REPUBLIC OF SOUTH AFRICA

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

Case Number: **2025-067947**

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

12 May 2026 JRG

DATE SIGNATURE

In the matter between:

MasterCard Foundation	**Applicant**
and	
Africa Founders Ventures NPC (in business rescue)	**First Respondent**
Barry Claude Urban N0	**Second Respondent**
Companies and Intellectual Property Commission	**Third Respondent**
Nedbank Ltd	**Fourth Respondent**
The Standard Bank of south Africa Ltd	**Fifth Respondent**
Investec Bank Ltd	**Sixth Respondent**

JUDGMENT

Respondents' application for leave to appeal

Johann Gautschi AJ

[1] The First and Second Respondents apply for leave to appeal against the whole of the judgment and orders which I granted on 4 July 2025 in the above application *a quo*. Although they are applicants in this application for leave to appeal, I shall continue to refer to them as the First and Second Respondents (also collectively referred to as the Respondents) as I did in my judgment in the application *a quo*.

[2] These applications for leave to appeal are opposed by the Applicant on the grounds that a provisional order of winding up is not appealable and that, in any event, neither application has any reasonable prospect of success on appeal.

[3] The orders appealed against include orders for the provisional winding up of the First Respondent, interdicting the First and Second Respondents from disposing of any assets of the First Respondent and from transacting on various Bank Accounts pending final determination of disputes declared by the Applicant to be determined by way of arbitration and that the Second Respondent be ordered to pay *de bonis propriis* the costs of the application *a quo.*

Appealability of the provisional winding up order

[4] I commence with the Applicant's opening submissions that the provisional order is not final and accordingly lacks the attributes for appealability. Thereafter I shall deal with the merits of the grounds of appeal. I am in agreement with the submissions on appealability as set out in paragraphs 10 to 12 of the Applicant's heads of argument as follows:[1]

"9 There is no dispute that the company in business rescue is unable to pay its debts and, accordingly that the provisions of the Insolvency Act, 1936

[1] whilst noting that I was notified by email on 6 October 2025 that a final order of liquidation was granted on that day.

apply by virtue of the provisions of s339 of the Companies Act, 1973 which reads as follows:

> ***"339 Law of Insolvency to be applied mutatis mutandis***
>
> *In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act."*

10 Section 150(1) of the Insolvency Act provides for an appeal against a "final order of sequestration or by an order setting aside an order of provisional sequestration …". Subsections 150(2) - (4) similarly relate to a ***final order*** *of sequestration or order setting aside a provisional sequestration order. Section 150(5) provides:*

> *"(5) There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section."*

11 The provisional order is not final and accordingly lacks the attributes for appealability. In Sana Developers (Pty) Ltd and Another v Nedbank Limited (Leave to Appeal),[2] *Siwendu J considered an order that Nedbank was entitled to an order both under section 130(1)(a)(ii) or (iii) of the Companies Act, 2008 and on the alternative ground in section 130(5)(a)(ii) on the basis that it is just and equitable to set aside the resolution placing Sana Developers in business rescue and further granted a provisional order for the liquidation which included consequential orders setting aside the resolution placing Sana Developers under supervision, terminating the rescue proceedings, finding on the facts that the jurisdictional requirements for reasonable prospect of successfully rescuing Sana Developers have not been met and directing the filing of further affidavits to oppose the final order.*

12 The learned Judge held as follows:

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[2] 2025 JDR 0629 (GJ).

“[21][3] Counsel sought to contend that each of the orders should be construed in discrete parts. I disagree with this segmentation. In my view the granting of the provisional order for liquidation is linked inextricable with the finding on the prospect of success in rescuing Sana Developers. The same reasons for granting the provisional order impact whether Sana Developers can be rescued. Importantly, the provisional order has not been rendered final or discharged.

[22] In this case, the construction of the judgment and order appealed is material. The often cited decision in Firestone South Africa (Pty) Ltd v Genticuro[4] makes it plain that: ‘

The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order: the court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules …

Thus, as in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it.’

[23] Although Nedbank sought a final order for liquidation, the Court granted a provisional order for liquidation to safeguard the interests of all affected persons including the applicants. Notwithstanding the conduct which is not in keeping with the objects of business rescue and flagrant disregard of the requirements, the Court in its Judgment states the following:

‘I am minded that Professors Patrick O’Brien and Juanitta Calitz express the view that the requirement of a reasonable prospect for rescuing the company is a continuous one that applies to business rescue from birth to death. By implication Mr Tayob <u>can present facts pointing to the availability of post commencement finance to answer Nedbank’s supplementary affidavit</u>. Pending

[3] p7.
[4] 1977 (4) SA 298 (A) at 304 para D-F.

that, and without pronouncing on the correctness of the application, under section 153, or the right of an affected person to bring the business rescue proceedings, that right is not a bar to the provisional order Nedbank seeks as a security holder nor a legitimate basis for a postponement of this application.' [emphasis added]

[24] Accordingly, a final word has not been spoken on the fate of Sana Developers. The applicants were not left remediless or prejudiced by the orders. The Court availed them the opportunity to answer the supplementary affidavit and present any new information before the Court to dispel and rebut the prima facie view forming the basis for the provisional liquidation order.

[25] In the parlance in Zweni, a leave to appeal will not result if it will not lead to 'a just and reasonable prompt resolution of the real issue between the parties.' Here, leave to appeal will not dispose of all the issue between the parties. The court order is not final and definitive of the rights of the applicants. It could hardly be in the interest of justice to grant the leave to appeal in this case.

[26] In the result, I make the following order

a. The Application for leave to appeal is dismissed.

b. The applicants are ordered to pay the costs of the application jointly and severally at Scale C."

[5] Consequently, I find that the provisional order of liquidation is not appealable.

[6] I shall now in any event proceed to address the respondents' grounds of appeal on the merits.

***Locus standi* issue – whether applicant a creditor**

[7] The Respondents' grounds of appeal on the merits focus on the *locus standi* issue. They contend that I erred in finding that the applicant was from the outset a "*creditor*" in the definition of *"affected person*" in section 128 (1) (a) (i) of the Companies Act, 2008 (the Act) "*and therefore entitled to the publication of a notice of the offending resolution together with a sworn statement under Section*

130 (1) (b) (sic) of the Act and had the requisite standing to bring the application for the setting aside of the resolution under Section 130 (1) of the Act" .[5]

[8] The application for leave to appeal submits[6] that in so finding I *"erred in conferring upon the* [applicant] *rights as purported prospective creditor of the* [First Respondent]*, thereby drawing a distinction between different categories of creditors in business rescue proceedings without express legislative sanction.*"

[9] The application further submits[7] that in making that finding I "*erroneously conflated the purposes, mechanisms and procedures pertaining to insolvency and winding-up proceedings with those of business rescue under Chapter 6 of the Act*".

[10] The allied ground of appeal is that I erred in finding that the Applicant was a creditor of the First Respondent by virtue of the applicant's contractual claim for rebranding costs which had by notice dated 3 May 2025 been made the subject matter of a declared dispute in terms of clause 13 of the Grant Agreement.[8] Under this ground of appeal the respondents submit that I should consequently (presumably because it is the subject matter of a dispute referred to arbitration) have found that *"the rebranding claim was not an unpaid debt which is due*" and that the applicant is therefore "*not a creditor of the* [first respondent] *in the business rescue proceedings"*.

[11] It is further averred[9] that I erred in finding that the claim for rebranding costs constituted the Applicant "*a prospective creditor of the first respondent and thus accorded it standing to seek relief under section 130 (1) of the Act*".

[12] In elaboration of the aforegoing the Respondents submitted[10] that I should have found that all of the applicant's claims "*were contingent upon the determinations consequence upon the dispute resolution process*". They further submitted[11] that

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[5] paragraph 2 of the application for leave to appeal
[6] paragraph 6 of the application for leave to appeal
[7] in paragraph 7 of the application for leave to appeal
[8] paragraph 3 of the application for leave to appeal
[9] paragraph 5 of the application for leave to appeal
[10] paragraph 6 of the application for leave to appeal
[11] in paragraph 8 of the application for leave to appeal

"The court erred in interpreting section 128(1)(a)(i) of the Act in a manner which fell foul of the equality provisions of the Constitution and the obligation to interpret statutes through the prism of the Bill of Rights as required by section 7(a) of the Act".

[13] The underlying premise of the aforegoing grounds of appeal is the Respondents' argument in the application *a quo* that *"none of the applicant's purported contractual entitlements became due and owing (in the sense of a complete cause of action) during the course of business rescue proceedings*".[12]

[14] That argument also finds expression in the Respondents' submission that a contingent or prospective creditor is not a "*creditor*" as contemplated by the definition of "*affected person*" in Section 128 (1) (a) (i) of the Act.

[15] The Respondents' reliance on paragraph [21] of the Wescoal judgment in justification of the aforegoing is misplaced. When read together with succeeding paragraphs [23], [24] and [27] of that judgment – all as quoted in the applicant's heads of argument in the application *a quo* – it is clear that contingent and prospective creditors are included as creditors. Those four paragraphs of the Wescoal judgment read as follows (omitting the applicant's emphasis):

> *"[21] The absence of a specific definition of 'creditor' is an indication that the Legislature did not contemplate a specific meaning other than the ordinary grammatical meaning of the word; that is a person or entity to whom an unpaid debt is due. Unless the Act has classified creditors and given them different or unequal rights, there is no basis to import, via interpretation, any such different or unequal rights. Any interpretation which draws distinctions between different categories of creditors, without express legislative sanction, would fall foul of the equality provisions of the Constitution and the obligation to interpret statutes through the prism of the Bill of Rights and the Constitution as required by s 7(a) of the Act. No absurdity would result if the word were afforded its ordinary meaning.*

[12] paragraph 64, first and second respondent's heads of argument in the application of quo

[23] It is uncontentious that the purpose of business rescue is to save flailing entities and to avoid liquidation. The purpose of liquidation proceedings is different. It is to determine an appropriate distribution of an insolvent entity's assets. The hand of the law is laid upon an estate and creditors' rights become fixed and immutable in terms of the relevant provisions of Chapter XIV of the Companies Act 61 of 1973. The context of a concursus creditorum does not apply to business rescue proceedings. The differences between pre-commencement and post-commencement creditors are less pronounced and there is no need to differentiate between them.

[24] Even in the liquidation context, the word 'creditor' is to be given its normal grammatical meaning. In Ex Parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd, it was held <u>'the word in the section is probably limited to persons having pecuniary claims, whatever the nature of their source may be'</u>. In Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd and Others, it was concluded that <u>'a creditor includes a contingent or prospective creditor'</u>. It is not the word 'creditor', but the other relevant provisions of the insolvency legislation which provide the context and limits who has voting interests in an insolvency scenario.

[27] The absence of a specific reference to post-commencement creditors in s 145 and s 150 does not evidence any intention on the part of the Legislature to exclude them or to limit their rights. Section 145 regulates the rights and voting interests of creditors. A 'voting interest' is defined in s 128(j) as 'an interest as recognised, appraised and valued in terms of s 145(4) to (6)'. It expressly grants 'each creditor' various rights. There is no limitation placed on which creditors are afforded those rights. Instead, each creditor is expressly afforded such rights, including the right to vote in respect of a business rescue plan by s 145(2). The value of a voting interest is regulated by s 145(4), which only draws a distinction between secured and unsecured creditors, but

> *not between pre-commencement creditors and post-commencement creditors"*

[16] This is further supported by the judgment in *Rogal Holdings (Pty) Ltd v Victor Turnkey Projects (Pty) Ltd and Others* 2022 JDR 1031 (GP) at paragraphs [34] and [35] – also quoted with emphasis in the applicant's heads of arguments in the application *a quo* – which read as follows:

> *"[34] However, even (if) I accept that a dispute exists regarding the first respondent's liability to compensate the applicant for damages, and that the first respondent might have a counter claim against the applicant, the applicant 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. In this sense, the applicant is a creditor. It is not only creditors who have proven claims against the debtor that are to be regarded as affected parties. The 2008-CA 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-CA. 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.*
>
> *[35] The applicant is an affected person with the required locus standi to approach the court for an order that the resolution adopted on 6 September 2021 to commence with business rescue proceedings is set aside". [Underlining added].*

[17] The Respondents' reliance on the words "*debt is due*" in paragraph [21] of the Wescoal judgment is also misplaced for reasons articulated as follows in paragraph 15 of the applicant's heads:

"The applicants confuse the fact that a debt is "disputed" on the one hand with whether the debt is due. The ADR process does not defer the date upon which a debt falls due. There is in any event no genuine dispute about the company's liability for repayment of rebranding costs- nor indeed the indebtedness for large amounts owed to the first respondent. Although the applicants contend that this is not "liquidated", it is not necessary for the purposes of the first respondent qualifying as a creditor/affected person for the claim to be liquidated. In any event, in this instance the claim is liquidated even if the calculation of what was spent from the funds and applied towards rebranding costs is required to be verified. The quantum of those costs is objectively calculable and is simply subject to identifying the expenditure. There was a debt presently claimable by the first respondent within the meaning of Singh v Commissioner, South African Revenue Service (referred to in footnote 13 of the applicants' heads of argument)."

[18] The Respondents submitted as follows[13] that the obligations of the First Respondent in terms of the Grant Agreement were suspended by means of the second respondent's 8 May 2025 letter:

"16 The Court erred in finding that no obligation arose for the first applicant under the dispute resolution clause which was capable of being suspended by the second applicant under Section 136(2)(a) of the Act despite its wide scope ("any obligation of the Company arising under an agreement to which the company was a party at the commencement of the business rescue proceedings") and the first applicant's contractual obligations arising therefrom including but not limited to:

16.1 An obligation to engage in private meetings within 60 days;

16.2 An obligation to appoint one mediator;

16.3 An obligation to submit to arbitration by the International Centre for Dispute Resolution;

[13] in paragraphs 16-18 of the application for leave to appeal

16.4 An obligation to pay the costs of mediation and arbitration."

17 The Court erred in not finding that the dispute resolution clause and the consequent notice of dispute of 3 May 2025 gave rise to obligations upon its delivery which thereby commenced the dispute resolution process and that therefore the practitioner acted within his authority to suspend these under Section 136(2)(a) of the Act.

18 The Court erred in finding that the envisaged arbitration award pursuant to the envisaged arbitration proceedings would not constitute an obligation on the part of the first applicant which became due but would only constitute an obligation upon it becoming enforceable when made an order of Court. The Court should have found that an arbitration award once made would give rise to a debt and thus an obligation as envisaged under Section 136(2)(a) of the Act."

[19] If Even assuming that I erred in interpreting an "*obligation*" as contemplated in section 136 (2) (a) of the Act as referring to an enforceable obligation to pay pursuant to an application to enforce an arbitration award – and assuming further that the Respondents were able to overcome the arguments raised by the applicant in paragraph 75 of the founding affidavit,[14] the respondents, in my view, would still not have a reasonable prospect of success on appeal by reason of the lack of merit in the multiple other grounds of appeal dealt with herein.

[20] Moreover, the Applicant is in my view correct in submitting that: [15]

"21 – – the suspension of ADR proceedings (even if this were to be the case) under s136 (2) (a) of the Act does not in any way preclude a winding up. If anything, I think it indicates the urgent need for the winding up.

22 There is no genuine dispute as to the invalidity of the business rescue process in the clear basis for the business rescue to be avoided."

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[14] quoted on pages 23 and 24 of my judgment
[15] applicant's heads of argument in the application *a quo*, paragraph 21 and 22

[21] With regard to the Applicant's claim for the rebranding costs, the application for leave to appeal further avers that[16] "*The Court erred in finding on the evidence before it that the respondent's did not provide a "credible response" to the first respondent's email of 14 February 2025 in circumstances where there was no obligation on it to do so and in relying thereon for its finding of an alleged acknowledgment of indebtedness on the part of the first applicant for the rebranding costs. The Court should have had regard to the version of the applicants before it namely that the rebranding costs were approved by the first respondent and envisaged in the Grant Agreement as well as the evidence reflected in the attached accounting records of the first applicant, the remainder of correspondence thereanent between the parties and the outcome of investigations of the second applicant in relation thereto."*

[22] There is no substance in this ground of appeal. The willingness to repay the rebranding costs referred to in paragraph 42 of my judgment was explicitly confirmed without qualification in AFV's 17 February 2025 email[17] in response to the specific statement in response to the 14 February 2025 email from the applicant's director, Legal and Compliance, Canada which states that "*AFV is obligated to repay the grant funds spent on the rebranding campaign*".[18]

[23] in paragraph 21 of the application for leave to appeal the Respondents submittted that *"The Court erred on the evidence and facts before it in finding that the business rescue practitioner admitted the status of the first respondent has creditor at the meeting of 16 April 2025.*"

[24] Paragraph 58.1 of the Applicant's founding affidavit which I quoted in paragraph [39) of my judgment records that at the 16 April 2025 meeting which the second respondent, Grinitz and the Second Respondent's attorney attended with the Applicant's attorneys, the discussions included the following: *"Another was to take legal advice from senior counsel on whether, based on South African law, the Foundation is a creditor of a fee (the advice received by BRP was that the Foundation is a concurrent creditor of AFV)"*. The respondents' answering

[16] paragraph 12 of the application for leave to appea
[17] annexure FA 8, caselines 001-184
[18] quoted in paragraph [27] of my judgment

affidavit contained no more than a general denial of this paragraph and referred to what had been stated elsewhere. I could not find anywhere else that this issue was dealt with, nor was it dealt with in paragraph 56.10 of the Respondent's heads of argument in the application *a quo* where the 16 April 2025 meeting was addressed. In the result Respondents have not shown why another court would come to a different conclusion on this issue.

[25] In the result I am of the view that the Respondent's grounds of appeal relating to the *locus standi* issue have no reasonable prospect of success of an appeal

Insolvency of the First Respondent and setting aside the business rescue resolution

[26] Paragraph 9 of the application for leave to appeal submitted that "*The Court erred in not finding that the [applicant] had made out no case for relief under Section 129 (3) (a) of the Act. The Court moreover should have found that the [applicant] made out no case why it should be just and equitable to do so in its founding papers"*.

[27] Paragraph 10 of the application for leave to appeal further submits that *"The Court erred in interpreting Section 130(1)(a)(ii) of the Act in a manner which did not recognize the secondary object of business rescue proceedings as articulated in Section 128(1)(b)(iii) and/or in not having due regard to the secondary object of business rescue proceedings as articulated in section 128(1)(b)(iii), namely where it is not possible for the company to continue in existence, once approved, would result in a better return for the company's creditors (or shareholders) than would result from the immediate liquidation of the company*."

[28] Paragraph 13 of the application for leave to appeal challenges my findings relating to the insolvency of the First Respondent as follows:

> *"The Court erred in finding that the first applicant was undisputedly insolvent in the face of the uncontroverted evidence put up by the applicants that it was not commercially nor factually insolvent. The Court erred in relying for this finding of insolvency on the premature principal assumption that the first*

respondent had demonstrated prima facie that it had a proprietary (title) interest in the first applicant's assets and the materially incorrect inference that this in and of itself would disentitle the first applicant to settle its current liabilities from the funds standing in its local bank accounts."

[29] Paragraphs [56] to [58] of my judgment deals with the First Respondent's insolvent circumstances and why in my view it is just and equitable for it to be wound up. Nothing submitted by the respondents has given me any reason to think that another court would come to a different conclusion on those findings. Consequently, am of the view that also this ground of appeal has no reasonable prospect of success on appeal.

[30] Paragraph 11 of the application for leave to appeal submits that:

"The Court erred in not finding that the relief sought by the [applicant] relating to the winding-up of the first respondent as well as the interdictory relief relevant to property lawfully in its possession, constituted legal proceedings requiring its leave under Section 133(1) of the Act. The Court moreover should have found that the said relief was not concerned with the implementation or development of the business rescue plan and was a statutory requirement. The Court erred in not requiring the [applicant] to make out a case for the granting of such relief as a pre-requisite to its order."

[31] I dealt with the general moratorium under section 133 of the Act in paragraph [59] of my judgment where I referenced the judgment in <u>Moodley v On Digital Media (Pty) Ltd</u> as was referenced by the applicant in paragraph 54 in its heads of argument in the application *a quo.*

[32] The Applicant's amplified submissions in paragraphs 54 to 60 of its heads of argument in the application *a quo* provide further reasons why, in my view, it does not avail the Respondents to rely on the section 133 of the Act. Those submissions read as follows (footnotes omitted):

54 Moodley v On Digital Media (Pty) Ltd and Others[62] *found that section 133 only requires leave to be obtained in proceedings brought solely* *against the company – and not in proceedings against the company and its BRPs. It stated:*

> *"The language of s 133, when read in context with the other relevant provisions in ch 6 and having regard to its purpose, does not include within its ambit proceedings relating to the development, adoption or implementation of a business rescue plan. It is the business rescue practitioner who must develop a business rescue plan and implement it if adopted, and the company, under the direction of the practitioner, must take all necessary steps to attempt to satisfy any conditions on which the business rescue is contingent and implement the plan as adopted. Legal proceedings, such as the present case, which seek that an adopted business rescue plan be executed and implemented strictly according to its terms and in accordance with the applicable provisions of the Companies Act, are legal proceedings against the business rescue practitioner and the company in business rescue in connection with the business rescue plan. They are not legal proceedings against the company or property belonging to the company or lawfully in its possession within the meaning of s 133(1).*
>
> *Section 133, therefore, finds no application in legal proceedings against a company in business rescue and its business rescue practitioner in connection with the business rescue plan, including its interpretation and execution towards implementation. I respectfully consider the contrary finding in Redpath[63] to be clearly wrong and decline to follow it. The applicant does not require the leave of this court as contemplated in s 133(1)(b) of the Companies Act to proceed with the present proceedings."[64]*

55 *The KZN High Court in Resource Washing (Pty) Ltd v Zululand Coal Reclaimers Proprietary Limited and Others[65] quoted these paragraphs of Moodley, as well as citing Redpath. It then said "I align*

myself with Moodley in holding that s 133 does not apply to legal proceedings that are against the company in general or property belonging to the company or lawfully in its possession". It found further that:

> *"The principle of legality requires that anything done in conflict with the rule of law shall not enjoy the force of law. Eliminating illegalities that occur in business rescue proceedings should be automatic. Consequently, to interpret s 133 as indiscriminately barring all legal proceedings unless they meet the requirements of subsections (a) to (f) undermines the principle of legality."*[66]

56 *In Limbouris and Others v Du Toit NO and Others*[67] *application was made to interdict the BRPs from issuing a certificate of substantial compliance, pending the outcome of an action to set aside the Plan. The Court held that the earlier decision in Booysen v Jonkheer Boerewynmakery (Pty) Ltd*[68] *was obiter and departed from it.*[69] *It instead held that:*

> *"In my view, the common thread in these authorities is that the relief sought in which it was held that leave in terms of section 133 was not required is that the relief related to the business rescue itself or aspects thereof as opposed to aspects of the ordinary affairs, business or assets of the company in question. This feeds into the underlying purpose of the moratorium which is to provide 'breathing space' to a company in business rescue. On the other hand, an invalid business rescue plan, for example, should not be provided breathing space and, on the contrary, should rather be set aside.*
>
> *Therein, I think, the guiding principle ought to lie to determine on which side of the line a particular case falls: If the proceedings involving the company relate to the business rescue itself or aspects thereof, then leave is not required (these may be referred to as aspects relating to the business rescue itself). If the*

proceedings relates to the ordinary affairs, assets or business of the Company itself, leave is required (these may be referred to as aspects relating to the affairs of the Company itself)."[70]

57 *It is submitted that the decision in Limbouris provides the correct approach.*

58 *The relief claimed in respect of the invalidity/setting aside of the business rescue relates to the business rescue itself and is not subject to the moratorium under s133. The preservation of the assets on an interim basis is similarly not part of the "ordinary affairs, business or assets of the company" but rather related to the manner in which the business rescue practitioner is carrying out his functions. A consequential winding up is similarly related to the business rescue and not to the ordinary affairs, assets or business of the company itself.*

59 *Section 133(1)(b) in any event provides for leave to be granted by the Court. The learned authors of Henochsberg on the Companies Act 71 of 2008*[71] *expressed the view that the consent required in terms of subsection (1) is not a jurisdictional fact, i.e. a condition precedent for the proceedings to commence or proceed, the absence of which carries with it the implication that a Court has the power or competence to determine an issue between the parties and if it, nevertheless, proceeds to determine the matter notwithstanding the absence of jurisdiction although the consequence that the proceedings are void. Section 133(1) is merely a procedural limitation and not an absolute bar against institution of proceedings. The learned authors further state:*[72]

"There are conflicting judgments in respect of the question whether s133 requires a separate application for leave to commence or proceed with legal proceedings or whether such leave may be sought in one and the same matter and secondly if matters 'pertaining to the implementation of the rescue plan' (and a meeting of creditors) are included in s133 and also require

prior written consent of the business rescue practitioner or the leave of the court. … It is respectfully doubted that s133 is intended to operate also in the second category as opposition to a business plan is not legal proceedings against the company or property belonging to the company or lawfully in its possession: see, however, the Booysen case supra para 57. In this respect Moodley v On Digital Media (Pty) Ltd and Others 2014 (6) SA 279 (GJ) para 11 declined to follow the Redpath Mining South Africa (Pty) Ltd case supra and decided that s133 finds no application in legal proceedings against the company in business rescue and its business rescue practitioner in connection with the business rescue plan including the interpretation and execution towards implementation, as sub-s(1) refers only to the company and not to the business rescue practitioner and the company (para 10). This dictum was followed in Hlumisa Investment Holdings (RF) Ltd and Another v Van der Merwe NO and Others [2015] ZAGPPHC 1055 (14 October 2015) (para 17) where the application was by shareholders against the business rescue practitioners, and which were primarily aimed at disclosure of documents and information and also interdicting consideration and adoption of a business plan."

60 The learned authors further state:[73]

"The right to approach a Court in terms of s130(5) to set aside a voluntary business rescue process initiated in terms of s129 but not yet implemented, is also not subject to leave by the Court (or written consent of the practitioner), and also not an application in terms of s132(2)(a): Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and Others [2015] ZAKZPHC 21 (20 March 2015) para 13; … If this was the case, the application for leave would, in itself, also be subject to leave by the Court, ad infinitum, and in addition, the right to approach the Court is an essential counterweight to the curtailment of the

affected persons' rights licenced by the (unilateral) action by the company by way of a board resolution.

…

An application in terms of s130(5)(c) (for a winding up order) also implies that section 133 is not applicable: Cordeiro Holdings CC and Others v Market Demand Trading 254 (Pty) Ltd and Others [2016] ZAGPJHC 284 (6 September 2016) para 13. It is submitted that this is the correct position, also on general principles: …

On the issue whether the application to institute legal proceedings (first application) and the legal proceedings itself (substantive application) can be done in one application there are, however, divergent judgments.

…

It is submitted, that it will also depend on the fact to the particular case. In BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others 2017 (4) SA 592 (GJ) the Court said '[27] …. Where the main relief to be sought goes to the very status which invokes the moratorium protection, it seems overly technical to insist on two distinct applications as opposed to one application with two (sets of) prayers: one for permission, and one for the substantive relief'. Therefore (para 28) if the application is bad on the merits, the order should be to refuse leave to institute the proceedings. … Also, business rescue should be a speedy process, something that would be hampered if a separate substantive application must be brought. The Court should, in any case, also have the discretion to deal with exceptional circumstances, 'in accordance with any terms the court considers suitable' as provided for in sub-s(1)(b): Safari Thatching Lowveld CC case supra para 28.

…"

Interdictory relief

[33] Paragraphs 19 and 20 of the application for leave to appeal set out the grounds relating to the granting of interdictory relief as follows:

"19 The Court erred in finding that the requirements for interdictory relief were met and that a case had been made out in respect thereof

20 The Court erred in granting the interdictory relief in the absence of and non- joinder of interested parties."

[34] I dealt with the interdictory relief issue in paragraph [60] of my judgment and I have no reason to think that another court would come to different conclusion.

[35] The submissions contained in paragraph 68 to 82 of the Applicant's heads of argument in the application *a quo* provide amplified reasons why, in my view, there is no reasonable prospect of success. They read as follows (footnotes omitted):

"68 In the event that the business rescue is set aside it must follow that the BRP may not deal any further with the assets of the first respondent nor transact on the bank accounts identified in paragraph 6.1 of the notice of motion. This applies a fortiori in respect of a winding up.

69 On the basis that the Grant assets and the consequence of a Quistclose Trust, vests the rights in the assets in the applicant, the Remaining Grant does not form part of the general assets of AFV. The applicant therefore has a direct legal interest in preserving such assets pending the determination of the disputes between the parties in relation thereto.

70 The applicant therefore asserts the Foundation's ownership and claim to return of the entire fund to the Foundation. This vests in the Foundation the right to the funds in the bank accounts constituting part *of the Remaining Grant and the assets acquired by AFV with the Granting funding.*[83]

71 *The applicant has established at least a prima facie right in relation to a reasonable apprehension of irreparable harm having regard to the BRP's refusal to provide an undertaking not to utilise the Remaining Grant and his stated intention to pay employees, creditors and himself before paying the Foundation any amount that remains.*[84]

72 *The applicant has further identified potential irreparable prejudicial consequences both to itself and to underprivileged people in the event that the Remaining Grant is not dealt with in the manner required of the Foundation as a registered charity under Canadian Income Tax Law. In the event that the Foundation's registered charity status is revoked, the Foundation would be required to cease operations and transfer all of its assets to the Government of Canada and/or to another unrelated registered charity.*[85]

73 *There is no effective alternative remedy available to the Foundation but to seek the relief claimed in this application.*

74 *The parties have agreed to dispute resolution by arbitration in accordance with Canadian law.*

75 *The respondents contend that the dispute resolution provisions of the Grant Agreement have been suspended by the BRP in terms of s136 of the Act. Section 136(2) provides that subject to subsection (2A), the practitioner may during business rescue proceedings entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings and which would otherwise become due during those proceedings.*

76 *It is submitted that section 136(2) is not of application to the dispute resolution provisions of the Grant Agreement. The purpose of a suspension in terms of s136(2) is to relieve the BRP of an obligation to perform in terms of the contract. This does not prevent the applicant from initiating the dispute resolution proceedings which the applicant has commenced in accordance with the Grant Agreement. In the event that the proceedings are stayed, this would in any event add to the need to preserve the Grant assets pendente lite.*

77 *The balance of convenience clearly favours the grant of relief. Were the BRP to continue realising the assets this would be irreversible. On the other hand, the preservation of the assets pendente lite would not be prejudicial.*

78 *Since the interdict is directed at preserving property to which the applicant claims title, a Court should incline to the preservation of the res.*

79 *On the other hand it is clear from the BRP's stated intention that he intends to proceed with the realisation and utilisation of the assets.*

80 *There is no dispute therefore that the BRP intends to dispose of the assets.*

81 *Having regard to the strength of the applicant's asserted right, particularly since the respondents do not contest the Canadian law position, the balance of convenience should tip the scales in this instance.*

82 *In Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another*[86] *(cited with approval by Corbett JA as he then was in Universal City Studios Inc and Others v Network Video (Pty) Ltd*[87]*) the Full Court (per Van Dijkhorst J, Boshoff JP and O'Donovan J concurring) accepted that an order for the interim attachment for the purpose of preservation of property in which a real or personal right (including both*

common law and statutory rights) was claimed by the applicant was competent.

Punitive costs to be paid *de bonis propriis*

[36] The order granting costs *de bonis propriis* was challenged in the grounds set out in paragraphs 22 to 29 of the application for leave to appeal as follows:

22 The Court erred in awarding a punitive cost order de bonis propriis on the attorney and client scale against the business rescue practitioner, the second applicant. As part of this finding the Court erred in relying upon a wrong view of the facts and solely on the first respondent's contested version that the practitioner would have stated that he was not aware of judicial authority supporting the proposition that business rescue cannot be utilised to informally wind-down a company.

23 The Court erred in making a finding of mala fides on the part of the practitioner in circumstances where there was no primary fact evidence of any wilfulness or deceit on the part of the practitioner in proceeding with his duties under the business rescue proceedings nor to prejudice the first respondent or that he had the requisite state of mind which would give rise to an inference or finding of mala fides on his part.

24.1 the nature of the first applicant's business and purpose;

24.2 the express terms of the Grant Agreement which provided for the granting of funds by way of gifts by the first respondent to the first applicant;

24.3 the first respondent not being recorded as a creditor in the books and financial statements of the first applicant;

24.4 the spectre of the application of the so-called Quistclose trust principle to the Grant Agreement having for the first time being raised in the first respondent's founding papers in its application issued on 14 May 2025 when Professor Oosterhoff's expert opinion was disclosed and which purports to result in all of the *first applicant's assets being held in trust for the first respondent from day one of the Grant Agreement (a concept foreign to South African law).*

25 The Court erred in the finding of mala fides on the part of the practitioner in circumstances where the first respondent itself failed to and/or was unable to particularise its claims or status under the Grant Agreement as either that of a creditor or that of the holder of a proprietary interest and having to await expert opinion on the issue.

26 The Court did not exercise its discretion on costs judicially and erred in not finding that this latter distinction was material to enable it to consider whether the conduct of the practitioner was reasonable or not, and whether or not he executed his duties in good faith to the benefit of all stakeholders in the business rescue proceedings, in particular employees and creditors. The Court exercised its discretion in the absence of legal grounds to do so when awarding an exceptional punitive cost order against an officer of the Court.

27 The Court erred in relation to the conduct on the part of the practitioner in not having due regard to the nature and extent of the objective and impartial enquiries and investigations conducted by him into the affairs and compliance of the first respondent with due regard to statutory obligations in this context arising from the Act and Nonprofit Organisations Act, 71 of 1997, nor of the extensive interactions between himself and the first respondent and its agents, and the full disclosure and transparency of such interactions inclusive those made to Deloitte's acting on behalf of the first respondent over a lengthy period of time which directly contradicts any mala fides or deceitful intent on the part of the practitioner in developing and publishing the business rescue plan.

28 The Court erred in ascribing dishonest and malicious intent to the practitioner in circumstances where the offending conduct of the *practitioner is not only in dispute on the papers before Court but contradicted by objective facts.*

29 The Court erred in not finding that the first respondent's accusation of mala fide conduct in bad faith on the part of the practitioner was scandalous and unwarranted."

[37] My reasons for granting the re-cost to be paid *de bonis propriis* and on a punitive basis are set out in paragraphs [61] and [62] of my judgment and I have no reason to think that another court would come to a different conclusion. In the circumstances the respondents have in my view not shown that they have a reasonable prospect of success on appeal on the costs issues.

[38] Given that this application for leave to appeal is as devoid of merit of merit as the opposition of the Respondents to the application *a quo*, I am of the view that it would also in the present application for leave to appeal be appropriate for a punitive costs order to be granted which are to be paid by the Second Respondent *de bonis propriis*.

[39] In the premises I make the following order:

ORDER:

[1] The application for leave to appeal is dismissed.

[2] The Second Respondent is ordered to pay the costs of this application on the attorney-client scale, including the costs of two counsel on scale C, *de bonis propriis*.

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Johann Gautschi AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

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(087 8022013)

Hearing date: 19 September 2025

Judgment date: 12 May 2026