

SOUTH AFRICA / JUDGMENT

Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others (83344/18) [2019] ZAGPPHC 411 (30 August 2019) [2019] ZAGPPHC 411

COURT
North Gauteng High Court, Pretoria

BEFORE
Potterill

CASE / FILE NUMBER
83344/18

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OF SOUTH AFRICA
(GAUTENG DIVISION,
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Case number: 83344/18

In the matter between: OAKBAY
INVESTMENTS (PTY) LTD
Applicant
and
TEGETA EXPLORATION AND
RESOURCES (PTY)
LTD [IN BUSINESS
RESCUE]
1st
Respondent
JOHAN LOUIS KLOPPER
N.O.
2nd
Respondent
KURT ROBERT KNOOP
N.O.
3rd
Respondent
THE COMPANIES AND
INTELLECTUAL PROPERTY
COMMISSION
("CIPC")
4th
Respondent

JUDGMENT

POTTERILL J

- [1] The Applicant, Oakbay Investments (Pty) Ltd [Oakbay] is seeking leave in terms of s133(1)(b) of the Companies Act No 71 of 2008 [the Act] to bring an application to remove the Second Respondent, Johan Louis Klopper N.O. [Klopper] and the Third Respondent, Kurt Robert Knoop N.O. [Knoop] as the business rescue practitioners [BRP's] of First Respondent, Tegeta Exploration and Resources (Pty) Ltd [In Business Rescue][Tegeta]. They do so as an effected party, a 29.05% shareholder in Tegeta.[1]
- [2] This Court is asked to direct that Tegeta appoint substitute BRP's, who are not conflicted or show a lack of independence contra to s139(2)(e) of the Act. The Fourth Respondent, the Companies and Intellectual Property Commission [CIPC] in prayer 4 is asked to control the process as set out in the subsections to prayer 4. It is however common cause that if the BRP's are removed the pre-existing management will have control of Tegeta again until such time as new BRP's are appointed. It is also common cause that this process of appointment could be a protracted one as Tegeta has to decide the independence of the BRP's whose names have been

put forward.

The background to the matter

[3] 3.1 On 19 February 2018 Tegeta voluntarily filed for the commencement of business rescue proceedings. In terms of the resolution and the sworn statement to commence the business rescue proceedings the reason for the business rescue in Tegeta was that it would not be able to pay all its debts as they fell due because it does not possess a bank account and could thus not trade. The whole purpose of the business rescue proceedings was that it would afford Tegeta interim transactional banking facilities allowing commercial banks to adopt a different view towards Tegeta when placed under the stewardship of BRP's. It averred it was not financially distressed but was commercially insolvent because it could not trade.

3.2 The Oakbay group of companies [Oakbay Group], owned and controlled by the Gupta family, consists of a complex corporate structure of which several companies in the group are in business rescue. Oakbay, not in business rescue, is the holding company that directly or indirectly controls all eight subsidiary companies in business rescue. It consists of:

- Oakbay, the holding Company;
- Tegeta; [now in business rescue]
- Optimum Coal Mine (Pty) Ltd [OCM]; [now in business rescue]
- Koornfontein Mines Pty Ltd [KFM]; [now in business rescue]
- Optimum Coal Terminal (Pty) Ltd [OCT]; [now in business rescue]
- Shiva Uranium(Pty) Ltd – [Shiva][in business rescue]
- Optimum Nekel Mining and Exploration (Pty) Ltd;
- Optimum Vlakfontein Mining and Exploration (Pty) Ltd; and
- Optimim Overvaal Mining and Exploration (Pty) Ltd.

3.3 Tegeta consented to the appointment of Knoop and Kloppers as BRP's. Also for OCM Knoop and Klopper were appointed with Damons and Monyela appointed as additional BRP's. The appointment of Damons and Monyela is the subject matter of a dispute in a separate application. For OCT only Knoop was appointed as BRP. For KFM also Knoop and Kloppers were appointed as BRP's. Ravagan, the deponent of Oakbay, signed the resolutions for Tegeta and all the companies were placed in business rescue at the instance of directors' resolutions.

3.4 Tegeta in 2015 purchased 100% of the shares and loan accounts in OCM [in business rescue], OCT [in business rescue] and KFM [in business rescue] in 2015 from Optimum Coal Holdings, then in business rescue. Optimum Coal Holdings then ceded the following claims to Tegeta:

OCM: R4 321 081 272. 00;

KFM: R258 679 229.00;

OCT: R224 700 000.00;

These amounts are reflected as the initial balances of the inter-company loans at the conclusion of the sale of shares and claims. OCM, KFM and OCT were thus indebted in these amounts to Optimum Coal Holdings.

3.5 Oakbay owns 100% of the issued shares of Shiva [in business rescue] through 3 subsidiaries being Oakbay Resources and Energy Limited, 59.47%, Islandside Investments 255 (Pty) Ltd [Islandside 255], 20,90% and Tegeta, 19.63%. Oakbay owns 29,05% of the issued shares of Tegeta, which in turn owns 100% of the issued shares of OCM, KFM and OCT.

3.6 Ms Ravagan [Ravagan] is the acting chief executive officer of the Oakbay Group, the sole director of KFM and a director of Islandside 255 and a director of Tegeta. She is the deponent to this application. Ms Govender [Govender] is the financial manager of the Oakbay Group, the sole director of OCM and a director of OCT and VR Laser Services (Pty) Ltd in business rescue [VR Laser]. Mr Van der Merwe [Van der Merwe] is a director of Shiva and OCT and the chief executive officer of OCM, KFM and Shiva.

The issues to be decided

[4] 4.1 Must leave be granted to Oakbay to bring this application?

4.2 The crisp issue is whether the BRP's, Klopper and Knoop, have a conflict of interest on the facts before the Court and if this conflict of interest has manifested in their conduct as BRP's of Tegeta.

Application of the Act

[5] The new Act has as its purpose, inter alia, to promote compliance and application with the Bill of Rights as provided for in the Constitution. [s7(a)]. The Act strives to promote the development of the South African economy and as such reaffirms the concept of a company as a means of achieving economic and social benefits. [ss 7(b)& 7(d).e] The Act's purpose is to encourage the efficient and responsible management of companies [s7(j)]. In terms of s7(k) the further purpose of the Act is to: "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders." [my emphasis]

[6] When Interpreting and applying the Act it must be done in a manner that gives effect to the purposes set out in section 7. To the extent it is appropriate, a court when interpreting and applying the Act may consider foreign company law.[ss 5(1) &(2)]

[7] Business rescue is defined in the Act as:

"128. Application and definitions applicable to Chapter

(1) In this Chapter-

(a) ...

- (b) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially

distressed by providing for -

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

Must this court grant leave to Oakbay to institute this application?

[8] S 133(1)(b) reads as follows:

"133. General moratorium on legal proceedings against company

- (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except -
 - (a) ...
 - (b) with the leave of the court and in accordance with any terms the court considers suitable; ..."

[9] On behalf of Oakbay it was argued that whilst there is a prayer to grant leave, such leave is strictly not necessary or required, when the proceedings are not directed at the company itself but at the removal of the practitioners. Reliance for this submission was placed on *Moodley v ON Digital Media 2014 (6) SA 279 (GJ)* at par [10] followed by *Thobane AJ in Hlumisa Investment Holdings (RF) Ltd and Another v van der Merwe N.O. and Others* at par [17]. Par 10 of *Moodley supra* reads as follows: "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)."

- [10] On behalf of the BRP's it was argued that the conduct of Ravagan should negate against this court granting leave. The court should take cognisance of the fact that the very loan which is relied on as the basis of the averred conflict of interest herein is subject to a subordination agreement, but this agreement is not in the founding affidavit disclosed to the court. The undisputed allegations of mismanagement of the Oakbay Group together with all the other undisputed allegations should sway this court not to grant leave. Another factor to consider is that the litigation is being funded by a third party. The delay that will occur if the management returns to the hands of the pre-existing management is a serious consideration. The Full Court in *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC) found the decision in *Moodley supra* was wrong:

"[57] As far as the decision in Moodley is concerned, the ratio appears in para 10 of the judgment. It is stated therein that, inasmuch as it is the business rescue practitioner who must develop and implement the business plan (once it is adopted), and it is the company which must make all necessary attempts to satisfy any conditions on which the plan is contingent and which must thereafter implement the plan under the direction of the business rescue practitioner, any legal proceedings which seek to give effect to such plan (ie to implement it) will be legal proceedings which must be instituted against both the business rescue practitioner and the company, and are thus not legal proceedings against the company within the meaning of s 133(1). To my mind and with all due deference, the distinction which is sought to be made is an artificial one. Any plan which

is adopted and which needs to be implemented by a company in business rescue, is a plan which belongs to that company and the business

rescue practitioner merely seeks to give effect thereto as the manager in charge of the company. To this end, the business

rescue practitioner steps into the shoes of the board of the company and its management during the period when it is temporarily under supervision for the purposes of business rescue. But, any proceedings taken in relation to such plan, ie to set it aside or to enforce its implementation, are proceedings taken against the company, which is represented by the business rescue practitioner, and to my mind, there is no justification in seeking to distinguish such proceedings or to hold that they are not the kind of proceedings covered by the provisions in question."

- [11] S139 reads as follows:

"139. Removal and replacement of practitioner –

- (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) ...
- (b) ...
- (c) ...
- (d) ...
- (e) conflict of interest or lack of independence; or ...”

[12] As much as I think the factors listed by the BRP’s are relevant to the main application, they are irrelevant to the application for leave to bring this application. In terms of s139(2) an affected party may bring an application, or in the words of the Act “a request” to remove a practitioner - the Act itself thus authorises that a removal application can be brought. In the Moodley matter a shareholder sought an interdict to prevent the implementation of certain transactions in the business rescue plan. In the Booysen matter an employee sought enforcement of a preferent claim for outstanding remuneration. In the Hlumisa matter an interdict was sought to prevent a meeting. There are no separate, distinct sections authorising such applications or requests for any of those remedies. Upon a reading of section 139 I am of the view that 131(1)(b) is no bar to the bringing of this application and no leave of the court is required. To approach the BRP’s for leave, under these circumstances, would be futile and is not a requirement in view of s139(2) authorising such a request.

Lack of independence

Unfounded and irrelevant allegations of BRP’s

[13] On behalf of Oakbay it was submitted that the BRP’s have a duty to look after the shareholders, but the BRP’s are on the Gupta vilifying train. In their answer they tell the court how bad the Guptas are and point to the wedding in Sun City and the Estina Dairy Farm project which are totally irrelevant to this application. It was submitted that in the first 78 paragraphs they malign the Gupta’s as shareholders with paragraphs 37-38 setting out the irrelevant on-going litigation. This lack of independence is confirmed with the disclosure of the without prejudice settlement offer.

[14] A court is not influenced by irrelevant disclosures and the Sun City wedding and Estina Dairy Farm project are in the public domain. These averments are irrelevant to this application, but the question is whether this shows a lack of independence on the part of the BRP’s. The conclusion this court is asked to make is that the BRP’s don’t like the Guptas and therefore they lack independence. A BRP, just like a director, need not like a shareholder, as long as the BRP’s actions do not prejudice the specific share holder. The objective facts are that the Oakbay group cannot be divorced from the Guptas; Oakbay does not trade and the shareholders have fled this country. The court should not divorce itself from the fact that the successful rescuing of this group is indeed in the public interest. This does not mean that

the BRP's can act to Oakbay's detriment, but a bias must be seen to have manifested itself in the conduct of the BRP's. This conduct must be balanced with the public interest and the group as a whole. This court must also take cognisance of the fact that none of the other companies in business rescue have supported Oakbay in the bringing of this application, while directly involved.

The ongoing litigation

- [15] The on-going litigation is relevant to this application. The only inference is, that the Group, through Ravagan and others have been actively hindering the BRP's in their statutory duties. With this finding the irony in Oakbay's complaint is not lost on the court. "Independence" in the New Shorter Oxford English Dictionary is defined as inter alia: "not depending on another person for one's opinion or livelihood ... unwilling to be under an obligation to others ..."

In the answering affidavit the BRP's have stated that they have been swamped with litigation because they have refused to do the group's bidding; exactly that what independence means. This was not answered to by Oakbay except in a general sweep with: "The majority of the contents of the answering affidavit is a diatribe containing irrelevant, scandalous and vexatious allegations without properly answering to the allegations in my founding affidavit and dealing with the subject and purpose of the application." [2]

- [16] I cannot find that the reference to the on-going litigation and to the Guptas and their conduct has per se manifested a lack of independence in the BRP's conduct in the business rescue. This will be addressed further on in the judgment.

The settlement offer disclosing bias on the part of the BRP's

- [17] On 10 May 2019 the attorney for OCM, OCT, KFM, Tegeta and Oakbay wrote a letter marked without prejudice to the attorneys of the BRP's. Paragraph 11 of the letter reads as follows:

"11. The BRPs will become entitled to a 5% fee on the total recommencement finance."

- [18] Oakbay argued that a Court cannot trust the BRP's when they dishonestly categorize a business proposal as a bribe. The court must accept that the BRP's are mala fide in disclosing privileged offers to the Court. This is especially so when annexure 2 to the Tegeta proposed plan reflects as follows: "The Success fee will be an amount equal to 5% of the realized value of the assets and/or quantum payable to the combined rank of creditors." In the OCT plan a similar fee is set out. In the OCM plan a 3 % success fee on top of "further fees of 10% on successful collection of any debtors" is reflected. Success fees are not illegal in terms of the Act and the disclosure of the settlement was malicious with its only intent to discredit Oakbay. The only inference to be drawn is that the BRP's are not acting as dispassionate officers of the court and must be removed.

[19] The BRP's submitted that the disclosure was done, and is admissible, in terms of public policy. The BRP's persist that it was an attempted bribe because it was an offer on "success" of the sale of Tegeta's shares/assets and not a success fee published in a plan emanating from the creditors.

[20] The disclosure of the without prejudice settlement offer was with the purpose to inform the court that the BRP's were offered a bribe. I need not find whether it is a bribe, or not, but whether the disclosure was done mala fide by the BRP's and from that their lack of independence is a fact.

[21] In the Act remuneration is set out as follows:

"143. Remuneration of practitioner

- (1) The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).
- (2) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to -
 - (a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or
 - (b) the attainment of any particular result or combination of results relating to the business rescue proceedings.
- (3) Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by -
 - (a) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145(4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and
 - (b) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.
- (4) A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that -
 - (a) the agreement is not just and equitable; or

- (b) the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company.
- (5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.
- (6) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1)."

[22] The policy underlying the without prejudice principle is to promote the settlement of disputes without resort to litigation.[3] Exceptions to this rule have been developed.[4] A court must apply the without prejudice rule as expounded by the English Courts. The Constitution has not impacted on this rule. There are however occasions when the without prejudice rule does not prevent the

admission in evidence of what a party wrote. Robert Walker LJ in *Unilever Plc v Proctor & Gamble* [2000] FSR 344 [cited with approval in the *Lynn & Maine* matter] set out eight instances of which the following are the most important; where the negotiations resulted in a contract, an

estoppel, or a misrepresentation, or where they are invoked "... as a cloak for perjury, blackmail or other unambiguous impropriety ..." I need however not find whether this letter should be admitted as evidence on special circumstances as "unambiguous impropriety", simply because the issue of the fee in the without prejudice letter has no bearing on the main issue, i.e., the business rescue itself. It is also not an admission of a fact relevant to the main issue; i.e. the business rescue. The offer on the fee can thus be admitted.

[23] Any remuneration agreement is only binding if the holders of a majority of the creditors' voting interests approve such remuneration. This offer certainly side-steps any such approval. The success fees set out in the plans of the BRP's may be equal to 5 %, but would have to be approved by the majority creditors' voting interest as required by the Act. The 5 % offered is not on a published plan but on the total recommencement finance rendering it out of the ordinary. Under those circumstances the disclosure of the offer is not a reflection of bias.

Can the BRP's act as the BRP's for the Oakbay Group or does it create a conflict of interest?

[24] The general duties and powers of the BRP's are set out in s140 of the Act. With regard to a lack of independence and a conflict of interest the following is relevant:

"140. General powers and duties of practitioners –

(1) ...

(1A) ...

(2) ...

- (3) During a company's business rescue proceedings, the practitioner –
 - (a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;
 - (b) has the responsibilities, duties and liabilities of a director of the company, as set out in section 75 to 77; and ...”

Argument on behalf of Oakbay

Tegeta's proposed business plan.

[25] 25.1 A proposed business rescue plan for Tegeta was published on 25 April

2018. In par 4 of the proposed plan it is stated that there is a disputed amount owing by OCM to Tegeta. “There had been settlement discussions to make available sufficient funds to settle the concurrent/trade creditors and the post-business rescue creditors. The practitioners verily believe that a settlement of the outstanding sum is very likely against which it will facilitate the settlement of outstanding creditors debts. In the interim, the BRP's will pursue the recovery of the debtors.”

25.2 In the proposed plan the inter-company loans between Tegeta, Shiva, KFM and TRPL are reflected, but not that of OCM. The BRP's accordingly left out Tegeta's biggest asset - the loan to be repaid by OCM.

25.3 The conflict of interest lies therein that the BRP's cannot act in the best interests of OCM as a debtor of Tegeta and in the best interests of Tegeta, a creditor of OCM. The BRP's cannot act as mediators between Tegeta and OCM because the resolution will be beneficial to only one party.

25.4 It was further argued that from the conduct of the BRP's it is clear that they are compromising Tegeta's claim against OCM with the sole purpose of extinguishing all the creditors' claims in Tegeta to the extreme detriment of the shareholders contrary to the duty of the BRP's to look after the business, including the shareholders.

25.5 The BRP's have vilified the interconnected nature of the intercompany loans, but Tegeta stepped into the shoes of a reputable company. Ravagan states that OCM, OCT and KFM have from time to time made payment to Tegeta and sets out what the balances owing to Tegeta are. Yet, the BRP's just fudge this with the fact that Tegeta's financials are unaudited. The court must accept that historically from 2015 there must have been some repayments from OCM, OCT and KFM to Tegeta, even if Ravagan's figures are not completely accurate. By disregarding Tegeta's inter-company loan the BRP's are destroying Tegeta's statement of assets and liabilities, to the extreme prejudice of Tegeta, its shareholders and other creditors. The stance of the BRP's also has direct consequences for the creditors in relation to OCM.

OCM's proposed business plan

[26] 26.1 It was submitted that Tegeta is only referred to in this plan twice, of which only

Annexure 11 reflects Tegeta as a disputed claim. Under the heading “Proof of claims”[5] the following is inter alia stated:

“Any creditor or any amount, claim, security or preference not reflected herein shall be deemed to have been rejected, in which event that Creditor shall be required to prove its Claim.”

Under the heading “disputed claims”,[6] it is recorded that the BRP does not admit disputed claims referred to and dealt with in this plan and will continue to see these claims as disputed. “For the purposes of these Proceedings the BRP will not allow the holders of disputed claims to exercise a vote.”[7]

26.2 The argument was that when the BRP’s are acting for OCM they dispute the inter-company loans thereby negating Tegeta’s voting and participation rights. If Tegeta is not regarded as an independent creditor it loses its voting interests, which would equate to 75% of the creditors’ voting interests in a vote to preliminarily approve the business rescue plans of OCM. In terms of s152(2)(a) of the Act Tegeta would be able to prevent the adoption of a plan if Tegeta is not satisfied, but the BRP is denying it this right. “The failure by the BRP’s to take positive steps, or for that matter any, steps to pursue Tegeta’s claim against OCM lies at the heart of this application for their removal. [my emphasis]”[8]

KFM’s proposed business plan

[27] 27.1 On 23 April 2018 the proposed business plan for KFM was published. This plan has exactly the same term as that quoted in par 7.1 complained: that if a claim is not reflected in the plan it was rejected and a creditor will have to prove the claim, and that the holders of disputed claims will not be allowed to exercise a vote.

27.2 This plan does not reflect that OCT is a creditor of KFM in the amount of R305 000.00. One of KFM’s creditors is Tegeta in the amount of R305 637 254, but this claim is not reflected at all.

27.3 It was submitted that the BRP’s have, in the plan, carefully hidden a post commencement finance loan from OCM in an amount of R35 000 000.00. Although the BRP’s label the inter-company loans as “incestuous” they propose exactly such a loan in this plan: “An amount of approximately R30 000 000.00 is needed in the form of a loan from Optimum.”

OCT’s proposed business plan

[28] 28.1 This plan is published on 25 April 2018.

28.2 The loan to OCM is reflected as an asset but was omitted in the OCM plan.

28.3 The loan of KFM is not reflected as an asset.

28.4 Tegeta’s claim as a creditor is not reflected.

[29] On these facts, it was argued, the conflict of interest is glaring: the BRP’s, when acting for Tegeta, in Tegeta’s plan, acknowledge the claim against OCM in the sum of R2 643 483 652.13. They do not acknowledge it as an asset however. In OCM’s plan they dispute the existence of

this claim. The likely reason for the rejection of Tegeta's claim is to divest Tegeta of voting rights which would allow the remaining creditors, then paid in full, to adopt the business plan to the detriment of Tegeta. "The conflict of the BRP's is evident as the plan proposes a full payment to creditors, yet the shareholders and other affected parties with residual claims would be left to share in the proceeds of the sale of the mining operations to their detriment"[9] The argument thus was that the plans were drawn up to manipulate the voting rights.

The BRP's response

- [30] The BRP's deny that they are conflicted and express the view that this application is one in a flood of litigation brought by Oakbay, and its pre-existing management, to purposefully disrupt the business rescue proceedings and to force the BRP's to dispose of OCM, KFM and OCT on terms favourable to Oakbay and its pre-existing management.
- [31] The BRP's dispute the averment of Ravagan that she is a former director of Tegeta. According to the CIPC she is still a director of Tegeta. In the reply Ravagan stays silent hereon.
- [32] It is not denied that the onslaught of litigation commenced pursuant to the BRP's attempt to implement new contracts with third parties for the management of OCM and KFM, obtaining post commencement finances for OCM, KFM and OCT to pre-purchase coal. The BRP's also, in April 2019, cancelled a sale agreement allegedly concluded in August 2017 with an offshore entity, Charles King SA. This is a shelf company registered in Switzerland with its representatives living in Dubai. The Reserve Bank queried the transaction, but the pre-existing management, including Ravagan, never responded to the Reserve Bank.
- [33] It is common cause that the BRP's had to bring an urgent application to gain access to the offices to attend to their statutory duties and obligations as they had been denied access to the offices for several weeks.[10] The application was granted. The respondents in that matter, including Ravagan, filed an application for leave to appeal with the BRP's then filing an application for enforcement of the interdict granted by Fisher J pending the application for leave to appeal and appeal, if leave was granted. Fisher J dismissed the application for leave to appeal and granted the application in terms of s18(1) of the Superior Courts Act 10 of 2013 ordering the pre-existing management to carry the costs on attorney and client scale jointly and severally. A full court then, on an urgent basis, heard the appeal and the application for leave to appeal against the execution of the order of 13 April 2018 was refused and the appellants were ordered to pay the costs of the appeal jointly and severally on the scale as between attorney and client jointly and severally. In that judgment the following was stated:

“44. ‘The majority, if not all of the business rescue entities are involved in the supply of rendering of services on behalf of the people of South Africa. In particular Tegeta Exploration and Resources (Tegeta), Koornfontein Mines, Optimum Coal Mines and Terminal are involved in the supply of coal to Eskom. The latter is a national asset on which the economy and the population of this country rely for the supply of electricity.’

...

‘It is evident that it is in the interest, not only of the employees and creditors of these entities that the affected companies be rescued, but also in the interest of the entire country on which the economy depends. That it is in the public interest for these entities to be rescued, is obvious. It is therefore undisputed that the rescue practitioners in executing their duties are performing a public and statutory duty beneficial to the people of South Africa. If these rescue entities are permitted to carry on the running of their business without the control and authority of the rescue practitioners, it would be, not only highly detrimental to the country, but also unlawful.’”

- [34] Govender, the director of OCM, brought an urgent application on 11 April 2018^[11] to interdict Knoop and Kloppers from holding themselves out as BRP’s and exercising any powers flowing from such purported appointment including implementation of any agreements concluded between the BRP’s and the Burgh Group Holdings and Vitol Group. This application was struck because of lack of locus standi of Govender and lack of urgency by Kollapen J.
- [35] Govender brought an urgent application to remove the BRP’s on 17 April 2018.^[12] This application was removed from the unopposed roll and has not been re-enrolled.
- [36] On 17 April 2018 the BRP’s of OCM approached the court for an urgent anti-dissipation order of an approximate amount of R90 million, a VAT refund, that was diverted to a company, In House Wages(Pty)(Ltd). The Director, Mr Maharaj, was appointed to In House Wages two days after OCM was placed in business rescue. It is not denied that Ravagan gave the instruction to Maharaj to divert the funds from SARS to In House Wages. The order was granted and the funds were retrieved.
- [37] On 24 April 2018 van der Merwe launched an urgent application^[13] to remove the BRP’s from OCM and OCT. After extended argument the matter was struck from the roll.
- [38] On 30 April 2018 Oakbay issued an urgent application^[14] to interdict the BRP’s of KFM from convening a meeting in terms of s151(1) of the Act. This application was withdrawn on 4 May 2018.
- [39] On 2 May 2018 Oakbay again approached the urgent court^[15] to restrain the BRP’s in Tegeta from convening a meeting in terms of s151(1) of the Act. This application was by agreement postponed sine die.

- [40] On 8 May 2018 Westdawn, with the deponent being Ravagan[16], filed an urgent application to interdict the s151 creditors meeting of Shiva from proceeding. Oakbay alleged that it was a creditor in Shiva in the sum of R3,163,799.25. The application was withdrawn on 10 May 2018.
- [41] On 4 September 2018 Charles King SA issued an urgent application[17], supported by Ravagan, to enforce the alleged rights to Tegeta's shares of OCM, KFM and OCT. Charles King SA avers that it bought OCM, KFM and OCT. The matter was struck from the roll. The BRP's agreed to resolve the dispute with arbitration on an expedited basis. Willis AJ (retired) rejected Charles King's claim. This decision is taken on appeal. Charles King objected to Moseneke J (retired) hearing the appeal as 1 one of the arbitrators because Moseneke J in an article referred to the Former President of South Africa, Mr Jacob Zuma, as a "bumbling fool" who "hollowed out institutions" which they surmise includes Eskom.[18] They allege that because the Gupta family and Mr Duduzane Zuma are shareholders the Judge would not be impartial. The appeal is pending.
- [42] Shiva was again in court because van der Merwe attempted to appoint substitute BRP's for Shiva in Messrs Tayob and Januarie. The BRP's had to approach the Companies Tribunal to prevent these appointments. The application was successful and Messrs Damons and Monyela were confirmed as the BRP's for Shiva. Messrs Tayob and Januarie sought an urgent interdict[19] pending the review of the Tribunal's decision. On 21 December 2018 the application was dismissed. Their application for leave to appeal was dismissed on 22 February 2019.
- [43] In case number 84095/18 Chetali Gupta brought an application to inter alia remove the BRP's from Islandsite with the affidavit deposed to by Ravagan and supported by van der Merwe.
- [44] Centaur has also brought two applications, one to interdict the BRP's from convening a meeting of OCM to proceed with a meeting in terms of s151 pending a declaration that Eskom does not have a right to vote at such a meeting. The further interdict was to prevent the BRP's

from concluding and/or implementing a commencement finance agreement. These applications are pending.

- [45] On 6 February 2019 Oakbay brought an urgent application[20] to interdict the continuation of the meetings in Tegeta, OCM, OCT and KFM at which the new business rescue plans were to be voted on. On 27 February 2019 the BRP's delivered a notice in terms of Rule 47(1) demanding that security of R500 000 be provided. It was brought because Oakbay does not have a bank account, has not traded

or have a source of income for a year and does not have audited financial statements. This application was opposed, but in a turnabout security of R500 000 was paid and the interdict application was withdrawn. This removal application then proceeded at the insistence of Oakbay before the meeting of creditors on the new business plans to be voted on. On behalf of the BRP's it was

submitted that the R500 000 must be funding from an undisclosed third party who wants to disrupt the business rescue proceedings with the purpose to dispose of OCM, KFM and OCT on terms favourable to them.

[46] In reply it was undisputed by Ravagan that she is beneficially interested in VR Laser, Tegeta, OCM, KFM and OCT and that she has instigated and/or supported the ongoing litigation.

[47] It was not denied that the BRP's had independently established that the pre-existing management and directors indiscriminately mixed and used funds within the Oakbay Group. The BRP's also established that OCM was used as a cash-cow from which vast amounts were transferred to Tegeta from where it was circulated to Oakbay and the other subsidiaries within the Oakbay group. A bank statement of 1 September 2016 to 1 February 2018 supports this conclusion.[21] In fact, in the founding affidavit Ravagan states as follows: "The related entities as I have described above operated in the years preceding business rescue as related entities with often common

shareholders, accordingly there was never any contemplation by the applicant that any party could question the inter-company loans as has now been done by the BRP's." [22]

[48] The allegations by the BRP's of Ravagan being a party to the mismanagement of OCM is undisputed. Paragraphs 87 and 88 which read as follows stands undisputed:

"87. ... Needless to say, the financial hardships that inevitably befell OCM and the other companies, and which have caused massive disruptions to creditors and employees, as well as the supply of coal to ESKOM, which has been felt at a national level, followed as a direct result of this highly unlawful and irregular conduct. The problems were not solely related to the withdrawal of the group's

banking facilities.

88. At the time OCM was placed in business rescue its major pre-existing debts exceeded R250 million attributable to inter alia Eskom (R104 million), Transnet (R133 million) RBCT (R12.5 million)."

[49] Immediately after the BRP's gained access to the offices of Tegeta [10 May 2018] they commissioned a report of a forensic auditor, Mr Harcourt-Cooke [Harcourt-Cooke] to analyse the flow of money in and out of Tegeta's account. The first provisional report dated 23 May 2018 reflects net outflows of more than R1 billion from OCM to Tegeta in respect of 167 transactions between May 2016 and January 2018. R2.7 billion flowed from KFM to Tegeta between April 2016 and January 2018. Tegeta acted as a central treasury into which the other companies paid monies which were again transferred. Upon questioning Ravagan

explained that these funds were used to pay the salaries of employees in other companies. The BRP's submitted that, if true, it was irregular and unlawful, but in any event it is difficult to understand how amounts of R1 billion and R2.7 billion can constitute salaries for an 18 month period. Once again these facts set out in the answering affidavit were not replied to in the replying affidavit.

- [50] A second provisional report was submitted on 31 May 2018 and a final report on 20 June 2018. The preliminary business rescue plans of OCM, KFM, OCT and Tegeta pre-dated the reports of Harcourt-Cooke. The meetings of affected persons in OCM, KFM, OCT and Tegeta were adjourned for purposes of presenting amended plans at reconvened meetings pursuant to Harcourt-Cooke's reports. This application is thus premised on the old plans, while there are new plans. The BRP's were busy with on-going investigations and the new plans reflect the discrepancies raised by Ravagan. The OCM plan of 6 December 2018 reflects OCT as a creditor in the sum of R224 700 000. In the OCT plan the same amount is reflected as a debtor. The claim of KFM of R305 000.00 is reflected in the plan. The Tegeta claim was verified by December 2018 and is reflected in the revised plan as R44 963 204.79. No revised plan for Tegeta has been published and they will do so once they have certainty on OCM, OCT, KFM and Shiva.
- [51] The assertion of the BRP's that the directors and shareholders of the companies have utilised funds to the detriment of other creditors or in preference to other creditors of which the reduction in the loan amounts speak volumes, was never denied by Ravagan.
- [52] Ravagan never disclosed the subordination agreement between Tegeta and OCM which she signed as a witness. In terms of the agreement Tegeta agreed not to recover any loan from OCM while OCM was in business rescue. In this application she was completely silent about the existence of the subordination agreement, despite this loan being the crux of this application.
- [53] Ravagan is completely silent on the reason for the unaudited financials of Tegeta for 28 February 2017 and in fact asks the court to accept same. Ms Moodley, the designated auditor for Tegeta, disclaimed the audited opinion and provided an Independent Auditor's Report to the shareholders of Tegeta wherein she explains the reason for the disclaimer of opinion: inter alia the financial statements declared its profitability despite contrary evidence that Tegeta had incurred a loss of R80 440. 000.00, was not profitable and casted doubt on its ability to continue as a going concern. Furthermore improperly maintained accounting records without appropriate supporting evidentiary evidence rendered performing the audit only as a disclaimed audit.
- [54] Mr Philippou was the designated auditor for OCT, OCM and KFM. As at 28 February 2017 he also provided a disclaimer of opinion for each entity.

- [55] The result was that the auditors resigned. Although Ravagan does state that the auditors of Tegeta resigned, she never tells the court why. The reason for the business rescue should thus also have been that Tegeta was in fact commercially insolvent but Ravagan never disclosed this fact.

“122.11. ... ‘audit findings across Oakbay indicate a number of non-compliances and possible non-compliances with laws and regulations of which some have resulted in Reportable Irregularities reported to the Independent Regulatory Board for Auditors (IRBA). As a result of the pervasive nature of these findings, our audit risk has increased to a level which we as a firm believe is too high for us to continue being external auditors.’”

Reasons for decision on inter-company loans

- [56] Ravagan states that the BRP’s failure to take positive steps to pursue Tegeta’s claim against OCM lies at the heart of this removal application. Ravagan, as the deponent, is duty bound to set out all the essential evidence which would be led at a trial. It is therefore inexplicable why there is no reference in the founding affidavit to the subordination agreement between Tegeta and OCM. In reply Ravagan retorts that she did not mention it because “OCM was (as it still should be) solvent and the claims would not be subrogated ...”[23]
- [57] This explanation as to why it is not contained in the founding affidavit is to be rejected as unfounded. If that was Ravagan’s stance, then in the founding affidavit she has an obligation to refer to the agreement - confide in the court about the existence of the agreement, and then colour the agreement however she wanted to. The inescapable inference is that Ravagan did not want this court to have knowledge that the loan agreement between Tegeta and OCM, which is the crux of this removal application, is subject to a subordination agreement. Any reference to the subordination agreement in other applications is irrelevant to this matter. The reply states that full legal argument will be presented hereon. Unfortunately no legal argument was presented, but a factual argument followed that was nowhere to be found in the founding or the replying affidavit. The argument was that the BRP’s inclusion of the Eskom and Centaur claims led to OCM being insolvent and the BRP’s should not have admitted the claims. Although there is detailed reference to the OCM plan, not once is there reference to specific the Eskom and Centaur claims in the founding affidavit as the reason for the insolvency of OCM. The insolvency of OCM invokes the subordination agreement. These facts cannot present themselves for the first time in oral argument.
- [58] It was argued that the BRP’s cannot decide whether the claim is subordinated because it must be done independently and the BRP’s cannot simultaneously look after the interests of OCM and Tegeta. The conclusion of the agreement and terms of the agreement are undisputed. The relevant terms read as follows:

“2.1 With effect from the date of signature of this Agreement and in order to facilitate OCM ceasing to be ‘financially distressed’ (as contemplated in Chapter 6 of the Companies Act, 2008), Tegeta hereby agrees, subject to the terms and conditions in this Agreement, that:

2.1.1 it subordinates for the benefit of the other creditors of OCM, both present and future, so much of the Tegeta Claim as would enable the claims of such other creditors to be paid in full as and when such claims fall due;

2.1.2 the claims of the other creditors of OCM, both present and future, will rank preferentially to the Tegeta Claim; and

2.1.3 in liquidation of, or during the existing or any future business rescue of, or compromise by OCM, it will not prove or tender to prove a claim in respect of the Tegeta Claim, which proof would reduce or diminish any liquidation dividend payable to other creditors, whether present or future, and accordingly, Tegeta hereby abandons the Tegeta Claim to the extent that it would reduce or diminish the dividend payable to those other creditors. In addition, and without derogating from the foregoing, Tegeta hereby withdraws any claim made in respect of the Tegeta Claim during the existing business rescue proceedings of OCM to the extent to which such claim has been accepted or proved.

2.2 ...

2.3 Tegeta hereby agrees that, whilst this Agreement remains in effect, it shall not be entitled to demand or sue for or accept repayment of the whole or any part of the Tegeta Claim and set-off shall not operate in relation to the Tegeta Claim in respect of any debts owing by it now or in the future; provided that if the auditor of OCM shall certify in writing that he/she has been furnished with evidence that reasonably satisfies him/her that the amount of the Tegeta Claim exceeds the amount by which the liabilities of OCM exceed its assets, such excess portion of the Tegeta Claim as is specified in the said certificate shall, subject to the provisions of clause 3.1, be released from the operation of this Agreement. It is recorded that Tegeta acknowledge that it is responsible for requesting the auditor to issue the said certificate and for the costs in connection thereto.”

On these admitted terms the BRP’s face no conflict. In the founding affidavit no conflict surrounding the subordination agreement was raised.

[59] Much criticism was levelled at the BRP’s for relying on new business plans without attaching all of them to the opposition. The argument was that the old business plans reflected how conflicted the BRP’s were and the BRP’s cannot now rely on the new business plans to fix the conflict. It is undisputed that the business plans were drafted before the report of Harcourt-Cooke and were then adjusted in line with his report and further investigation. It is undisputed that the pre-existing management is not assisting the BRP’s in any way: the BRP’s had to obtain an order to gain access to the offices; Tegeta’s last financial statements are unaudited. The BRP’s accordingly appointed an independent forensic expert and adjusted their plans. This does not reflect a bias or a conflict of interest. This court need not peruse those plans because the conflict is raised on the old plans. I find this application to be

premature. If there are any objections to the new plans Oakbay has remedies, Oakbay however brought an interdict to prevent the meeting in terms of s151 of the Act from considering the new plans.

[60] Going forward, the question is whether the fact that the BRP's were appointed, as they were, to a group of companies, with inter-company loans, constitutes a conflict of interest. Ravagan expressed that they never thought that the inter-company loans would be questioned as the BRP's are now doing.

[61] There is no South African case-law on the removal of BRP's due to a conflict of interest and/or a lack of independence. Upon my enquiry the legal advisor of the Australian Insolvency and Turnabout Association advised that there is no case-law on the removal of a "restructuring advisor". There is also no precedent in the Canadian law on this issue.

By analogy counsel for Oakbay relied on the position of a liquidator and reliance was placed on the matter of *Standard Bank v Master of the High Court*

[2010] 3 All SA 135 (SCA) para [112]:

"In Commentary on the Companies Act the following appears: 'The liquidator stands in a fiduciary relationship to the company of which he is the liquidator, to the body of the creditors as a whole, and to the body of its members as a whole.'

As a fiduciary, the liquidator must at all times act openly and in good faith, and must exercise his powers for the benefit of the company and the creditors as a whole, and not for his own benefit or the benefit of a third party or for any other collateral purpose. He must act in the interests of the company and all creditors, both as individuals and as a group. He must not make a decision which would prejudice one creditor and be of no advantage to any other creditors or to the company.

He may not act in any matter in which he has a personal interest or a duty which conflicts, or which might possible conflict, with his duties as a liquidator."

Navsa JA quoted with approval from the matter of *Hudson & Others NNO v Wilkins NO and Others* 2003 (6) SA 234 (T) at [13]: "A liquidator may be removed from office if there is sufficient suspicion of partiality or conflict of interest, since a liquidator

must be and appear to be independent and impartial. He or she must be seen to be independent ... A Court will exercise its discretion to remove a liquidator if it appears that he or she, through some relationship, direct or indirect, with the company or its management or any particular person concerned in its affairs, is in a position of actual or apparent conflict of interest." Reliance was also placed on *Commentary on the Companies Act* [24] Third edition 1998 at p227: "where a group of companies is placed in liquidation, the conflicts of interest involved in acting as the liquidator for more than one of those companies may, in the circumstances result in the court refusing to appoint the liquidator of one of the companies as the liquidator of another or, where that appointment has already been made, in removing him from office as liquidator of another or

other companies within the group.”

[62] It was argued that the BRP’s herein must be removed because they are on par with the finding of Navsa in par [101] of the Standard Bank matter supra: “What is distressing is that Nel did not appreciate the conflict situation he found himself in. As the liquidator of Macmed seeking to prove a contentious claim in Intramed he was motivated by the interests of a creditor. As liquidator of Intramed, together with de Villiers, he was obliged to consider the interests of the debtor.”

[63] I would agree that the principles stated in Standard Bank would in general also apply to a BRP. The facts of a matter will however determine if the BRP’s are conflicted or would render them to be conflicted.

[64] The conflict of interest was demonstrated with the following sketch:

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[65] Interestingly in this argument no complaint, which Oakbay says lies at the heart of this application (Tegeta’s loan to OCM) is demonstrated. But, in any event, Knoop and Kloppers are the BRP’s of Tegeta with OCM having besides Knoop and Kloppers also Damons and Monyela as BRP’s, leaving Damons and Monyela to consider any claim. However, the undisputed subordination agreement has effect. The bare denial in Oakbay’s reply with “Tegeta’s claim cannot be resolved” does not constitute a real dispute of fact.

[66] OCM’s claim against OCT has been resolved, but, once again Damons and Monyela serve as a safety net for this claim.

[67] The claim of OCT against KFM has been settled with once again Damons for OCT and Monyela for KFM acting as safety net when, and if, necessary.

[68] There is accordingly no conflict of interest. This position is very far removed from the facts in the Standard Bank-matter where the liquidator accepted a claim without examining all available books and documents. The claim was admitted despite the fact that: “Up until the end of October 1999, almost three and a half months after the Peregrine structure took effect, neither the Macmed nor Intramed financial records, including Intramed’s balance sheet, reflected a loan of R325m. Macmed, it will be recalled, was placed under provisional liquidation on 10 October 1999 and final liquidation on 9 November 1999. It is, therefore, clear that, until then, no loan to Intramed was reflected in its books of account.”[25] The inference thus was that the liquidators had inserted the claim in the records. Furthermore the liquidators, despite a judgment of the Grahamstown High Court whereby the liquidators were ordered to pay costs personally they nevertheless continued to use Intramed funds to pay their legal costs including the costs of the appeal to the Supreme Court of Appeal. This was persisted with despite the Master’s protestations. It must also be remembered that the court in Standard Bank found that the removal of a liquidator is an extreme step and a

radical form of relief which will not be granted unless the Court is satisfied that a proper case is made out [paras 135,124-127]. The utilisation of the funds despite a Court order and the Master's objection and the acceptance of a claim without perusing documents led to the removal in the Standard Bank matter.

- [69] The mere fact that a BRP drew up a plan and will receive a fee in accordance with the plan, as provided for in the Act, is not a proper case to remove the BRP's. The subordination agreement itself is undisputed and the court accepts the BRP's version in terms of the Plascon Evans[26] rule.
- [70] If any conflict should manifest itself, for instance the appraisal of the voting interest by an independent appraiser, an affected party can utilise the remedy in s145(6). Furthermore s153(1)(b) allows for an affected person to call for a vote from the holders of voting interests to prepare and publish a revised plan; alternatively apply to court to set aside the result of the vote by the holders of voting interests or shareholders, on the grounds that it was inappropriate.
- [71] In summary the inter-company loans have not and did not create a conflict of interest. With the group structured as it is, I agree with the following found in Pellow NO and Others v The Master of the High Court and Others 2012 (2) SA 491 (GSJ) that:
- "The common practice of appointing a single liquidator to oversee the winding-up of companies in the same group is a salutary one that has distinct advantages, including a broad understanding of the inter-relationship between associate companies and the justification of intergroup transactions."*
- [72] I am satisfied that with the appointment of Damons and Monyela there are enough checks and balances built in providing for the efficient rescue and recovery of this group, in the manner that balances the rights and interests of all relevant stakeholders. The inter-company loans have been settled or resolved and the undisputed insub-ordination agreement takes care of Tegeta's claim against OCM.
- [73] The ongoing litigation in this process needs to stop. Not only for the group itself, but also in the public interest. I agree with the finding of the full court that the majority of the companies in business rescue are involved in the supply or rendering of services on behalf of the people of South Africa. Tegeta, KFM, OCM and OCT, are involved in the supply of coal to Eskom, a national asset with unsurmountable trouble. It is in the public interest that these entities are rescued.
- [74] With this goal in mind, I will accept the BRP's tender in court that the BRP's will provide the court with 6-weekly reports in terms of section 130(3)(a) of the Act. I find this suitable as I am the Judge appointed to case manage this matter. I will strive to ensure that the rescue is conducted in a manner that balance the rights and interests of all relevant stakeholders.

[75] The BRP's requested attorney and client costs on the basis that their reputation is tarnished in these proceedings. A further factor is that Oakbay did not disclose the subordination agreement in the founding agreement as expected of an applicant. Oakbay brought the application on the old plans when the new plans were available, i.e this application is premature.

[76] An award of attorney and client costs are not lightly granted. A court will grant attorney and client costs on special grounds that prevent inter alia vexatious, reckless, malicious and/or frivolous conduct or a party's unreasonable actions in its conduct of litigation or that the party's conduct is some other way reprehensible. Ravagan in this instance failed to disclose to the court a highly material fact, the insubordination agreement. This agreement is material to the crux of the application. On

that fact alone I agree that punitive costs should be granted.

[77] I accordingly make the following order:

77.1 The application is dismissed.

77.2 The applicants is to carry the costs on an attorney and client scale, including the costs of two counsel.

77.3 The second and third respondents must file reports six-weekly in terms of section 140(3)(a) to Court.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 83344/18

HEARD ON: 26 June 2019

FOR THE APPLICANT: ADV. M.R. HELLENS SC

ADV. L. VAN GASS

INSTRUCTED BY: Van der Merwe & Van der Merwe

FOR THE 1st to 3rd RESPONDENTS: ADV. P. STAIS SC

ADV. G.D. WICKINS

INSTRUCTED BY: Smit Sewgoolam Attorneys

DATE OF JUDGMENT: 30 August 2019

[1] s128(1)(a)(l) of the Act

[2] Paragraph 2.1

[3] Naidoo v Marine & Trade Insurance Co Ltd 1978 (3) SA 666 (A)

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- [4] Absa Bank v Chopdat 2000 (2) SA 1088 (W); Lynn & Main Inc v Naidoo & Another 2006 (1) SA 59 (N) and KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd 2017 (6) SA 55 (SCA)
 - [5] Par 6.1 of plan
 - [6] Par 6.2 of plan
 - [7] Par 6.2.2 of the plan
 - [8] Par 2.58 of the founding affidavit
 - [9] Par 2.81 of the founding affidavit
 - [10] Case number 12897/2018
 - [11] Case number 24924/18
 - [12] Case number 24924/18
 - [13] Case number 29146/2018
 - [14] Case number 29802/2018
 - [15] Case number 30041/2018
 - [16] Case number 31531/2018
 - [17] Case number 64678/2018
 - [18] AA32
 - [19] Case number 86673/2018
 - [20] Case number 8345/2019
 - [21] AA38
 - [22] Paragraph 1.2
 - [23] Paragraph 6.3
 - [24] 14-378
 - [25] Paragraph 43
 - [26] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984
 - (3) SA 623 (A) at 634-635; National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at [par 26]; Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 55; Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) (2008 (2) SACR 421;
 - [2008] ZACC 13) paras 8-10

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