adv. Denichaund
Instructed by:	Assheton-Smith Ginsberg Inc.
Date heard:	9 September 2025
Date of judgment:	4 November 2025