**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

**Case No**: 21859/2025

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

In the matter between:

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|---|---|
| **KIM DRYDEN N.O.** | Applicant |
| and | |
| **WALKERVILLE CROSSING (PTY) LTD** | First Respondent |
| **THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSIONS** | Second Respondent |
| **THE MASTER OF THE HIGH COURT, JOHANNESBURG** | Third Respondent |
| **THEODOR WILHELM VAN DEN HEEVER N.O.** | Fourth Respondent |
| **ABDUL BAAKI TAYOB N.O.** | |
| **ABSA BANK LIMITED** | Fifth Respondent |
| **SASOL SIYAKHA ENTERPRISE AND SUPPLIER DEVELOPMENT TRUST** | Sixth Respondent |
| **SASOL LIMITED** | Seventh Respondent |

## JUDGMENT

*This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time of hand-down is deemed to be 10h00 on Tuesday 28 April 2026.*

**<u>COOKE AJ</u>:**

1. The applicant is the executrix of the estate of her late husband, Mr. Evan Dryden, (estate number: 0[…]) ("**the Estate**"). She has held this role since her appointment by the third respondent on 26 May 2022.

2. Before his passing, Mr. Dryden was the sole shareholder of the first respondent ("**Walkerville Crossing**"), and its initial sole director. Shortly before his death in 2022, Mr Dryden resigned his directorship and his sister, Candice Dryden, assumed sole directorship of Walkerville Crossing in his stead.

3. Walkerville Crossing's only asset and source of income is an immovable property situated at the corner of […] and M[…] Roads, Walkerville, Gauteng ("**the Property**"). In part the Property is a vacant construction site – with only the foundation for a small shopping mall having been laid. On the remaining portion there are a number of shops and, particularly relevant to this application, a franchised Sasol filling station ("**the Filling Station**").

4. The Filling Station is currently owned by Walkerville Filling Station Pty Ltd – of which the applicant (in her personal capacity) is the sole shareholder and sole director ("**WFS**"). A franchise was granted by the seventh respondent to WFS during 2021. Prior thereto, the franchisee that operated the Filling Station was

EGC Properties (Pty) Ltd ("**EGC**") – a company owned by Mr Dryden, his sister: Candice, and his brother: Gareth.

5. Given Mr. Dryden's interest in all of these companies, there was no rental agreement between Walkerville Crossing and EGC, and no rent was paid either. In apparent disregard of the principle of separate and distinct legal personality, the applicant's affidavit candidly states:

*"My deceased husband did not see the need to charge rental to himself…"*

6. This extremely favourable position continued when WFS took up ownership and operation of the Filling Station in place of EGC.

7. In an understandable state of grief after Mr. Dryden's passing, the applicant took no interest in WFS or the Filling Station. At this time both were run and operated by Candice. By this time, the relationship between the applicant and Mr. Dryden's siblings had soured and the intervention of lawyers was required to return control of the Filling Station to the applicant. This occurred in September 2022, from which date the applicant (in her personal capacity) resumed operation of the Filling Station.

8. Walkerville Crossing was placed into final winding-up on 9 November 2023 at the instance of the fifth respondent ("**Absa**"). The fourth respondents ("**the Liquidators**") were appointed provisionally, and then finally in February 2024. At the second meeting of creditors in March 2024, the Liquidators were authorized to sell the Property by private treaty or public auction.

9. As executrix of the Estate, the applicant took steps to have Candice removed and herself appointed as the director of Walkerville Crossing, which she

achieved in January 2024, notwithstanding that control of Walkerville Crossing (in liquidation) was then lawfully exercised by the Liquidators. The applicant says that she did not know of the winding-up order at this time.

10. The applicant attempted to engage with Absa, Sasol, and the Liquidators, proposing that a monthly rental of R 200,000.00 be paid by WFS to Walkerville Crossing. She contends that this is sufficient for Walkerville Crossing to show a profit after paying its monthly expenses. The sixth respondent ("**Siyakha**") disputes this on the basis that the monthly repayment due to it alone by Walkerville Crossing exceeds the amount tendered as rental by the applicant.

11. The Liquidators obtained a valuation of the Property which reflects: a market value of R 13,2 million and R 9,2 million on a forced sale. In either event, significantly higher than the R 3,9 million asserted by the applicant.

12. On 29 October 2024, Siyakha made an offer for the Property at its market valuation of R 13,2 million. The Liquidators accepted the offer and transfer is pending. The effect of the relevant terms of the agreement of sale include that:

    12.1. the purchase price would be used to pay the full amount due to Absa under its first covering mortgage bond, as well as the costs and charges that have accrued under section 89 of the Insolvency Act 24 of 1936; and

    12.2. any and all leases over the Property were cancelled.

13. In December 2024, the applicant launched an application for business rescue seeking essentially the same relief as that sought in this application. The Liquidators objected to the first business rescue application on a number of

grounds that were set out in a letter to the applicant attorneys. No response was received to the queries and difficulties raised by the Liquidators. Instead, and without withdrawing the first business rescue application, this application was launched during February 2025. There is no explanation or apparent rationale for this. The first application was withdrawn before the hearing of this matter.

14. At the hearing, Ms Ntsele appeared on behalf of the applicant. In their entirety, her brief and candid submissions were confined to:

    14.1. accepting that no case for business rescue had been made out; and

    14.2. requesting that costs be granted against the applicant only on the party and party scale.

15. The nature and ambit of the submissions made on behalf of the applicant are an appropriate indication of her prospects of success. On nearly every ground conceivable, there is no basis to sustain the application and every reason to refuse it. Some of those grounds include:

    15.1. the application was not served on interested parties,[1] or it would appear the CIPC;

    15.2. no evidence is proffered,[2] or even cogent allegations made,[3] to substantiate the conclusion that a business rescue might have any prospect of succeeding;[4]

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[1] *Lutchman NO and Others v African Global Holdings and Others* 2022 (4) SA 529 (SCA) para 39

[2] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386* 2012 (2) SA 423 (WCC) at para 24

15.3. business rescue is opposed by the majority creditor;[5]

15.4. on the model postulated by the applicant, it will take more than twelve years for creditors to be paid;[6] and

15.5. there is no mention of post-commencement funding having been sought, much less that obtaining it will be either likely or sufficient.

16. In bringing the application for business rescue, the applicant apparently secured a suspension of the winding-up process under section 131(6) of the Companies Act. Mr Cajee, who appeared for Siyakha, pointed out that this application was launched a year after the winding-up had been granted, and after a sale of the Property had already been agreed. He submitted that the applicant's abusive and self-serving intention is evident: by delaying the winding-up and sale of the Property, she secures a financial advantage for her personally held company, WFS, which occupies the Property without paying rent, while pocketing the profit that it makes from operating the Filling Station. I agree with the submission.

17. This conclusion gives rise to two consequences:

17.1. first, the application for business rescue is an abuse which non-suits the applicant and her application. As Weiner JA held in *PFC Properties (Pty) Ltd v Commissioner, South African Revenue Service and Others*:[7]

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[3] *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) at paras 40 and 41

[4] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) 539 SCA at paras 29 to 31

[5] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and* Others 2013 (4) 539 SCA at para 38 and *Forty Squares (Pty) Ltd and Another v Noris Fresh Produce (Pty) Ltd t/a Golden Harvest (in Liq) and Others* 2023 (5) SA 249 (WCC) at para

[6] *Grieseel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ) at paras 78 and 80; *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP) at para 25

*'[36] From what is set out above, it is clear that the DRFT trustees have sought to use the legal process provided for companies, which may legitimately be rescued, for an ulterior purpose — to thwart the winding-up proceedings and the consequences for the De Robillards that may arise therefrom. This stratagem, as stated in Villa Crop, subverts fundamental values of the rule of law. The conduct of the DRFT trustees and PFC is so tainted by impropriety that this court must use the power it has to safeguard the integrity of its process.*

*[37] In so acting, the power of this court to non-suit the DRFT trustees is warranted. As a consequence, their ill-fated application should not have been entertained by reason of its use in a scheme of abuse. Although the application was correctly dismissed by the Pietermaritzburg High Court, it fails in this court, on appeal, for different reasons.*

*[38] PFC sought to oppose the liquidation application on the basis of the moratorium provided for in s 131(6) of the Act. But the legislature could not have intended that a business rescue application, tainted by abuse, would have that effect. In essence, because the DRFT trustees were non-suited for the reasons set out above, the doomed business rescue application was not made, as envisaged in s 131(6). Thus, the moratorium did not come into operation and did not suspend the winding-up proceedings. That being so, there was no impediment to the winding-up proceedings.'*

17.2. secondly, the applicant ought to pay the costs of this application on a punitive scale for the reasons I outline below.

18. A court's justification for holding a litigant liable to pay costs on a punitive scale was set out in *Alluvial Creek*:[8]

*An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where*

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[7] 2024 (1) SA 400 (SCA)
[8] *In re: Alluvial Creek Ltd* 1929 CPD 532 at 535

*they have the effect of being vexatious, although the intent may not have been that they should be vexations. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may he regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.*

19. The ambit and scope of 'vexatiousness' was considered in *Fisheries Development Corporation of SA v Jorgensen:*[9]

> *In its legal sense, "vexatious" means*
>
> > "frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant"
>
> *... Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; "abuse" connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive.*

20. The latter finding in *Jorgensen* was expanded in *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels F (Pty) Ltd*,[10] where this was said of a respondent's opposition:

> *... would seem to be merely dilatory and designed to keep the plaintiff out of his legitimate remedy. It was not a bona fide defence, but one designed primarily to buy time for the defendant. It seems to me that the Court would therefore be justified in expressing its disapproval of the defendant's conduct by ordering it to pay the costs on the scale of attorney and client*

21. In addition to those general principles, an applicant's liability to pay punitive costs in circumstances where they seek business rescue for an ulterior purpose is well established. In *Pro-Wiz*,[11] Wallis JA found:

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[9] 1979 (3) SA 1331 (W) at 1339E-F
[10] 1991 (3) SA 276 (SE) at 289G. See also In re Alluvial Creek 1929 CPD 532

*It is apparent that Pro-Wiz could never have thought that a viable business rescue could be instituted in relation to Oljaco. Its failure to engage with the liquidators or the principal creditor on that subject prior to launching its application speaks volumes in that regard. The timing of the application suggested that its true purpose was to stultify the interrogation of Mr Smith. The failure to deal with any of the issues raised by the liquidators and Sars in this regard indicates that no response was possible. Finally, the withdrawal at the very last minute, without explanation, when confronted with the reality of having to argue the application in court, conveyed the impression of an absence of any bona fide belief in the merits of the case and a lack of intention genuinely to pursue it. I conclude that it was brought to provide a reason for avoiding Mr Smith's interrogation and with a view to delaying the liquidators in their enquiries as to the squirrelling away of assets.*

*All of that constituted an abuse of the process of the court and an abuse of the business rescue procedure. It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals, a punitive costs order is appropriate.*

22. I am of the view that the applicant's conduct in seeking to derail the winding-up with a still-born application for business rescue is vexatious not only in its effect, but also in its intent. This alone renders her liable to pay attorney and client costs. In addition, the finding in *Syfrets* (there applied to a respondent) applies equally to an applicant who brings an application to frustrate a process that is well underway, as it too keeps creditors out of their *legitimate remedy*.

23. These general principles flow seamlessly into the rationale of Wallis JA in *Pro-Wiz*. Litigants who see fit to abuse the process of business rescue for self-serving and ulterior reasons, while the very creditors that they have neglected

[11] *van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at paras 21 and 22

are kept out of their legitimate remedy, are not deserving of the leniency for which they ultimately and inevitably plead when their cases eventually come to court.

I make the following order:

1. *The application is dismissed;*
2. *The applicant is to pay the costs of both the fourth and sixth respondents on the scale as between attorney and client, such costs to include the costs of counsel.*

**M J COOKE**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG, JOHANNESBURG**

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|---|---|
| DATE OF HEARING | 23 April 2026 |
| DATE OF JUDGMENT | 28 April 2026 |
| APPLICANT'S COUNSEL | T Ntsele |
| APPLICANT'S ATTORNEYS | SP Attorneys Inc |
| $4^{th}$ RESPONDENT'S COUNSEL | E L Theron SC |
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