



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Not Reportable

Case no: 2025 - 232376

In the matter between:

ACCESS BANK (SOUTH AFRICA) LIMITED

APPLICANT

and

**SEACOW PROPERTIES PROPRIETARY LIMITED
(IN BUSINESS RESCUE)**

FIRST RESPONDENT

WERNER CAWOOD N.O.

SECOND RESPONDENT

DILLION WESSELS N.O.

THIRD RESPONDENT

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

FOURTH RESPONDENT

Neutral citation: *Access Bank (South Africa) Limited v Seacow Properties Proprietary Limited (In Business Rescue) and Others (2025-232376) (22 May 2026).*

Heard: 13 February 2026.

Delivered: 22 May 2026.

Summary: *Company law* - business rescue proceedings - section 133(1) of the Companies Act 71 of 2008 - general moratorium on legal proceedings against a company under business rescue - the Court granting leave to proceed with the application - the creditor status of the applicant questioned - a declarator issued confirming the creditor status and participation of the applicant in business rescue proceedings - removal of business rescue practitioners on the grounds set out in section 139(2)(a), (b) and (e) of the Companies Act - the applicant failing to establish on the balance of probabilities that the removal is justified - the application partially granted.

ORDER

1. The applicant, Access Bank (South Africa) Limited, is granted leave to proceed or commence with the application filed under case no 2025-232376, as supplemented, in terms of section 133(1)(b) of the Companies Act 71 of 2008, to the extent required.
2. It is declared that the applicant is a creditor of the first respondent, Seacow Properties Proprietary Limited (in Business Rescue), and entitled to participate in the business rescue proceedings of the first respondent.
3. The first, second, and third respondents are to pay the costs of the application as well as those of the postponement application of 12 December 2025, jointly and severally, the one paying the other to be absolved, on party-and-party scale, such costs are to include counsel's fees on scale C, as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

JUDGMENT

Phatshoane DJP

Introduction

[1] Two urgent applications were filed in this Court under case no 2025-232376 and 2025-232280. Both applications were launched by Access Bank (South Africa) Limited (the bank). The first application is against Seacow Properties Proprietary Limited (in Business Rescue), and its two Business Rescue Practitioners (BRPs), Messrs Werner Cawood and Dillion Wessels, the first to third respondents (the Seacow matter). The Second application is against Brakhoek Properties Proprietary Limited (in Business Rescue) and its BRPs, Messrs Werner Cawood and Dillion Wessels, the first to third respondents (the Brakhoek matter). The relief sought in both applications is identical. The parties agreed that this Judgment addresses only the Seacow matter, as what applies to it would also bear upon the Brakhoek matter.

[2] The bank's application against Seacow Properties Proprietary Limited (Seacow) and the BRPs (collectively referred to as the respondents) was initially for an order setting aside the resolution that commenced business rescue proceedings in respect of Seacow. The bank further sought relief that the business rescue proceedings be terminated, and that Seacow be placed in liquidation (the main application). The bank amended its notice of motion and supplemented its papers with leave of this Court. In its amended notice of motion, the bank seeks leave to proceed or commence with the application filed under case no 2025-232376, the Seacow matter, as supplemented, in terms of s 133(1)(b) of the Companies Act 71 of 2008 (the Act); a declaration that the bank is a creditor of Seacow and entitled to participate in its business rescue or liquidation proceedings; an order removing the BRPs of Seacow from the business rescue proceedings in terms of s 139(2) of the Act; that Seacow be directed to appoint a new business rescue practitioner in terms of s 139(3) of the Act; and an order that the BRPs pay the costs of the application and those of the

postponement application of 12 December 2025, *de bonis propriis* on the attorney and client scale.

Background

[3] On 6 December 2019, De Vos Landgoed Proprietary Limited *in business rescue* (De Vos Landgoed) and the bank concluded what is labelled a Facility Letter in terms of which the bank provided the following facilities to De Vos Landgoed: (a) working capital facility with an initial limit of R 1 500 000 which was subsequently increased to R 5 000 000; and (b) a term loan facility of R 18 000 000. Pursuant to clause 2.5 of the Facility Letter, De Vos Landgoed and the bank concluded a term loan facility agreement (Term Loan Facility Agreement), the purpose of which was to record the full terms and conditions of the term loan facility.

[4] Almost three years later, around 4 August 2022, De Vos Landgoed and the bank entered into a Medium-Pre-Term Agreement/Agreement of Loan and Acknowledgment of Debt (the August 2022 Agreement), which replaced the Term Loan Facility Agreement governing the Term Loan Facility. The working capital facility remained governed by the Facility Letter. The Facility Letter, the Term Loan Facility Agreement, and the August 2022 Agreement are collectively referred to as the Facilities Agreements. It is undisputed that some of these security instruments were originally entered into by De Vos Landgoed and Grobank Limited (Grobank). Much emphasis was placed on the bank's failure to prove its lawful succession to Grobank's rights, an aspect I will address later.

[5] The indebtedness of Seacow to the bank arises from the limited guarantee and unlimited suretyship executed by Seacow in favour of the bank for the indebtedness of De Vos Landgoed. In this regard, a guarantee limited to R 22 million was concluded on 8 December 2019, whereas the unlimited deed of suretyship was entered into on 1 August 2022.

[6] On 27 September 2024, the board of Seacow resolved, *inter alia*, that Seacow voluntarily begin Business Rescue Proceedings as set out in s 129 of the Act. This was intended to facilitate Seacow's rehabilitation on the basis that it was considered

financially distressed, and that there appeared to have been a reasonable prospect of rescuing it, should it be financially and operationally restructured. Seacow commenced business rescue proceedings on 1 October 2024 pursuant to this resolution, which was filed with the fourth respondent, the Companies and Intellectual Property Commission of South Africa (CIPC). Messrs Cawood and Wessels were appointed its BRPs.

[7] On 11 October 2024, the bank submitted its claim in the business rescue of Seacow based on the above-mentioned security obligations (limited guarantee and unlimited suretyship), recording the quantum of the claim and attaching contemporaneous certificates of balance. At the time of launching the application in this Court in November 2025, the balance of the claims were R6 713 522.51 together with interest at the bank's prime lending rate (then 10.25%) plus two percent per annum from 25 November 2025 to date of settlement and R20 902 914.91, together with interest at the bank's prime lending rate (then 10.25%) plus two percent per annum from 25 November 2025 to date of settlement. The respondents deny that Seacow owed the aforesaid amounts and that such indebtedness had become due and enforceable.

[8] On 21 October 2024, the first meeting of creditors of Seacow (in business rescue), as required by s 147 of the Act, was held. In terms of the minutes of that meeting, the extension of the publication of the business rescue plan was adopted in accordance with s 150(5) of the Act. It was agreed that the business rescue plan would be published by 14 February 2025. On 6 February 2025, the BRPs circulated a notice to affected persons proposing a further extension of the publication of the business rescue plan from 14 February 2025 to 28 March 2025. On 10 February 2025, the bank's attorneys responded to the notice and indicated, inter alia, that the bank did not support the proposed extension and voted against it.

[9] Unbeknown to the bank, on 4 March 2025, the BRPs circulated a status report, dated 28 February 2025, in which they indicated, inter alia, that the motion to further extend the publication date of the business rescue plan to 28 March 2025 was approved by the majority of the creditors and that the business rescue plan would be published on 28 March 2025. On 17 June 2025, the bank's attorneys, oblivious to the

extension and the publication of the business rescue plan on 28 March 2025, directed a letter to the BRPs in which they indicated, inter alia, that the bank was not aware of an application to court to extend the publication date nor of a vote by the holder of a majority of the creditors' voting interests extending the publication of the business rescue plan beyond 28 March 2025. The bank, therefore, required the BRPs to advise whether the publication date for the business rescue plan had been extended and, if so, to provide a copy of the notice issued to creditors to vote on the extension. In addition, the bank enquired whether the status reports for March, April, and May 2025 had been circulated, and, if not, required the BRPs to provide the reason. The BRPs did not respond to any of the bank's attorneys' correspondence.

[10] On 14 November 2025, the bank's attorneys sent another letter to the BRPs, drawing their attention to the bank's 17 June 2025 letter, which had still not received a response. They further stated, inter alia, that the last status update received was for February 2025. The BRPs were informed that by their conduct, they abandoned Seacow. Therefore, the BRPs were urged to apply to the Court for an order discontinuing the business rescue process and for the placement of Seacow in liquidation. The BRPs were required to inform the applicant within five working days that they would comply with the request; failing which, the bank would launch an urgent liquidation application and seek a cost order against the BRPs in their personal capacities.

[11] The launch of the present application was precipitated by the BRPs' failure to respond to the above-mentioned attorneys' letter dated 14 November 2025. In the main application, the bank relied, inter alia, on s 130 of the Act. It averred that the BRPs had failed to publish the plan within the period contemplated by s 150, and that no proper extension was procured from the affected persons or the court. That failure, so it argued, engaged this Court's power to set aside or terminate the business rescue proceedings in terms of ss 130 and 132, read with s 141 of the Act. The bank stated that when the main application was filed on 28 November 2025, it had been under the impression, based on the BRPs' failure to respond to its attorneys' correspondence of 14 November 2025, that the BRPs had failed to publish the business rescue plan and provide the status reports. The bank further laboured under the impression that the BRPs had abandoned Seacow.

[12] The main application moved the BRPs to file a prolix answering affidavit, comprising approximately 205 pages, including annexures, after hours on Friday, 5 December 2025, in opposition to the main application. In that affidavit, the BRPs, for the first time, addressed the bank's queries of 14 November 2025. From the BRPs' response, the following was apparent. Although the bank was initially included on the mailing list for affected persons in the business rescue proceedings, the BRPs removed it from the list. The business rescue plan published on 28 March 2025 was tabled and voted on at a second creditors' meeting on 11 April 2025. The plan received 26% support but was rejected due to the votes cast by SARS, Wesbank, and the Land Bank, which collectively accounted for 74% of the voting interest, with Land Bank alone holding 52.74%. The BRPs had issued an application in the Gauteng Division, Pretoria, on 23 April 2025, to have the Land Bank's controlling vote declared inappropriate in terms of s 153(7) of the Act and an order setting it aside.

[13] The bank contended that the BRPs had published a business rescue plan for Seacow but failed to forward a copy thereof to it despite the bank being a creditor of Seacow and an affected person in the business rescue proceedings. It further argued that the BRPs had unlawfully deprived it of its statutory rights to participate in the business rescue proceedings, including the right to vote for or against the business rescue plan. The bank further argued that, because the respondents' answering affidavit contained substantial new facts previously unknown to it, the application was not ripe for hearing, not due to any fault on its part but because of the BRPs' failure to timeously respond to its attorneys' correspondence. The bank submitted that it needed to consider the new facts and, accordingly, amend its notice of motion and supplement its founding papers. Therefore, the bank delivered an application for postponement of the main application and for leave to supplement its papers (the postponement application).

[14] The respondents opposed the postponement of the main application. The thrust of their opposition was that the bank sought a postponement to repair a defective application by rewriting its founding papers after the respondents had exposed material misrepresentation in the application. The respondents further asserted that

the bank was not entitled to receive reports and to be involved in the business rescue proceedings because the BRPs did not consider it a creditor of Seacow, contending that it was not an “affected person” as defined in section 128(1)(a), and was therefore not entitled to business rescue notices, status reports or statutory communications, with the result that the BRPs were under no legal duty to respond to it. In any event, so it was argued, the bank cannot be a creditor of Seacow because of: the accessory nature of suretyship; the absence of any due, enforceable principal debt against Seacow; the restructuring of any alleged exposure under the De Vos Landgoed Business Rescue Plan; and the absence of any written demand or contractual trigger that would give rise to liability. The respondents also questioned the bank’s *locus standi* on the further basis that the bank had not proven its lawful succession to Grobank’s rights under s 54 of the Banks Act 94 of 1990 (the Banks Act).

[15] In essence, the respondents contended that postponing the main application would serve no purpose, as the amendment could not cure the inherent jurisdictional, statutory, and factual defects in the application. They further contended that the application’s urgency was moot because the factual allegations underpinning it had been shown to be false.

[16] The application was enrolled for hearing on the urgent court roll of 12 December 2025. Stanton J granted the bank leave to supplement its notice of motion and founding affidavit to address the new facts introduced in the answering affidavit, directed a timetable for the filing of further affidavits and the re-enrolment of the matter for hearing on the urgent court roll of 13 February 2026, and reserved the issue of costs pertaining to the postponement application. It is important to set out in detail the order made, as much store was set by the respondents that the order did not permit the bank to craft a new cause of action. The order reads:

- ‘1. That the Applicant is granted leave to supplement its notice of motion and founding affidavit to address the new facts introduced in the answering affidavit of the First to Third Respondents;
2. That the urgent application is postponed, with a timetable for the filing of further affidavits and re-enrolment as follows:
 - 2.1. The Applicant is to file a supplementary founding affidavit on or before Friday, 16 January 2026.

- 2.2. The First to Third Respondents are to file any supplementary answering affidavit (if any) by Friday, 30 January 2026.
 - 2.3. The Applicant is to file any replying affidavit (if any) together with its heads of argument by Wednesday, 4 February 2026.
 - 2.4. The Respondents are to file their heads of argument by Wednesday, 11 February 2026.
 - 2.5. The application is to be re-enrolled for hearing on the urgent court roll of Friday, 13 February 2026.
3. That the costs of this application be reserved.'

The respondents' preliminary contention against the main application

[17] The respondents persist with the multiple points *in limine* raised in the postponement application. It was argued on their behalf that the application is not urgent and that this Court lacks jurisdiction to consider it. Additionally, so it was contended, the bank expanded its case beyond the scope of the 12 December 2025 order; has no standing to bring the application; failed to prove its lawful succession to Grobank; failed to join De Vos Landgoed in the litigation; and finally, failed to comply with s 130 of the Act¹. I address each of these points in the paragraphs that follow.

Urgency

[18] The respondents contended that the alleged failure by the BRPs to publish the business rescue plan and to respond to the bank's correspondent did not render the application urgent. These complaints, the respondent argued, had existed for months prior to the launching of the application and did not prevent the bank from taking earlier steps under s 130 of the Act. In any event, it was argued that the urgency is moot because the factual allegations underpinning it have been demonstrated to be false. Furthermore, it was contended that the urgency is not reinforced by repeated allegations of the bank's exclusion from the business rescue proceedings. The respondents further pressed that the bank's introduction of time-lines in the

¹ Section 130(1) in the relevant part, provides inter alia, that at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order setting aside the resolution or the appointment of the practitioner on the grounds outlined therein.

supplemented papers, with regard to the further conduct of the litigation, suggesting the setting down of the main application two months later, militated against urgency.

[19] The bank countered that it would not obtain substantial redress in the ordinary course if its application was not disposed of on an urgent basis. By the time the matter is heard in the normal course, the business rescue process would be at an advanced stage, if not finalised, which would equate its efforts to *brutum fulmen*.

[20] There are varying degrees of urgency. In my view, the multifaceted issues raised in the papers are serious and require that the matter be disposed of on a semi-urgent basis to prevent any injustice. I am persuaded that the bank may not be afforded substantial redress at a hearing in due course. Upon the respondents' failure to provide the bank with a response, following repeated requests, the bank promptly brought the application. All the necessary affidavits, albeit on suitably truncated periods, were filed, and the issues fully ventilated through argument. I can conceive of no prejudice for the disposal of this matter at this stage.

The alleged lack of jurisdiction of this Court

[21] The respondents took issue with the bank's assertion that this Court is endowed with jurisdiction solely because Seacow's registered address lies within its jurisdiction. They contended that the Court's assumption of jurisdiction merely on the basis that the registered address of Seacow fell within its boundaries was factually incomplete and legally insufficient to establish jurisdiction. This was so because the bank sought orders that, initially, purported to terminate the ongoing business rescue. Those proceedings, it was argued, are conducted by the BRPs from their offices in Pretoria and all the statutory functions under Chapter 6 of the Act are discharged from that jurisdiction. The respondents further contended that the appropriate forum to challenge the conduct of the BRPs and the continuation of the business rescue proceedings is the court having territorial jurisdiction over the administration of the business rescue, being the Gauteng Division, Pretoria.

[22] The respondents also challenged this Court's jurisdiction insofar as the relief is now sought personally against the BRPs. It was submitted that the BRPs did not perform

any of the acts complained of in their personal capacities. The protestation is that the BRPs reside and practice in Pretoria and do not conduct business within this Court's area of jurisdiction. In any event, the respondents maintained, the proceedings are jurisdictionally barred by virtue of the statutory moratorium contained in s 133 of the Act. No court may assume jurisdiction over any proceedings against a company in business rescue, including liquidation, except with the written consent of the BRPs or with leave of the court. The bank obtained neither. I deal with the question of the statutory moratorium later.

[23] This Court's jurisdiction is established by virtue of Seacow's registered office falling within its area of jurisdiction.² In addition, Seacow operates in Colesberg, within the Northern Cape Province, and therefore, this Court has jurisdiction over it on this basis as well.³ To my mind, this Court also has jurisdiction over the BRPs even though they are 'resident' outside the Northern Cape. This is so because the BRPs are joined as parties to the application, in respect of which this Court has jurisdiction.⁴ Accordingly, the argument advanced to the contrary is without merit.

Expansion of the bank's case beyond the scope of the 12 December 2025 order

[24] The respondents asserted that the principal answering affidavit did not set out new facts but the correct factual and statutory position. In their affidavit opposing the postponement, the respondents submitted that the bank, by requesting leave to file supplementary papers, was attempting to improperly recast the cause of action, rewrite the notice of motion, introduce a completely new factual basis for its case, and circumvent the consequences of having launched an urgent application on materially incorrect facts.

² See D Davis et al *Companies and other Business Structures in South Africa* 5ed (2025) at 64-65; see also *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) para 21 and 23.

³ *De Bruyn v Grandselect 101 (Pty) Ltd and Another* (1961/2013) [2014] ZANHC 3 (5 March 2014) para 13; see also *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) para 10.

⁴ Section 21(2) of the Superior Courts Act 10 of 2013, *Els v Weideman and Others* 2011 (2) SA 126 (SCA) at 132E-F.

[25] The respondents further contended that the 12 December 2025 order did not grant the bank leave to introduce new causes of action; seek new and different relief not claimed in the original notice of motion; or retrospectively cure jurisdictional or statutory non-compliance that existed at the time the application was launched. They argued that the relief now introduced in the amended notice of motion and supplementary founding affidavit does not arise from any newly disclosed factual development. Rather, it constitutes a fundamental reformulation of the bank's case.

[26] The respondents objection is not of any great weight. In the postponement application, the bank specifically pleaded for an opportunity to consider the new facts and information contained in the answering affidavit so that it could take appropriate remedial steps, as it may be advised. The bank further explained that the 'disclosure in the answering affidavit necessitated it to amend and supplement the application and expand the relief, including the removal of the second and third respondents as the Business Rescue Practitioners of the first respondent'. The bank went on to state: '... given the conduct of the second and third respondents, the applicant has been advised to seek a costs order de bonis propriis...'

In the bank's replying affidavit, it said:

'The Applicant must be permitted . . . to place before the Court targeted supplementary evidence and submissions addressing the Respondents' late disclosures and to calibrate the relief, including, if necessary, seeking the removal of Practitioners and appropriate consequential directions'.

[27] The publication of the plan, the decision to exclude the bank as a creditor, and the purported communication by the BRPs to the affected persons were raised for the first time in the respondents' answering affidavit. Apparent from the preceding paragraphs is that the relief sought in terms of the amended notice of motion was foreshadowed in the postponement application and arises directly from the 'newly disclosed factual development'. The respondents were not taken by surprise. On the contrary, they were made fully aware of the bank's intentions with respect to the amendment and supplementation of its papers. What Stanton J did was to grant the bank what it urged in the postponement application. Naturally, this should have ended any debate on the bank's entitlement to supplement its papers.

[28] The bank had to address its “creditor/affected person’s” status and the BRPs’ compliance with their statutory duties. The supplementation of the papers was an appropriate means to address the belated material disclosures for the sake of fairness and completeness. These core substantive issues could only be dealt with by the Court with the benefit of a complete record. I am satisfied that the bank, when supplementing its papers, in accordance with the terms of the order of 12 December 2025, did not impermissibly expand its case beyond the scope of that order.

The *locus standi* of the bank under Chapter 6 of the Act

[29] The actual area of controversy in this case is the question whether the bank is the creditor of Seacow. The respondents accuse the bank of fabricating rights that the Act does not confer. They contended that the bank is not a creditor of Seacow, it holds no voting interest in it, and therefore it is not an affected person under s 128(1)(a) of the Act. They further submitted that the statutory architecture of the business rescue proceedings presupposes identifiable and quantifiable indebtedness, not derivative or contingent exposure dependent upon future enforcement events. Insofar as the bank’s claim against Seacow is grounded in the limited guarantee and unlimited suretyship executed by Seacow in respect of De Vos Landgoed’s indebtedness, the respondents argued that the suretyship in question is not autonomous and does not constitute an independent payment obligation. Seacow’s liability arises only when the principal debt is due, the principal debtor is in default, and enforceability is legally permissible under the Act. None of these, argued the respondents, were established by the bank.

[30] The respondents further contended that De Vos Landgoed’s indebtedness to the bank was fully incorporated into De Vos Landgoed’s business rescue plan, which is currently subject to a s 153(7)⁵ application. That plan, it was argued, restructures the bank’s claim, prescribes when and how that is to be paid, and suspends enforcement pending judicial finalisation. The respondents further argued that even if the Court was to accept that the limited guarantee created a contingent obligation on the part of Seacow, such an obligation has not matured into an enforceable, due-and-

⁵ This is an application for an order that the vote on a business rescue plan be set aside.

payable liability. The bank's claim, the respondents' state, never met the statutory threshold to qualify as a claim in the business rescue proceedings.

[31] It is to be remembered that the bank, in its amended notice of motion, now seeks a declaration order that it is a creditor of Seacow. In light of the substantial overlap, it is convenient to jointly dispose of the preliminary point raised by the respondents and the declaration sought by the bank. The Act does not expressly define the term "creditor" in the context of the business rescue proceedings. Section 128(1)(a) of the Act defines an "affected person" in relation to a company, as (i) a shareholder or creditor of the company; (ii) any registered trade union representing employees of the company; and (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

[32] Mr Louw, for the bank, called in aid *Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) Ltd and Others*⁶, (*Rogal*), in support of the bank's argument that it is a creditor of Seacow. In *Rogal*, the Court dealt with the question whether a person is a creditor for purposes of business rescue proceedings. There, the Court held that if a person has made out a case that a cause of action exists and that it has a claim that should be tried by a court of law, even if a dispute exists as to the liability of the debtor (and that the latter has a counterclaim), that person is a creditor. The following *dicta* in paragraph 34 of that decision is apposite:

' . . . It is not only creditors who have proven claims against the debtor that are to be regarded as affected parties. The [2008 Companies Act] does not require that the creditor must have a liquidated claim before being recognised as a creditor for purposes of Chapter 6 of the [2008 Companies Act]. Where a party holds a debt that is "owing" in that a complete cause of action for the recovery of the debt exists, and that party would be precluded from enforcing its claim because of the business rescue proceedings except if in accordance with the provisions of the business rescue plan, that party holds a direct and substantial interest in the business rescue proceedings and is an affected party, irrespective as to whether it acquired any voting interests.'

[33] The respondents do not deny that Seacow stood as surety and guarantor for De Vos Landgoed. As already discussed, the indebtedness of Seacow to the bank

⁶ 2022 JDR 1031 (GP).

arises from a limited guarantee and an unlimited suretyship. Insofar as the nature of the suretyship is concerned, Seacow guaranteed and bound itself jointly and severally as surety *in solidum* for and co-principal debtor with De Vos Landgoed (now in business rescue), renouncing the benefit of excussion. The bank contended that it did not rely solely on the unlimited suretyship but primarily on the guarantee. Here, Seacow guaranteed irrevocably and unconditionally the due and punctual repayment of monies owed by De Vos Landgoed, and would make payment to the bank against receipt of the first written demand. Seacow renounced all benefits or exceptions. It is important to recite below, although copious, some of the insightful terms of the guarantee.

Clause 1 of the guarantee stipulates:

'The Guarantor hereby irrevocably and unconditionally guarantees to and in favour of Grobank the due and punctual repayment by the Borrower of all amounts whatsoever arising out or in connection with the Facilities (the "Obligations"), regardless of how evidenced or documented, whether now existing or hereafter created, originally contracted with Grobank, secured or unsecured, direct or indirect, absolute or contingent, matured or un-matured, falling which the Guarantor shall make payment to Grobank, against receipt of first written demand therefore, of any amount(s) in respect of the obligations which are not paid by the Borrower duly and punctually.'

Clause 6 provides:

'This Guarantee shall be effective regardless of the validity or enforceability of the Obligations, any related documentation, any collateral security for the Obligations and any other guarantee of the Obligations. If as a result of the bankruptcy, dissolution, reorganization, intervention, arrangement or liquidation proceedings (or proceedings similar in purpose or effect), or if for any other reason any payment received by Grobank in respect of the Obligations is rescinded or must be returned by Grobank, this Guarantee shall continue to be effective as if such payment had not been made. Notwithstanding that there may from time to time be no Obligations, this Guarantee shall continue to be effective until the Borrower unconditionally and irrevocably has discharged all its liabilities and obligations under the Borrower.'

Clause 9 records, in part:

'9.1. The Guarantee shall at all times be fully and immediately enforceable, despite the fact that:

9.1.5. the Borrower and/or the Guarantor may be wound-up, placed in liquidation (whether provisionally or finally), business rescue or may become subject to any legal disability or to any law for the benefit or assistance of debtors and/or creditors or any change in status, function, control and/or ownership in the Borrower and/or the Guarantor... or

9.1.8. Any other fact or circumstances which may have the effect of wholly or partially relieving the Guarantor of its obligations, including any fact or circumstance which arises by reason of any act or omission on the part of Grobank, other than factors or circumstances involving wilful or wrongful misconduct of Grobank.'

Clause 11 states:

'The Guarantor hereby agrees and undertakes in favour of Grobank during the period of this Guarantee that it shall not:

11.4. In respect of any claim arising out of this Guarantee, raise the defence that there is no cause (i.e. reasonable basis) for Grobank's claim or the granting of the Guarantee.'

Clause 15 deals with renunciations as follows:

'The Guarantor hereby renounces the legal benefits and exceptions of no cause of debt, revision of accounts, errors in calculation, division and all other benefits or exceptions which might or could be taken hereto to the Guarantor's liability in terms of the Guarantee, the Guarantor declaring it to be fully acquainted with the full meaning and effect of this renunciation.'

[34] Apparent from the clauses cited is that the guarantee in issue is an irrevocable undertaking which must be honoured without judicial interference and or contestation unless fraud is at play. The terms of the guarantee are fatal to the respondents' argument regarding the purported material disputes of fact on the bank's creditor status. All that is required for payment is a demand by the beneficiary, stated to be based on the event specified in the guarantee. In *State Bank of India and Another v Denel Soc Limited and Others*⁷, it was said:

'A "first demand" guarantee, such as the principal guarantees, is independent of the underlying contract which gives rise to the guarantee. Therefore, regardless of a dispute between the parties to the underlying contract, the guarantee must be paid on demand.'

⁷ [2015] 2 All SA 152 (SCA) para 8.

[35] In terms of the guarantee, the grantor (Seacow) shall make payment to the bank against receipt of the first written demand thereof of any amounts in respect of the obligations which are not paid by the borrower duly and punctually. De Vos Landgoed failed to make payment of the amounts owing to the bank under the Facilities Agreements. Therefore, on 26 August 2024, the bank demanded payment from it. It can hardly be argued that the principal debt is not presently due and enforceable, given that, on 9 September 2024, prior to the commencement of Seacow's business rescue proceedings on 1 October 2024, the bank demanded payment from Seacow of the amounts owing to it under the Facilities Agreements. Additionally, the bank enforced its claim by submitting it to Seacow's BRPs. This triggered payment by Seacow because the event stated in the guarantee materialised. All these demonstrate the bank's creditor standing in this litigation. Stated otherwise, the bank is owed a debt and unquestionably qualifies as a creditor of Seacow.

[36] Mr Louw argued that the impact of the De Vos Landgoed business rescue plan is of no moment insofar as the bank and Seacow are concerned. That is so because the latter is obliged to make payment to the bank of amounts due by De Vos Landgoed on the basis that Seacow is a guarantor and co-principal debtor. The only notional impact of the De Vos Landgoed business rescue plan may be a reduction in the quantum of the bank's claim against Seacow. That argument is manifestly cogent and buttressed by Clause 9 of the guarantee, which stipulates that the Guarantee shall at all times be fully and immediately enforceable despite circumstances which may have the effect of wholly or partially relieving the guarantor of its obligations.

Failure of the bank to prove lawful succession to Grobank Limited (Grobank)

[37] To further bolster their case that the bank had no standing in the litigation, the respondents argued that all facility agreements, guarantees, and securities forming the basis of Seacow's indebtedness were concluded exclusively with Grobank. According to them, the bank has previously admitted under oath that it did not acquire Grobank's rights through a name change but by a mandatory statutory transfer governed by s 54 of the Banks Act. In the answering affidavit, the respondents rely on an extract from an affidavit deposed to on behalf of the bank in another matter filed under case no 2025-134472 in this Court, where it was stated that the bank took over

the assets and liabilities of Grobank in terms of s 54 of the Banks Act. It was contended that the bank failed to show that it obtained a prior written consent of the Minister of Finance for the amalgamation, merger and arrangement referred to in s 54(1) of the Banks Act read with Chapter 5 of the Act, the shareholders' resolution approving the amalgamation, and the registration of the transfer by the Prudential Authority in terms of s 54(5) to (7) of the Banks Act.

[38] The bank is undoubtedly the same entity as Grobank, with the same registration number. It simply changed its name from Grobank to its current name. This is apparent from CIPC Form 14.3 (Amended Registration Certificate), which clearly states that the bank filed an amendment to its memorandum of incorporation in terms of s 16 of the Act, changing its name from Grobank to Access Bank (South Africa) Ltd, which change took effect on 21 April 2021. The South African Reserve Bank Prudential Authority issued a "Certificate of Change of Name" dated 7 May 2021, confirming that Grobank changed its name to Access Bank (South Africa) Limited. Additionally, the South African Reserve Bank released a media statement on 31 March 2021, stating that Grobank Limited would be "renamed and rebranded as Access Bank (South Africa) Limited". Accordingly, there is sufficient basis to conclude that the rights and obligations under the agreement in issue, concluded between Grobank and Seacow, remain enforceable by the same entity, now known as Access Bank (South Africa) Limited. The respondents' objection is thus not well-founded.

Non-joinder of De Vos Landgoed

[39] The respondents submitted that the bank's supplementary case is grounded on the alleged enforceability of obligations arising from the indebtedness of De Vos Landgoed (in business rescue). Therefore, they argued that De Vos Landgoed has a direct and substantial interest in the determination of whether its debt is enforceable; the timing and manner of any enforcement; the effect of its business rescue plan on any alleged suretyship; and any finding which may be made regarding its alleged default, which would have a direct and prejudicial legal effect on its own business rescue proceedings and its relationship with its other creditors.

[40] The bank's amended relief is against Seacow and the BRPs. No relief is sought against De Vos Landgoed. It is common ground that the BRPs in this case are also the Business Rescue Practitioners appointed for De Vos Landgoed. The BRPs have treated the bank as a creditor in the business rescue of De Vos Landgoed itself. The bank's claim was admitted in that process, and the bank is reflected as a creditor in the De Vos Landgoed business rescue plan.

[41] A person must be joined as a party to the proceedings if it is determined that their joinder is necessary. That would be the case if a party has a material direct or substantial interest in the relief claimed, unless it has waived that right. A direct and substantial interest is an interest in the right which is the subject matter of the litigation. More importantly, for present purposes, a mere financial interest is an indirect interest and may not require joinder.⁸ The mere fact that a party may have an interest in the outcome of litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings has thus been held to be limited.⁹

[42] I have already dealt with the immediate enforceability of the limited guarantees as against Seacow, and with the only hypothetical impact of the De Vos Landgoed business rescue plan being a reduction in the quantum of the bank's claim against Seacow. De Vos Landgoed, in my view, holds a mere financial interest. Therefore, the respondents failed to demonstrate that De Vos Landgoed has a direct and substantial interest in the subject matter of this litigation, which may be affected by this Court's judgment and order. Its non-joinder is of little consequence.

Non-compliance with s 130 of the Act

[43] Less needs to be said about the bank's purported non-compliance with s 130(1) of the Act, which provides:

⁸ *Eugene Prinsloo v Donovan Theodore Majiedt N.O and Another* (257/2024) [2025] ZASCA 74 (30 May 2025) para 13.

⁹ *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) para 12.

'(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-

- (a) setting aside the resolution, on the grounds that-
 - (i) there is no reasonable basis for believing that the company is financially distressed;
 - (ii) there is no reasonable prospect for rescuing the company; or
 - (iii) the company has failed to satisfy the procedural requirements set out in section 129;
- (b) setting aside the appointment of the practitioner, on the grounds that the practitioner-
 - (i) does not satisfy the requirements of section 138;
 - (ii) is not independent of the company or its management; or
 - (iii) lacks the necessary skills, having regard to the company's circumstances; or
- (c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.'

[44] The respondents critiqued the bank for not having invoked the s 130 procedure in the circumstances where the bank had complained, *inter alia*, that the BRPs failed to publish a plan timeously, failed to provide reports, and failed to respond to correspondence. It was contended that an affected party may, in terms of s 130, seek the setting aside of the business rescue resolution, or an order compelling the BRPs to perform their duties. The bank bypassed the statutory remedy, circumvented the procedural safeguards designed to protect affected parties, and attempted to collapse the business rescue process, so the argument continued. On these bases, it was contended that the application is fatally defective. In my view, the point, apart from being bad, is of no consequence and devoid of merit. This application, prior to its amendment, was partly for an order setting aside the resolution that commenced business rescue proceedings in respect of Seacow.

Conclusion on the preliminary attack against the application

[45] As I have shown, none of the points *in limine* raised against the application are sustainable in law and in fact. This paves the way for the consideration of the main application.

The main application

[46] To recapitulate, the relief the bank is currently pursuing, following the amendment of its papers, is first, to seek leave to commence with the application as supplemented in terms of s 133(1)(b) of the Act; and a declarator that the bank is a creditor of Seacow and entitled to participate in its business rescue or liquidation proceedings. The bank also seeks an order removing the BRPs of Seacow from the business rescue proceedings in terms of s 139(2) of the Act; that Seacow be directed to appoint a new business rescue practitioner in terms of s 139(3) of the Act; that the BRPs pay the costs of the main application and those of the postponement application of 12 December 2025, jointly and severally *de bonis propriis* on the attorney-and-client scale. I have already determined that the bank is a creditor of Seacow. It is to the residual issues that I now turn.

Leave to proceed in terms of s 133(1)(b) of the Act

[47] Section 133 provides for a general moratorium on legal proceedings against the company in a business rescue. Section 133(1)(b) 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 with the leave of the court and in accordance with any terms the court considers suitable.

[48] The respondents objected to the introduction, in the bank's supplemented papers, of the relief the bank sought in terms of s 133(1)(b) of the Act. It was argued that the initial relief of placing Seacow in liquidation equally required leave in terms of s 133(1)(b), which the bank failed to seek. A failure to comply with s 133, so it was argued, is not a technical defect. It goes to the competence of the proceedings themselves. The respondents further contended that the present relief under s 133(1)(b) is a procedural afterthought designed to retroactively legitimise an originally fatally defective application.

[49] It bears repeating that in the original notice of motion, the bank sought to set aside the resolutions commencing business rescue proceedings, that those

proceedings be terminated, and that Seacow be placed in final liquidation. The relief was sought in terms of s 130 and 132(2)(a)¹⁰, read with s 141¹¹ of the Act. It has been held that the statutory moratorium does not find application where the applicant is an affected person who applies to the court under s 130(1) to have the adoption of the resolution adopted under s 129 set aside before a business rescue plan is adopted.

[50] In *Rogal*¹², the Court said:

'Since the applicant is an affected person and s 130(1) authorises an affected person to apply to court to have the adoption of the resolution in terms of s 129 set aside before a business plan is adopted, the moratorium on legal proceedings does not apply.'

In *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others*¹³, (*LA Sport*), the Full Court pronounced that on the express wording of s 130(1), the right to apply to court is conferred on affected persons and that there is no textual indication that this right is subject to the moratorium regime in s 133(1). The Court further held:

'The right to approach the court is an essential counterweight to the curtailment of affected persons' rights licensed by s 129. The purpose of the measures does not require s 130(1) to be read subject to s 133(1).'

[51] The interpretation assigned by the Full Court in *LA Sports* to s 130(1) commend itself in this instance. The bank did not require leave in terms of s 133(1)(b) of the Act when it sought the relief set out in the initial notice of motion, particularly one aimed at setting aside the resolution placing the Seacow in business rescue. However, on the amended notice of motion, there appears to be no dispute that leave of the Court is required to proceed or commence with the application as supplemented in terms of s 133(1)(b).

¹⁰ Objection to a company resolution to begin business rescue proceedings (s 130) and ending the business rescue proceedings (s 132).

¹¹ Section 141, inter alia, places an obligation on a business rescue practitioner to investigate the company's affairs, business, property, and financial situation, and after having done so, to consider whether there is any reasonable prospect of the company being rescued. If, at any time during business rescue proceedings, the practitioner concludes that - there is no reasonable prospect for the company to be rescued, the practitioner must inform the court, the company, and all affected persons in the prescribed manner; and apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation.

¹² *Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) Ltd and Others*, above fn 6, para 36.

¹³ (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) paras 35-36.

[52] It is trite that a moratorium on legal proceedings against a company under business rescue is of cardinal importance, as it provides the crucial breathing space to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.¹⁴ Section 133(1)(b) involves the exercise of the court's discretion, having regard to the interest of justice. The discretion is to be exercised judicially, taking into account the purpose and objects of s 133(1)(b), read in the context of the Act as a whole. Considerations of fairness and convenience are fundamentally important.¹⁵ An applicant seeking to obtain leave under the section must, as a minimum requirement, establish a *prima facie* case against the company in business rescue. What is meant by a *prima facie* case depends on the context in which it is used.¹⁶ There is no closed list of the factors that may be taken into account in deciding whether or not to grant leave, as each case must be determined on its own facts. In *Arendse*¹⁷, the Court listed, inter alia, the following:

'... Without being prescriptive in any way, the following considerations are relevant: (a) The effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders; (b) the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health; and (c) whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in ss 7(k) and 128(b) of the Act.'

[53] I have already demonstrated that the bank is a creditor of Seacow. The bank, correctly in my view, argued that it stood to be severely prejudiced if the relief currently sought in terms of s 133(1)(b) of the Act is refused because it would remain excluded from the business rescue proceedings despite being a creditor of Seacow and an affected person with concomitant statutory rights. The bank further contended that it would be unable to enforce its contractual rights against Seacow and would suffer financial harm by being precluded from recovering the debt owed to it.

¹⁴ *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 14.

¹⁵ *Arendse and Others v Van der Merwe and Another NNO* 2016 (6) SA 490 (GJ), ("*Arendse*"), paras 10-11.

¹⁶ *Arendse (supra)* paras 16 and 18.

¹⁷ *Supra*, para 28.

[54] A declaration of the bank's creditor status does not, in my view, amount to premature determination of issues properly falling to be decided in enforcement proceedings or during statutory Chapter 6 processes, as suggested by the respondents. In terms of s 145 of the Act, each creditor is entitled, inter alia, to formally participate in a company's business rescue proceedings to the extent provided for in Chapter 6 of the Act. The removal of the bank from the business rescue proceedings on the basis that it is not a creditor, when all the indications are that it is, provides an adequate basis for the lifting of the moratorium on legal proceedings against Seacow in terms of s 133(1)(b) of the Act. The suspension of the moratorium ought to be done, in the interest of justice, in order to fortify the bank's rights to participate in the business rescue proceedings of Seacow and for its BRPs or their successors to recognise those rights. The bank's unceremonious exclusion from the business rescue proceedings was, in my view, unreasonable. It is therefore appropriate that the declarator that the bank is a creditor of Seacow and an affected person in its business rescue proceedings ought to issue.

Removal of the BRPs

[55] Section 139 of the Act provides for the removal and replacement of business rescue practitioners and sets out the grounds for doing so. The bank relies on the grounds in s 139(2)(a), (b) and (e) in urging that the BRPs be removed. Section 139 provides as follows, in the part relevant:

- '(1) A practitioner may be removed only-
- (a) by a court order in terms of section 130; or
 - (b) as provided for in this section.
- (2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:
- (a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
 - (b) failure to exercise the proper degree of care in the performance of the practitioner's functions;
 - ...
 - (e) conflict of interest or lack of independence; or ...'

[56] The recitation of the *dicta* in *Knoop NO and Another v Gupta and Another*¹⁸ (“*Knoop*”) below usefully elucidates the guiding principles applicable to the Court’s determination of the removal of a business rescue practitioner:

‘The general nature of the grounds for removal is such that they cannot be established directly. They are factual conclusions or inferences drawn from other proven facts. It is necessary for the applicant for removal to specify and establish by evidence the conduct on the part of the BRP that they say justifies an order for removal. Only if there is proper proof of the primary facts can the question of drawing an inference properly arise. The drawing of inferences from the facts must be based on proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd* [[1939] 3 All ER 722 (HL) ([1940] AC 152) at 733E – F]:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish . . .

But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture”.’

At paragraphs 20-21 it was said:

‘. . . Reliance on this ground [incompetence or a failure to perform the duties of a BRP of the particular company] required evidence of specific instances of incompetence, or failure to perform the BRP’s duties, in relation to the company under business rescue. Incompetence suggests that the BRP lacked the necessary skills to perform their duties. It may be established by proof that the BRP is “of inadequate ability or fitness; lacking the requisite capacity or qualifications”. That is a reasonably high bar. Merely moderate ability does not amount to incompetence. Nor does the failure to meet the standards that the affected party would like to see achieved, whether that relates to the time taken to complete the business rescue process, or the prices at which assets are sold, or the manner in which the BRP approaches their task. The alleged incompetence must relate directly to the performance of the task of a BRP. An inability to perform the role of BRP properly in relation to the circumstances of the particular company must be demonstrated.

Where a failure to perform the duties of a BRP is relied on it is essential to identify the duties that the affected party says should have been performed and to show the respects in which they were not performed. A failure to convene meetings as required by the statute and the business rescue plan, or a failure to report to the creditors and other affected parties, come to mind as fairly obvious examples. A general neglect of the duties of a BRP, where the BRP

¹⁸ 2021 (3) SA 88 (SCA) para 19.

simply fails to deal with matters requiring attention in a regular and timeous fashion, may suffice, but a BRP who is attending to matters in a manner which the affected party does not approve of is not failing to perform their duties.’

[57] The bank relies on the alleged failure by the BRPs to report to the creditors and other affected parties, as a basis upon which it asserts that the BRPs were incompetent or failed to perform their business rescue duties (s 139(2)(a) of the Act). It was contended for the bank that it had submitted its claim to the BRPs and remained an active participant in the business rescue proceedings until the BRPs unilaterally excluded it from the proceedings without notice. It was further argued that the timing of its removal from the mailing list of affected persons was telling because, so it was argued, it happened soon after the bank had voted against a further extension for the publication of the business rescue plan.

[58] The respondents aver that the bank was initially included in certain communications as a precautionary measure pending investigation of its claim. Following the BRPs’ analysis, in terms of s 141 of the Act¹⁹, it was determined that the bank held no direct, liquidated claim against Seacow. That its alleged exposure arose solely from instruments relating to the indebtedness of De Vos Landgoed, not Seacow. Any alleged claim was at best contingent and disputed. It was on these bases, the respondents submit, that the bank was removed from the “affected persons” mailing list. The respondents further intimated that the BRPs are required to communicate with affected persons, not with entities that held no direct claims against Seacow. They further aver that the bank’s expectation of further communication from the BRPs is unfounded, as the bank had been removed from the list of affected persons and not legally entitled to the information sought.

[59] In *Knoop*²⁰, it was held that:

‘A failure to exercise a proper degree of care in the performance of their functions will in most instances require proof of negligence. It is difficult to see how that could be shown by way of general allegations without reference to specific instances of negligence. While proof of harm

¹⁹ Section 141(1) provides that: ‘As soon as practicable after being appointed, a practitioner must investigate the company’s affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.’

²⁰ *Supra* fn 18 para 22.

to the company, whether in the implementation of an approved business plan or from the perspective of its future operations after business rescue is terminated, may not be a prerequisite to proof of a failure to exercise a proper degree of care, in the absence of harm it may be difficult for a court to conclude that the BRP has not exercised a proper degree of care. At the very least the potential for harm to have been caused by the actions of the BRP must be considered, even if that harm was averted or did not materialise.’

[60] The bank argued that the BRPs’ failure to recognise it as a creditor and their failure to notify it of the decision thereof constituted a failure to exercise a proper degree of care in the performance of the practitioners’ functions as contemplated in s 139(2)(b) of the Act. So too, was their failure to provide the bank with monthly status reports. In addition, so it was argued, the BRPs’ delay in disclosing these facts to the bank until 5 December 2025 also constitutes a failure to exercise a proper degree of care in performing the practitioners’ functions. The bank further argued that the manner in which the BRPs approached the litigation is also testament to their mala fides. Instead of consenting to the postponement, the BRPs, pursuant to the eleventh-hour disclosure of material facts, opposed it, resulting in the multiplication of proceedings and the incurrence of further costs that could have been obviated. This shows a lack of independence and incompetence or failure to perform the duties of a business rescue practitioner as set out in s 139(2)(a), (b) and (e) of the Act. The conduct of the BRPs caused prejudice to Seacow, an already distressed company, and its creditors, and constituted a gross violation of the bank’s right as a creditor.

[61] The decision of the BRPs to exclude the Bank from further participation in the business rescue proceedings was, in my view, unwarranted. The displeasure expressed by the bank, occasioned by the BRPs’ decision to terminate its participation and the apparent frustration arising from the bank not being recognised as a creditor of Seacow, is understandable. However, I am not persuaded that the conduct complained of, without more, establishes incompetence, a failure to perform the BRPs’ statutory duties, or a failure to exercise the requisite degree of care in the performance of the BRPs’ functions. Nor does the available evidence sustain a finding of conflict of interest or lack of independence on the part of the BRPs. The removal of business rescue practitioners is a serious step and ought not to be ordered lightly.²¹ The manner

²¹ See *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA), paras 18, 20 - 24.

in which the BRPs approach their work is not a ground for their removal. In general, in this case, the BRPs complied with their statutory obligations. For instance, they circulated the status reports and published the business rescue plan as contemplated in s 150 of the Act. Following the filing of the answering affidavit, it became apparent that the BRPs had not abandoned Seacow, contrary to the bank's initial belief.

[62] It is concerning that the BRPs did not respond to the bank's request for status reports on the business rescue proceedings. In my view, it did not matter that the BRPs did not consider the bank a creditor or affected person. At the very least, they ought to have responded to the bank's attorneys' letters or informed the bank that it had been removed from the list of affected persons. Failure to do so demonstrates some lack of courtesy. However, this omission is not of such a nature or degree as to warrant the removal of the BRPs. This also applies to the BRPs' failure to agree with the bank to postpone the application, which may have been motivated solely by the exigencies of the litigation. The evidence is sparse to conclude that the BRPs did not act with probity or breached the canons of good professional conduct. In my view, the bank did not establish on the balance of probabilities that the removal of the BRPs is justified in the circumstances. This leads ineluctably to the conclusion that the relief it seeks on this score ought to fail.

The question of costs

[63] Section 140(3)(c)(ii) of the Act provides that during a company's business rescue proceedings, the practitioner may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of the practitioner.

[64] On some of the grounds set out under s 139(2) of the Act, for the removal of the BRPs, the bank invited this Court to mark its disapproval of the BRPs' alleged unlawful, *mala fide*, and at the very least grossly negligent conduct, by directing that they pay the costs of both the main and the postponement application, on an attorney-and-client's scale, from their own pockets, jointly and severally. It was argued for the bank that awarding costs against Seacow would impose an obvious injustice on the estate and

the creditors. In *Public Protector v South African Reserve Bank*²², the Constitutional Court observed thus:

'It does not follow that a punitive costs order will always be justified in circumstances where a personal costs order is warranted. An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment, be viewed as "double punishment". While the test for awarding a personal costs order or costs on a punitive scale may overlap, an independent, separate inquiry should be carried out by a court in respect of each order. Both personal and punitive costs orders are extraordinary in nature and should not be awarded "willy-nilly", but rather only in exceptional circumstances.'

[65] Costs on an attorney and client scale are awarded to mark the Court's disapproval of the conduct of a litigant. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.²³ Furthermore, cost orders *de bonis propriis* are rarely made.²⁴ They will be made where a party acted in bad faith, or negligently, or unreasonably.²⁵ I have already determined that the BRPs did not act *mala fide* or negligently, nor did they display a lack of independence. It follows that an order of costs on an attorney and client scale *de bonis propriis* would be inappropriate in the circumstances of this case.

[66] The bank achieved substantial success in the main application. There is no reason to deprive it of its costs. As to the costs of the postponement of 12 December 2025, I am of the view that such an application was a reasonable and commensurate response to the belated disclosures made by the respondents. Had the respondents provided the bank with the information it required at the earliest opportunity, the postponement could have been avoided. They are to be blamed for the delay occasioned by the postponement. An order is therefore made:

²² [2019] ZACC 29 (CC); 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) para 220.

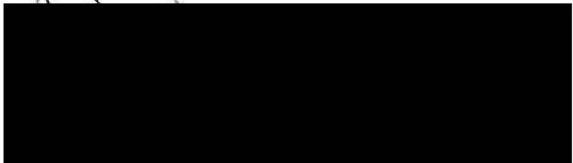

²³ *Ibid* para 223; see also *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA & Others* (2016) 37 ILJ 2815 (LAC) para 46.

²⁴ *Lushaba v Mec for Health, Gauteng* 2015 (3) SA 616 (GJ) para 69.

²⁵ *Blou v Lampert and Chipkin, NNO, and Others* 1973 (1) SA 1 (A) at 14B-C.

Order

1. The applicant, Access Bank (South Africa) Limited, is granted leave to proceed or commence with the application filed under case no 2025-232376, as supplemented, in terms of section 133(1)(b) of the Companies Act 71 of 2008, to the extent required.
2. It is declared that the applicant is a creditor of the first respondent, Seacow Properties Proprietary Limited (in Business Rescue), and entitled to participate in the business rescue proceedings of the first respondent.
3. The first, second, and third respondents are to pay the costs of the application as well as those of the postponement application of 12 December 2025, jointly and severally, the one paying the other to be absolved, on party-and-party scale, such costs are to include counsel's fees on scale C, as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.



PHATSHOANE DJP
DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

Appearances

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