

SOUTH AFRICA / JUDGMENT

Member of the Executive Council for the Department of Community Safety and Transport Management of the North West Provincial Government v Samons N.O and Others (039123/24) [2024] ZAGPPHC 1236 (21 November 2024) [2024] ZAGPPHC 1236

COURT

North Gauteng High Court, Pretoria

BEFORE

H Kooverjie

CASE / FILE NUMBER

039123/24

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 039123/24

(1)

REPORTABLE: YES/NO

(2) OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE:

21 November 2024

SIGNATURE:

In the matter of:-
THE
MEMBER OF THE EXECUTIVE COUNCIL FOR
THE
DEPARTMENT OF PROVINCIAL TREASURY OF
THE
NORTH-WEST PROVINCIAL GOVERNMENT
Intervening Applicant
In
Re:-
THE
DEPARTMENT OF COMMUNITY SAFETY AND
TRANSPORT
MANAGEMENT OF THE NORTH-WEST
PROVINCIAL
GOVERNMENT
Applicant
VS
THOMAS
HENDRICK SAMONS N.O.
First Respondent
THOMAS
HENDRICK SAMONS
Second Respondent
NORTH-WEST
TRANSPORT INVESTMENT (SOC) LTD
Third Respondent
NORTH-WEST
STAR (SOC) LTD
Fourth Respondent
ATTERIDGEVILLE
BUS SERVICE (SOC) LTD
Fifth Respondent
THE
COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION
Sixth Respondent
THE
AFFECTED PERSONS OF THE THIRD, FOURTH
ANS
FIFTH RESPONDENTS
Seventh Respondent
Heard
on: 3-5 & 26 September 2024

Delivered:

21 November 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the Caselines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 17:00 on 21 November 2024.

Summary:

AD: Removal of the business rescue practitioner

1.

The principles set out in Knoop N.O. v Gupta and Another 2021 (3) SA 88 (SCA) was applied. On the proven facts it was found that the BRP was incompetent, he failed to conduct himself with the proper degree of care in the performance of his functions and he contravened various statutory provisions, particularly the Companies Act 71 of 2008 and of the Public Finance Management Act.

2.

Specific instances were dealt with which justified his removal in terms of Section 139(2) of the Companies Act.

4.

On the facts before me, the issues in dispute could be resolved on the papers.

Where disputed versions were proffered, the defences were found untenable and/or not good in law.

AD: The counter application

1.

The evidence before the court, on the balance of probabilities, was not in favour of the respondents.

2.

Negotiations amongst legal representatives could, in law, never give rise to an agreement. In casu, the funding amount had to be approved by the applicant before any agreement could be entered into.

3.

An agreement on the R615 million funding could never have materialized in light of other unresolved issues, which were material to the agreement.

ORDER

It is ordered:-

1.

The intervention application is granted with costs, which costs are to be paid by the first respondent and Tansnat jointly and severally, the one paying, the other to be absolved. The costs are to include the costs of two counsel on Scale C.

2.

The first respondent is removed from office as the business rescue practitioner of the third, fourth and fifth respondents in terms of Section 139(2) of the Companies Act No. 71 of 2008.

3.

The second respondent, in his personal capacity is ordered to pay the costs of

the Section 139(2) application jointly and severally with Tansnat (Tansnat JV), the one paying, the other to be absolved.

The costs are to include the costs of two counsel on Scale C.

4.

The counter application is dismissed with costs, which are to include the costs of two counsel on Scale C.

JUDGMENT

KOOVERJIE J

INTRODUCTION

- [1] The applicant herein seeks the removal of the business rescue practitioner, Mr Samons, in terms of Section 139(2) of the Companies Act No. 71 of 2008 (“the Act”) [the removal application].
- [2] The respondents (first, third and fourth respondents) further seek relief in terms of their counter application for the payment of R615 million from the applicant, the MEC for the Department of Community Safety and Transport Management of the North West Provincial Government (COSATMA) [the counter application].
- [3] I wish to reiterate that both parties, in their respective applications, had raised arguments that there are disputes of fact which cannot be resolved on the papers. I will herein address this aspect in respect of both applications.
- [4] For the purposes of both applications, the parties will be referred to as they are in the main application. The business rescue practitioner will also be referred to as “the BRP”. The applicant will also be referred to as “COSATMA”. Furthermore the Companies Act No. 71 of 2008 will be referred to as “the Act” and the Public Management Finance Act No. 1 of 1999 will be referred to as the “PFMA”.
- [5] At this juncture, it is convenient to point out that when the application for the removal of the BRP was instituted, a business plan was not finalized nor adopted. Shortly before the hearing of this matter, on 28 June 2024, an approved and adopted business plan (“THS1”) came to light. The BRP alleged that the plan was approved by 96% of the creditors. The applicant did not vote on this plan. This plan was, in fact, furnished to the applicant with the BRP’s answering affidavit in these proceedings.

THE RELEVANT ROLE PLAYERS

[6] The applicant is represented herein in his nominal capacity as the executive authority as contemplated in the PFMA[1]. He is responsible for the third to the fifth respondents. The third respondent, North West Transport Investment (Soc) Ltd (“NWI”), the fourth respondent, North West Star (Soc) Ltd (“NWS”), and the fifth respondent, Atteridgeville Bus Service (Soc) Ltd (“ABS”) are defined as the provincial government business enterprises in terms of the PFMA[2] (referred to as “the NTI companies”). The NTI companies are responsible for the cost effective and efficient

transport of commuters, not only in North West Province but in Gauteng as well.[3]

[7] The first respondent, Mr Samons, is the duly appointed business rescue practitioner (“the BRP”) and was appointed to manage the third to the fifth respondents in the business rescue proceedings. He was appointed on 21 July 2022 in respect of NTI; on 4 August 2022 in respect of ABS; and on 16 September 2022 in respect of NWS. He is cited both in his personal and nominal capacities. In his nominal capacity as business rescue practitioner, the second respondent referred to as “the BRP”.

[8] The seventh respondent is cited as the “affected persons of the NTI, ABS and NWS”. They qualify as statutory-defined affected persons of these companies. Notably the employees have also, through their union, SATAWU, filed their affidavit in the application for the removal of the BRP.[4]

[9] The Provincial Treasury of the North West Provincial Government (“Treasury”) intervened on the basis that it holds a substantial and direct interest in this matter.

[10] The main creditor, Tansnat Coach Lines (Pty) Ltd and Zigi Investments CC joint venture (“Tansnat”), also participated in these proceedings and joined issue with the business rescue practitioner, thus opposing the BRP’s removal.

THE INTERVENTION APPLICATION

[11] The Treasury Department of the North West Provincial Government (“Treasury”) contended that it holds a direct and substantive interest in the matter, by virtue of the fact that it undertook to compile a report pertaining to the verification of the creditors’ books for the previous years. Such report was compiled through the Office of the Provincial Treasury by Mr Nel.

[12] It is settled law that an applicant seeking intervention has to show that it has a direct and substantial interest in the matter. The Supreme Court of Appeal in SA Riding for the Disabled Association[5] is authority for the proposition that: an intervening party qualifies if it is able to satisfy the court that it has a right

which is adversely affected or likely to be affected by the order sought.

- [13] Although the respondents filed papers opposing the intervention application, at the hearing, it indicated that it would abide by this Court's decision. Tansnat also filed papers and opposed the intervention application on the premises that Treasury has no direct and substantial interest in the litigation but merely a supervisory role over the applicant.
- [14] In my view, the intervention application not only has merit because of the Nel Report, but by virtue of Treasury's monitoring and intervention role in terms of the PFMA. In terms of Section 18 of the PFMA, the Provincial Treasury must monitor and assess, inter alia, the affairs of the provincial public entities (in this case, the NTI companies). It is further obliged to investigate their financial management and may even intervene and take appropriate steps and address serious material breaches committed by such entities. In casu, Treasury has clearly intervened in the affairs of the NTI entities. In my view, it has demonstrated a direct and substantial interest in these proceedings. Consequently I grant the intervention application.
- [15] In exercising my judicial discretion, since both Tansnat and the first respondent opposed the intervention application, there is no reason why they should not bear the costs of the intervention application. Consequently they are ordered to pay the costs jointly and severally, the one paying, the other to be absolved.

APPLICATION FOR THE REMOVAL OF THE BUSINESS RESCUE PRACTITIONER

- [16] The removal of Mr Samons was premised on the basis that he failed to comply with Section 139(2)(a),
- (b) and (c) of the Act, in that he was incompetent, he failed to perform his duties, he failed to exercise a proper degree of care in the performance of his functions and he engaged in illegal acts or conduct.

The GTAC Report

- [17] The background regarding the NTI companies, as well as the outcome of the General Technical Advisory Centre ("GTAC") Report[6] was extensively elucidated in the papers and was common cause between the parties. This judgment will therefore be limited to the context within which the parties have litigated in these proceedings.
- [18] The North West Provincial Government ("NWPG") is the sole shareholder of NTI, NWS and ABS. NTI consists of a holding company and two subsidiaries, NWS and ABS. NTI was initially established as a private company, but after it was placed under judicial management in 2007 it was converted to a state-owned company with the North West Provincial Government. NTI owns all the issued shares in NWS and NWS, in turn, owns all the issued shares in ABS.
- [19] The MEC, in order to appreciate the extent of the crisis of the NTI companies, mandated the General Technical Advisory Centre ("GTAC") to investigate and furnish a comprehensive report into the state of affairs of the NTI companies. At the time, COSATMA was under

administration pursuant to Section 100(1)(b) of the Constitution. The GTAC Report, dated 6 October 2019, revealed, inter alia, the staggering magnitude of the financial crisis of the NTI companies and which ultimately led to the collapse of their governance and management structures.

[20] The GTAC Report highlighted that the NTI companies were hopelessly insolvent. The report concluded that the entities had a bank balance of R2.5 million and liabilities of nearly R250 million. It highlighted that the entities would only survive if considerable financial support was provided. They would require inter alia an immediate injection of working capital of R250 million to settle accumulated liabilities as well as medium-term working capital

support over the next six months amounting to R15 million per month.

[21] COSATMA had initially, through the guidance of the previous MEC, Mr Lehari, attempted to address these challenges by establishing task teams and new executive management teams, to counter the systemic dysfunctional NTI entities. This was to no avail. A decision was then taken in 2022 to place the NTI companies under business rescue. The GTAC Report highlighted that:

21.1 NTI was operating without a board since 2018;

21.2 NTI's fleet was in serious disrepair and its busses were at least 27 years old. Over two thirds of its 612 busses are currently non-operative. NTI had to lease at least 150 busses to maintain its operations;

21.3 NTI was in arrears with most of its suppliers that provided spare parts, fuel and maintenance services. Further due to non-payment, there were disruptions in the bus trips causing frequent breakdowns;

21.4 the NTI businesses suffered significant losses since 2014. It was in fact commercially insolvent;

21.5 the personnel costs were found to be exorbitant and the salary scale were beyond industry norms; and

21.6 NTI was unable to make third-party payments on behalf of its employees, which included the failure of honouring the PAYE payments to SARS.

[22] Mr Samons emphasized that upon his appointment he was well aware of the enormous challenges that faced the NTI companies. His main project was therefore to resolve the crisis that the NTI companies' found themselves in.

[23] It was recommended that a bail-out together with a new contract with the GPDRT (Gauteng Provincial Department of Roads and Transport) as well as a significant restructuring was advisable under the business rescue process. The NTI companies could only be saved if government substantially funded the NTI business operations. It was therefore imperative for the GPDRT to commit to a new long-term contract. Furthermore aggressive cost cutting,

the sale of non-core assets, as well as the efficiencies in the governance structures had to be improved.

- [24] The GTAC Report acknowledged that the NTI companies constitute provincial state enterprises as defined in the PFMA. Consequently as state-owned companies, governance and accountability legislative prescripts are applicable to them. Ultimately, the core function of the NTI companies was to assist government in meeting its service delivery objectives to the public whilst maintaining the objectives of the developmental state in an efficient, effective and economic manner.

Rationale behind business rescue proceedings and duties of the BRP

- [25] Business rescue is designed to resolve a company's future direction expeditiously. Even though compliance with the statutory time periods set out in the Act is not always possible, there must at least be indications of progress.[7] In this period, creditors allow the BRP breathing space in order to restructure the affairs of the companies, in this case, the NTI companies. If progress cannot be achieved, then liquidation is inevitable. The business rescue process is intended to be a highly transparent process where creditors are actively involved in formulating a business rescue plan together with the BRP.
- [26] I pause to reiterate that business rescue is only suitable for entities that; have reasonable prospects of trading, would be able to gain commercial viability, and where creditors would collectively be better off if the business rescue were successful. In the circumstances of the NTI companies, the scenario was exactly the opposite. They were hopelessly insolvent and were only able to sustain their operations if they received extensive financial assistance. It is common cause that the core reason for recommending that the entities be rescued was premised on government's obligation to provide affordable transport services to commuters.
- [27] The BRP is appointed as a creature of statute and specifically an officer of the court in terms of Section 140(3)(a) of the Act.[8] By virtue of Section 140(3)(b), the business rescue practitioner assumes the role of a director of a company as envisaged in Section 75 to 77 of the Act.
- [28] A BRP is required to act with the necessary competence, independence, and skill. These traits are fundamental to the outcome of the business rescue process. Section 7(k) of the Act provides for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights of all the relevant stakeholders, which includes creditors, employees and shareholders.[9]

The core dispute

- [29] The nub of the applicant's case is that the business rescue practitioner was grossly negligent in his conduct, caused extensive and unnecessary delays, was incompetent, and reckless in his statutory obligations in terms of, inter alia, the Companies Act and the PFMA. His conduct has resulted in the debt of the NTI companies now standing in the region of almost over R1 billion.[10]
- [30] The focus of the BRP's case was that the applicant, the directors, and management, amongst others, played a pivotal role in derailing the business rescue process. Their persistent and obstructive behavior, together with the dire financial fate of the NTI companies, made his task impossible.
- [31] He pointed out that COSATMA continuously reneged on its undertaking to fund the NTI companies on a monthly basis, despite being acutely aware that extensive financial assistance was necessary for NTI to remain in operation. The failure to provide the funding particularly when the business rescue proceedings commenced, in fact, paralyzed the entire process. At that time, the applicant was aware that the BRP was unable to pay the salaries of bus drivers for months of July, August, September
2022. COSATMA only provided funding in October 2022, months after business rescue was initiated. He was further faced with impending litigation since mid-2023 which included applications for his removal as a business rescue practitioner and an interdict preventing him from dissipating the NTI companies' assets.
- [32] The applicant identified the BRP's incompetence under specific instances, namely that the BRP failed to:
- 32.1 publish the business rescue plan timeously or at all;
 - 32.2 publish the annual financial statements;
 - 32.3 he was instrumental in the escalation of NTI's debt;
 - 32.4 verify Tansnat's debt;
 - 32.5 prioritize the employees' salaries as entrenched in the Companies Act;
 - 32.7 comply with the PFMA and the Treasury Regulations in various respects;
 - 32.8 manage the debt from SARS in a competent manner.
- [33] I pause to further mention that argument was proffered on the part of the BRP that since the plan was adopted and approved, the application for his removal became moot. Hence even if the removal application is upheld, it would have no practical effect. I am not in agreement with this proposition. In my view, the outcome of the counter application does not influence the main application (removal of the BRP application). In fact, counsel for the respondents, in argument on the counter application, confirmed same. Even though particular issues, such as the funding dispute overlaps,

I face no impediment to make a determination in terms of the Section 139(2) application. In my view, the issues for determination

are distinct and can be adjudicated independently.

Discretion of the court

[34] It is settled law that this court has a discretion either to grant or refuse an order for the BRP's removal. The discretion is exercisable if one or more of the grounds set out in Section 139(2) of the Act have been established on a balance of probabilities. Proof of one or more of these grounds does not necessitate removal.

Ultimately the court's decision would be dependent on the facts of the particular case. Removal of the BRP is not something

that is done lightly. The primary reason to justify removal would entail that actual or potential prejudice is evident.

[35] It is apposite to refer to the Supreme Court of Appeal decision in Knoop[11] which had set out guidelines for a court when applying its discretion in terms of Section 139 of the Ac. I summarize same, namely:

35.1 the fact that the BRP's conduct was serious to an extent that necessitated his removal does not mean that his removal is justified. At the end of the day the court must take into account the number of disparate and incommensurable features. The removal is not something to be ordered lightly and the primary reason justifying removal will be actual or potential prejudice or harm[12] to the interest of the estate, trust or company;

35.2 in order to determine the grounds for removal, one has to draw factual conclusions or inferences drawn from proven facts.[13] An applicant seeking the removal must furnish evidence that justifies an order for removal. Only upon proper proof of the primary

facts

does the question of drawing an inference properly arise. The drawing of inferences from the facts must be based on proven facts and not matters of speculation;

35.3 thus in determining whether there was incompetence or failure on the part of the BRP to perform his duties, evidence of specific instances of this incompetence or failure to perform his duties must be set out. The term "incompetence" suggests that the BRP lacked the necessary skills to perform his duties. The standard against which the BRP is measured is higher than that of an ordinary person. His standard of care is akin to that of a trustee[14];

35.4 mere moderate ability does not amount to incompetence nor does the failure to meet the standards that the affected party would like to see achieved. The alleged incompetence must relate directly to the performance of the task of the BRP. His inability to perform the role of the BRP properly in relation to the circumstances must be demonstrated;

35.5 in alleging that the BRP failed to perform his duties it is necessary to identify the duties that the affected party should have performed and identifying in what manner they were not performed. For instance, failure to convene meetings as required by statute and preparing the business plan or failure to report to the creditors or other affected parties is illustrative of the failure to perform his duties;

35.6 The allegation made that the failure to exercise a proper degree of care in the performance of his functions will in most instances require proof of negligence. Again there must be specific references made to specific conduct. In this instance, there must be proof of harm or even potential harm. In the absence of harm it is difficult for a court to conclude that the BRP has not exercised a proper degree of care.

Tansnat's claims

[36] Tansnat is no doubt the largest creditor and the only supplier of busses to NWS and ABS. Section 145(1)(b) of the Act permits Tansnat to participate in these court proceedings.[15] Tansnat, in its answering papers, highlighted specific issues. At the outset it emphasized that it had efficiently serviced the NTI companies over the years and in such time no complaints had ever been made concerning its services and/or its charges. It was pointed out that the services were always rendered in accordance with the payment terms agreed upon between the parties.

[37] According to the applicant, the total amount paid by NTI and NWS to Tansnat since the commencement of the business rescue proceedings was in the region of R125 million. As things stand currently, the debt owing to Tansnat is exorbitant. On Tansnat's version, as at 31 May 2024 Tansnat was owed almost R500 million. The actual figures identified were R443,366,759.90 which comprised of:

37.1 NTI's account of R77,454,887.94 (pre-business rescue debt);

37.2 NWS's account reflects R167,068,398.80 (pre-business rescue debt);

37.3 NWS's account reflects R198,843,473.16 (post-business rescue debt).

[38] It is convenient, at this point, to identify the various contracts entered into with Tansnat, which include both pre-commencement and post-commencement agreements relevant to the dispute between the parties.

Pre-business rescue agreements with Tansnat

[39] The pre-business rescue agreements entered into between Tansnat with NTI and Tansnat with NWS and Tansnat with ABS were identified as follows:

39.1 two 2018 vehicle rental agreements, the first between Tansnat and NTI where NTI was charged for the rental of busses, which agreement was for a period of one year. The second agreement with NWS, was for a period of 5 months. These agreements were then extended on a monthly basis until October 2020 (2018 rental agreements);

39.2 the 2020 ABS memorandum of agreement which was concluded on 29 October 2020 between Tansnat and ABS. This was not implemented as the CEO of the entities did not authorize the agreement;

39.3 the 2020 bus rental agreement was concluded on 29 October 2020 with Tansnat and NWS for a period of just under three years, from the 6 October 2020 to 31 March 2023;

39.4 on 1 November 2020 first deed of addendum was concluded between Tansnat and NWS, which addendum was to the previous rental agreement, ABS also signed the agreement.

[40] NTI and NWS however defaulted on their respective payment obligations in terms of the said agreements. When the debt exceeded R200 million plus interest, NTI and NWS agreed to negotiate and enter in settlement agreements so that the debts could be set off. NTI acknowledged its debt of over R144 million and NWS's debt was over R57 million. It agreed to pay a minimum of R2.5 million a month commencing from 28 February 2021 and upon the settlement of the old debt, NTI agreed to settle its debt at R5 million per month.

[41] However NTI and NWS had been unable to honour their obligations in terms of their respective settlement agreements. This resulted in Tansnat instituting legal proceedings against them. A court order was granted ordering the entities to pay R40 million each to Tansnat (in total R80 million from the NTI companies). NTI and NWS were ordered respectively to pay an amount of R2.5 million, monthly, until the debts were fully paid.

[42] As NTI and NWS again defaulted on their payment obligations in terms of the said court orders, Tansnat then proceeded to have the orders executed. This resulted in the following enforcement steps being taken, namely:

42.1 on 6 July 2022, the Registrar issued a garnishee order requesting the sheriff to attach the proceeds due to NWS by the Gauteng Department of Roads and Transport the payment of outstanding amount;

42.2 on 8 July 2022 the Registrar issued a warrant of execution directing the sheriff to execute the movable goods of NTI and sell them through a public auction in the sum of over R144 million;

42.3 on 8 July 2022 the Registrar issued a warrant of execution directing the sheriff to attach and execute the movable goods and sell them through a public auction in an amount of over R57 million.[16]

Post-business rescue agreements

[43] The post-business rescue agreements that were entered into with the BRP were:

43.1 on 31 March 2023 Tansnat and NWS amended the 2020 bus rental agreement. The contract period was extended for three months, and in this period Tansnat was to make available a bus fleet of about 300 busses at a fixed monthly rental of R50,000.00 a month;

43.2 on 31 July 2023 Tansnat and NWS, again represented by the BRP, concluded the vehicle rental agreement where NWS hired 230 busses. The agreement was for a period of five years and the rental charge per bus was R61,000.00 which cost included a maximum of 5000 km per month;

43.3 on 19 December 2022 the first post-commencement finance agreement ("PCFA") was signed between Tansnat and NWS, whereby NWS requested post-commencement finance to continue to render bus transport services in terms of the tender as well as interim contracts with the GPDRT. Tansnat undertook to continue with its obligations in terms of the 2020 vehicle rental agreement, provided that the rental charges and other obligations of NWS become payable or in the future may become payable after the commencement of the business rescue proceedings. Notably the business rescue practitioner undertook to ensure that the monthly payments of R5 million would be paid by the GPDRT directly to Tansnat;

43.4 similarly the BRP, on behalf of NWS and ABS, then entered into the second post-commencement finance agreement (second PCF) on 7 March 2023 with Tansnat. In terms of this agreement Tansnat was again prepared to continue with its obligations under the previous 2020 rental agreement.

[44] I reiterate that the BRP appreciated that the necessary statutory governance requirements had to be met when entering into the latter post-commencement finance agreement. The agreement explicitly recorded that all governance requirements as envisaged by the Companies Act would have to be met. It was further recorded that for NWS to provide security, the necessary statutory and/or legislative approvals would have to be obtained. It is not in dispute that no such approval was ever obtained. Despite this, the said agreement implemented.[17]

Verification of Tansnat's claims

[45] Tansnat took specific umbrage to the allegations of fraud levelled against it and, in particular, extensively opposed the applicant's reliance on the Nel Report that illustrated that there has been an overstatement by Tansnat in an amount of R300 million.

[46] On the BRP's version it was submitted that the amount of R18 million was accounted for and set off against Tansnat's pre- and post-commencement claims. Tansnat submitted that the untested findings of fraud could only be proven properly through oral evidence. Tansnat further took objection to the change in stance of the applicant from initially leveling allegations of fraud to alleging an "inference" of fraud. In this regard, Tansnat argued that the applicant's version be rejected.[18]

[47] It is common cause that after the Nel Report surfaced, the BRP commissioned an independent verification of Tansnat's claims (Clemitsen Report) which established that there was an overstatement of R18 million. Tansnat disputed the findings of both reports. It procured the BDO Report which established that in fact there was an understatement in Tansnat's claims. Tansnat argued that the BDO Report was accurate as it was based on the findings of an independent auditor who performed a verification of claims in terms of the

recognized auditing standards.

- [48] The BRP advised that the overstatement of R18 million, as per the Clemitson Report, was relied upon. Accordingly the amount of R18 million was then set off against both Tansnat's pre-and post-commencement claims.
- [49] The applicant's further complaint that the BRP was obliged to verify Tansnat's claims upon his appointment, in my view, must be considered in context. It was alleged that the overstatement pertained to those claims before the business rescue proceedings. Although I accept the BRP's explanation that he initially relied on Mr Kenoshi as the CFO for the verification of the claims particularly those that arose before the business rescue proceedings, the BRP, at some point, was required to conduct an independent verification of all creditors' claims, which included Tansnat.

[19]

- [50] I find that the BRP had compromised his independence by relying on officials who, on his version, were instrumental in railroading the business rescue proceedings. Mr Samons was required to remain independent throughout the proceedings.[20] It was evident that Mr Samons only procured the Clemitson Report in an attempt to verify Tansnat's claims after the Nel Report surfaced.

The delay in publishing the Business Rescue Plan

- [51] The proven fact that the business rescue plan was not prepared timeously, is established. Section 150(5)(b) of the Act requires that the business rescue plan be published within 25 days after the date on which a practitioner was appointed. In this instance:

51.1 the first business rescue plan was only prepared and circulated on 3 July 2023 (the first plan – "TSH2");

51.2 the second plan was circulated on 18 September 2023 ("TSH3");

51.3 the third business plan ("THS1"), was adopted in July 2024.

- [52] The undisputed facts are:

52.1 the BRP sought several extensions between September 2022 and May 2023;

52.2 when COSATMA refused to accede to further extensions after November 2022, the BRP continued seeking extensions from the creditors;

52.3 the first plan was prepared just under a year after the BRP was appointed (July 2023);

52.4 the third plan was approved and adopted without COSATMA's consent.

- [53] On the reading of the papers it is evident that the contents of the adopted third plan has been placed in dispute. In particular, the absence of the conditions COSATMA insisted upon and the funding amount. The BRP should have appreciated that, in law, he was not permitted to amend the plan without the input of the affected parties, in this instance, COSATMA.[21]
- [54] The applicant pointed out that the extensions sought after November 2022, were unlawful. Since November 2022, the BRP failed to request any extensions from COSATMA. It was further argued that the extensions were sought from the NTI creditors (with Tansnat being the largest creditor) when Tansnat had no voting rights in NWS and ABS. In fact, ABS had no pre-commencement creditors.
- [55] The BRP extensively explained that the delays were caused by COSATMA and the GPDRT. Furthermore the delay in finalizing the second plan was also due to COSATMA and the BRP being seized in discussions regarding the funding from COSATMA. It is evident from the papers that in September 2023, when the second draft plan was circulated, COSATMA and the BRP continued with negotiations regarding the nature and extent of funding which included COSATMA's status on its right to vote.[22]
- [56] Even though the GPDRT was in the process of negotiating contracts with the BRP during this period, I have noted that the GPDRT insisted that a plan be adopted at the earliest. It particularly expressed that it was not comfortable in negotiating on contracts without a plan in place.[23] The BRP was well aware that once business rescue proceedings are instituted, the future management of the entities' affairs had to be endorsed by a business plan. He was forewarned of this fact several times in various correspondence, in particular, when advised to hold off the sale of NTI's and NWS assets.
- [57] It is not in dispute that for over two years the BRP made various decisions for the NTI companies, entered into various PCF agreements and attempted to dispose of the assets of the NTI entities without an approved plan and without the approval of COSATMA. This evinces the fact that he failed to appreciate the importance of an approved plan, and the fact that without an expedited business plan, the business rescue proceedings could not be successful.

Failure to have produced and submitted Annual Financial Statements

- [58] The following facts are proven: firstly, the annual financial statements for the financial years 2019, 2020, 2021, 2022, 2023 and 2024 were neither prepared nor made available; secondly, the BRP only informed the Auditor-General 18 months after his appointment of his difficulty with the compilation of the said financial statements.
- [59] On this aspect, the BRP elaborated extensively on the challenges he faced, namely that:
- 59.1 no source documents were in existence in order to prepare the financials;

59.2 the officials in the department, and particularly, Ms Sadiki, (the director and the head of the audit committee) and Mr Kenoshi (the CFO of the companies) and others were required to assist him with information and source documents pertaining to the NTI companies, in order to prepare the financial statements;

59.3 they further refused to assist the independent auditors, the South African Independent Reviewers and Associates (SAIRA). The BRP intended to appoint them to reconstruct the records and compile the outstanding annual financial statements as well as the management accounts. SAIRA indicated they would only be able to execute their mandate if furnished with the necessary documents. Moreover as SAIRA's fee of R15 million was exorbitant, he was hesitant to appoint them;

59.4 the BRP explained that it was not that he refused to audit the entities, but he was unable to do so.

[60] I have observed that the alleged recalcitrant conduct of the officials was not disputed by the applicant. Moreover there is no mention on the papers which indicated that this issue was raised with the applicant. At the end of the day, the officials were in the employment of COSATMA and was entitled to know that its officials are not cooperating with the BRP. The BRP most certainly had recourse in law to apply to court to cause them to perform their functions.[24] Although he removed Ms Sadiki as director, the rest of the officials were not held accountable.

[61] It is my view that the BRP was required to manage the process with a level of skill and independence and could not merely lay the blame at the door of the officials. He had an obligation to report the state of the entities' affairs to the MEC. He proffered no explanation as to why he did not inform the applicant of the challenges he faced. He was well aware that the progress of the business rescue, in principle, is determined through analyzing the financial records. The unenviable circumstances required the BRP to urgently advise the applicant that a forensic audit was crucial and urgent. He was well aware that he was statutorily obliged to compile the financial records expeditiously. He failed to deal with this issue with the degree of urgency and competence required of him.

[62] To make matters worse, he painted a different picture to the affected parties. I have taken cognisance of the misrepresentations to the creditors and the affected parties. For instance: the same statement: under the heading "Financial Records and Performance" records: "the annual financial statements are being finalised by the finance teams in close collaboration of the office of the Auditor-General and the North West Treasury Department" appears in all the respective progress reports that were filed between October 2022 to April 2023.

[63] In addition, in his 19 March 2023 affidavit, (filed in response to the first removal application of the BRP) at paragraph 88.2 he under oath stated:

“As a result, an independent external auditing firm has been employed, at additional expense, to manage the financial reporting requirements of NTI, and ultimately to perform the requisite audit in conjunction with the BRP team. This audit is currently in progress, for purposes of compiling the outstanding annual financial reports and other current reports to be submitted to the Auditor-General.”

- [64] Clearly, the aforesaid facts were not true. At the time SAIRA had not been mandated to conduct the audit. This infers that the audit could not be in progress. There can be no doubt that such misleading statements were prejudicial to the creditors as well as the affected parties.
- [65] He further proffered no tenable explanation as to why he only approached the Auditor-General at the end of February 2024 (18 months after his appointment) wherein he advised the office of the Auditor-General that:- the financials could only be compiled to an extent, due to the absence of the last five years' financial data the true financial position of the companies remain unknown, and that a forensic audit would be necessary. He also advised that the reconstruction of the financials would cost around R15 million.
- [66] Notably COSATMA was only approached to fund the SAIRA fees for the first time on 7 March 2024 (Annexure 'THS9.2'). Again no explanation was proffered as to why had he not sought the approval and assistance from COSATMA much earlier, particularly in light of the fact that SAIRA had already been consulted with in 2022.
- [67] Even more concerning is the fact that the BRP did not have current financial records including the management reports, in place (for the duration of the business rescue proceedings). He was unable to provide the Provincial Treasury with such information. In correspondence he attempted to explain his failure to comply with his statutory financial reporting obligations by again putting the blame at Mr Kenoshi and the other officials. On the facts the applicant was clearly in the dark. No financial records were in place.
- [68] The BRP was obliged, in terms of the PFMA, to have kept the MEC abreast with the financial situation of the entities. In terms of Section 19 of the PFMA, the MEC is required to prepare consolidated financial statements in respect of the public entities who are in the care and control of the provincial executive. Section 19(5) of the PFMA requires of the MEC to furnish an explanation to the provincial legislature as to why the financials were not timeously submitted. These shortcomings of Mr Samons not only illustrated his incompetence but his failure to act with a level of skill and care expected of him in his position as a BRP. He undoubtedly compromised the financial reporting obligations of not only the MEC, but Provincial Government as well as Provincial Treasury.

Employees' salaries were not prioritized

- [69] The fact that- the employees had not received their salaries on a monthly basis during the business rescue proceeding, is common cause.

- [70] The exorbitant labour costs had been identified in the GTAC Report as being the primary source of the NTI's debts. The non-payment of the salaries was raised with the BRP very early on through the office of the Head of Department (HOD). It became evident that this issue caused the discord between the parties.
- [71] In his defence, the BRP pointed out that in order to keep the bus operations afloat, he had no option but to pay Tansnat and the various suppliers. He persisted that he had balanced all the factors as envisaged in Section 7(k) of the Act. At most times after he paid the suppliers, he had no funds left to pay the salaries. He explained that salaries could particularly not be paid due to the applicant failing to provide funding regularly.
- [72] The BRP explained that monies that were deposited into the Escrow account were utilized to firstly pay creditors and only if there were remaining funds, would the employees be paid. Simply put, employees would only be paid if the applicant provided the funding.
- [73] I find that the BRP's reasoning clearly evinces the fact that he failed to appreciate that he had little or no discretion regarding the payment of salaries. It is statutorily prescribed that at post-business rescue stage, salaries are prioritized above that of creditors. In his defence, he labored on the understanding that it was permissible to skip salary payments as these claims would eventuate to post-commencement finance claims by virtue of Section 135(1)(a) of the Act. [25] His understanding is fatally flawed. It was evident from the facts that the employees' salaries were never prioritized.
- [74] Although I take cognisance of the unenviable task the BRP was placed in, on the one hand, he had to balance factors to keep the NTI companies in operation (which meant that suppliers and creditors had to be paid) and, on the other hand, salaries had to be paid, it cannot be gainsaid that his decisions were made to the detriment of the employees. His conduct was clearly in contravention of Section 144(2) of the Act[26] which stipulates that employees are preferred unsecured creditors.
- [75] During the business rescue period, regular and substantial payments were made to Tansnat on a monthly basis which included both Tansnat's pre-commencement finance claims as well as the post-commencement claims. The pre-commencement payments due to Tansnat were effected in respect of previous court orders which dictated payment structures.
- [76] It was contended that the BRP was required to have placed a moratorium on Tansnat's pre-commencement debts as they arose from enforcement actions, in terms of Section 133(1) of the Act.[27] The rationale of business rescue was to preserve the business coupled with the interest of the employees.
- [77] In his defence, the BRP argued that the debts stemming from pre-BRP agreements were considered final and liquidated by virtue of the settlement agreements, the court orders, garnishee order, and the execution. He pointed out that once he confirmed that the pre-commencement claims in the respective agreements, he had to honour the payments. Such decision in itself again demonstrates his lack of skill in terms of Section 7(k) of the Act.

Moreover the BRP was well aware that the moratorium was in place. In the third plan, he recorded that the moratorium remained intact since the commencement of business rescue and was not uplifted.[28]

[78] Section 133(1) stipulates:

“During business rescue proceedings no legal proceedings, including enforcement action, against the company or in relation to any property belonging to the company, or unlawfully in its possession may be commenced or proceeded with in any forum.”[29]

[79] The term “enforcement action” includes formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment. [30]

[80] The BRP was acutely aware that the failure to pay salaries led to the cancellation of employees’ medical aid coverage as well as the non-payment of their PAYE and UIF contributions. The salaries of more than 1500 NTI companies’ employees for the months: September to December 2022, March to May 2023, June to November 2023, as well as February to March 2024 were not paid. In other words, in the 2023 year, employees only received their salaries for three months.

[81] With regard to the post-commencement finance agreements, the BRP should again have appreciated that the prioritization of employees’ salaries was non-negotiable. Section 135(1) (a) and (b) of the Act classifies payments that become due and payable by the company to its employees during business rescue proceedings, to constitute post-commencement finance. Employees receive priority as post-commencement financiers in terms of Section 144(2). This entails that if an employee had any employment related claims in existence immediately prior to the commencement of business rescue proceedings, such employee would qualify as having a statutory preferred and unsecured claim.

[82] It is a known fact that the life blood of the NTI companies was the PCF (post-commencement finance). Hence payments to the various affected parties, namely the creditors and employees, are subjected to a ranking system. The rationale behind the ranking of post-commencement finance was to ensure that there was turn-around financing for the distressed entities.

[83] Unsecured pre-commencement claims rank below the claims of post-commencement claims. Accordingly the post-commencement claims are ranked in the following sequence:

83.1 the BRP’s remuneration;

83.2 the remuneration of the employees from the date of commencement of the business rescue proceedings;

83.3 secured creditors for any loan/supply of goods or services made after the business rescue proceedings commenced (secured post-commencement finance);

83.4 unsecured lenders or creditors for any loan supplied of goods or services made after business rescue proceedings commenced (unsecured post-commencement finance);

83.5 secured creditors for any loan or supply of goods made before the business rescue proceedings commenced;

83.6 employees for any remuneration that became due and payable before the business rescue proceedings commenced;

83.7 unsecured creditors for any loan or supply of goods and services made before business rescue proceedings. Hence the ranking system places claims that arose before business rescue proceedings last.[31]

[84] One of the main objectives of the current business rescue legislation is to ensure that job preservation is paramount. The BRP's reliance on Section 135(1)(a) of the Act was shortsighted. The BRP's conduct was contrary to the respective provisions of the Act, hence unlawful.

Failure to report and non-compliance with the PFMA and Treasury Regulations

[85] The following facts have been proven, namely:

85.1 the BRP had not complied with the PFMA, Treasury Regulations and related legislation;

85.2 the BRP failed to keep the MEC, as the executive authority, abreast of the status of the entities during the business rescue proceedings;

85.3 the BRP was not granted exemption from the Minister of Finance complying with the statutory prescripts of the PFMA.

[86] The first contention raised was that the BRP failed to implement and/or maintain effective, efficient and transparent systems of financial and risk management. The second contention concerned his failure to comply with his statutory reporting obligations relating to state enterprises.

[87] The BRP was required to regularly submit financial reports to COSATMA, the North West Provincial Treasury and the Provincial Government.[32] The NTI entities were accountable to report on matters concerning their affairs, including the funding received by COSATMA and GPDRT. This information had to be communicated via the MEC who was statutorily obliged to report to both Provincial Treasury and Provincial Legislature. It was evident from the requests for information from the HOD's office that there was no such financial reporting.[33]

[88] The BRP's explanation for his failure to respond to various correspondence from the HOD from September 2023 to 5 February 2024, as well as his failure to respond to the Portfolio Committee's request for information pertaining to the NTI companies once again illustrates his incompetence. [34]

[89] His particular response through his attorneys, namely that he had not prepared any financial reporting documents, is glaringly untenable.

[90] It was evident that the HOD sought information which was aligned to the BRP's reporting obligations to the Provincial MEC and Provincial Government. The BRP was requested to provide a report on the current financial operations and management of funds[35] received and how such funds were utilized, more particularly:

90.1 revenue/payments received from Gauteng Provincial Government;

90.2 revenue collected from ticket sales;

90.3 total amount owed to employees to date and reasons why employees have not been paid;

90.4 monthly management accounts for July, August, September, October, November and December 2023;

90.5 submission of financial statements for Provincial Treasury Audit preparations.

[91] There could be no assailable reason for the BRP not to have the current financial records available. To date no financial records have been prepared, nor submitted[36].

[92] In his defence the BRP argued that:

92.1 there was no obligation on him to report on the business rescue proceedings to COSATMA or provincial government,[37] as COSATMA/MEC has no locus standi in business rescue proceedings;

92.2 he had reported to the GPDRT on the state of the companies during the negotiation process and that was sufficient; and

92.3 he reported to the Auditor-General that the process was effectively managed and all payments were made in terms of the disbursement certificate which was fully disclosed;[38]

92.4 the BRP has managed to keep the bus operations afloat.

[93] It is settled law that the PFMA takes precedence over the Companies Act in the event there is a conflict between the provisions. Section 3(3) of the PFMA stipulates:

"If any conflict exists between the PFMA and another Act, the PFMA prevails."[39]

[94] Business rescue proceedings pertaining to state owned entities required of the BRP to comply with his reporting obligations. Even though the BRP endorsed the GTAC Report, which highlighted that a public entity is subject to the PFMA and is accountable to the provincial legislature, he failed to act in accordance therewith.

[95] Furthermore the GTAC Report recorded that the NTI's contracts with GPDRT would have expired at the end of March 2020 and the renegotiation of such contracts were inevitable. GPDRT had to ensure that NTI had a plausible plan to restructure its operations and that its own SCM and governance requirements were not violated when contracting with NTI. It was

imperative for the GPDRT not to expose itself to political embarrassment or allegations of financial misconduct in these circumstances. Accordingly the adoption of the business rescue plan was crucial for the GPDRT in its negotiations with the BRP.

- [96] The GTAC Report further recorded that since the NTI companies were actively seeking financial assistance from the provincial government, regard had to be given to Section 38(1)(j)[40] of the PFMA whereby an accounting officer has a duty to ensure that any entity (in this instance GPDRT) to which it transfers funds has systems and internal controls in place to manage the funds.
- [97] By virtue of Section 49 of the PFMA, every public entity must have an accounting authority which is accountable for the purposes of the PFMA, which is usually the board. In business rescue proceedings, the BRP however assumes the role of the NTI companies' accounting authority and external oversight is conducted through the Auditor-General's office and the provincial legislature.[41] In terms of Section 50(1)(c) of the Act, the BRP was thus required to disclose to the executive authority all material facts which, in any way, would have influenced the decisions or actions of such authorities.
- [98] The executive authority is defined in the PFMA as being the member of the Provincial Executive Council who is accountable to the provincial legislature for that public entity or in whose portfolio it falls. In casu, the executive authority is the MEC of COSATMA. The MEC hold public entities to account for their performance on the basis of their strategic plans, budget documents and annual reports. The MEC is responsible for the NTI companies and has control over them.[42]
- [99] The PFMA further imposes a financial responsibility on the executive authority. Even if the BRP had good reason to open the new bank accounts with FNB, it was still necessary for him to account to the MEC as well as the boards of the NTI companies. His transparent reporting obligations could in no way entail that the MEC intended to control the business rescue proceedings.
- [100] It was pointed out that the BRP had without the consent or approval of COSATMA ceded NWS' claims as security to third parties. He further encumbered NTI's immovable property to the value of R130 million in favour of Tansnat.
- [101] The BRP's limited appreciation of his statutory obligations are once again prevalent when he concluded the PCF agreements without seeking the approval of at least Treasury. The negotiated amounts were in excess of R1 million. Treasury's approval and oversight was paramount. Section 66(3)(d) of the PFMA dictates that the MEC for Finance in the province is the responsible person through whom monies can be borrowed.
- [102] I further reiterate that the PCF contracts expressly recorded that the relevant statutory and legislative approvals would have to be obtained. Even if I were to accept the BRP's explanation that he was required to act expeditiously, he was, in no way, absolved from his statutory obligations.

[103] His justification that there would be no harm, as the sale of the assets would augment cash flow issues and further fund operational expenses necessary to implement the GPDRT contracts, questions his competence. He simply failed to appreciate his reporting obligations. State enterprises are required to have efficient and transparent systems of financial management.[43] The NTI companies are required to be audited by the Auditor-General. In terms of Section 188 of the Constitution, the Auditor-General (AGSA) audits the accounts, financial statements and management of all departments or entities required by legislation.

[104] In conclusion, the proven facts demonstrates sheer incompetence and his failure to have acted in accordance with the relevant statutory prescripts.

DISPUTES OF FACT

[105] Having analyzed both the common cause and disputed facts as well as the proven facts, this court is required to determine if this matter can be resolved on the papers. The underlying objection raised by the BRP was that the application for his removal cannot be resolved in motion proceedings as insurmountable disputes of fact exist which require oral evidence of primary witnesses.

[106] Ultimately the test is whether the matter can be argued on affidavit or whether oral evidence of witnesses is necessary. It is settled law that a real and genuine dispute of fact exists where the court is satisfied that a party who purports to raise such dispute has, in its affidavit, seriously and unambiguously addressed the fact said to be disputed. The question before this court is whether there are real and genuine issues of fact which cannot be determined without the aid of oral evidence.

[107] The Plascon Evans rule entrenches the principle that in motion proceedings a final order may be granted if the facts stated by the respondent together with the admitted facts in the applicant's affidavit justify the order. Mere denials by the respondent of certain facts, which are alleged by the applicant, may not automatically raise a real genuine or bona fide dispute of fact. The denial by the respondent of a factual allegation in the applicant's founding affidavit must be real, genuine and bona fide before it can be considered prohibitive to the applicant being granted final relief.

[108] Therefore a court must be convinced that the allegations of the respondents are so far-fetched or clearly untenable that it is justified in rejecting them merely on the papers and without requiring oral evidence to be led.

[109] The applicant relied on Wightman[44] which highlighted that the disputes have to be looked at closely in order to determine if, in fact, such disputes are real, genuine or bona fide or if they are farfetched or clearly untenable, in which case the court is justified in rejecting them merely on the papers.

[110] The BRP relied on the approach set out in the Media 24[45] matter, arguing that the BRP's version should be accepted as it did not constitute bald, uncreditworthy denials, or untenable

explanations which could merely be rejected on the papers. Courts should be alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence.

[111] It was further contended that reliance on Wightman was flawed as the primary facts alleged by the applicant are highly controversial. Even if some facts are not controversial, the inferences sought to be drawn from these facts, are highly controversial. Hence the leading of evidence of the deponents

who filed confirmatory affidavits was necessary. This court should therefore be cautious as under cross-examination the court may come to a different finding.

[112] I am of the view that there are no real and genuine disputes of fact which require the aid of oral evidence. The issues in dispute are determinative on the papers. Where disputed versions were proffered, I have found such defences to be untenable and/or not good in law. The proven facts remain unassailable.

[113] The BRP's version that he had made successful inroads in the business rescue proceedings, particularly by managing to keep the business operations afloat, does not pass muster. It cannot be gainsaid that he did so to the detriment of the other affected parties.

[114] He was obliged to disclose his challenges as well as the unlikelihood of the NTI entities succeeding under business rescue, at the earliest. He was aware that business rescue proceedings could not continue indefinitely. There is no doubt that his conduct was serious. He failed to appreciate his responsibilities in terms of the Act. His conduct is measured against high professional and ethical standards.

[115] The next enquiry is to determine if his conduct justifies his removal as the BRP. I again refer to the decision of Knoop which is specific authority for the proposition that actual and/or potential prejudice has to prevail.

[116] It is demonstrably evident that, collectively, the NTI companies, the applicant as well as the employees have been prejudiced. It is a known fact that employees had not received their salaries for months and the applicant was left in the dark regarding the financial circumstances of the very entities which the applicant, through the MEC, is in control of.

[117] On the BRP's version, COSATMA had already provided over R292 million post-commencement funding. Moreover GPDRT provided R50 million in subsidies for a period of 10 months already (in total of R500 million). The BRP indicated that it will now need over R907 million to keep the entities afloat.

- [118] As things stand, the NTI entities find themselves in debt of around R1 billion. Prior to the business rescue proceedings, the debt was around R356 million. The financial predicament the entities find themselves now in is a far cry from what had been envisaged in the GTAC Report, namely a working capital of R250 million (in order to settle debts) and funding of R15 million per month for a period of 6 years.
- [119] I reiterate that although the GTAC Report recommended that business rescue proceedings may be a way out, it acknowledged that business rescue may not be the answer and thereby particularly recommended that the applicant seek further legal advice on both options, namely business rescue and liquidation.
- [120] Surely when the BRP faced the myriad of challenges, he was duty bound to conduct himself in an impartial manner which included being upfront with the affected parties. He had an obligation to advise that the prospects of the entities being rescued were far from successful. At the end of the day, the BRP's core duty was to continuously assess the financial prospects of the NTI entities and the extent of their financial distress, which in this case, he dismally failed to do.[46]

COSTS

- [121] The applicant persisted with its argument that the BRP should pay costs in his personal capacity and further be burdened with a punitive cost order. It was pointed out that he was forewarned of his incompetencies and was requested to resign on previous occasions.
- [122] Based on my findings, the BRP is the unsuccessful party. In exercising my discretion, I find that he should bear the costs, which costs are to be paid in his personal capacity. There is no reason why the entities under business rescue should be burdened with an adverse costs order. The BRP was steering the process and faulted on the decisions made.[47]
- [123] Furthermore as Tansnat entered the fray and joined issue with the BRP and particularly opposed this Section 139(2) application, I find that Tansnat should be jointly liable for the costs of this application.
- [124] It is settled law that if affected persons, including creditors, elect to enter the fray of litigation and actively participate therein, they do so at their own peril.[48]

THE COUNTER APPLICATION

- [125] I now turn to address the counter application. The parties in this counter application are the applicant and the first respondent together with the third, fourth and fifth respondents ("respondents"). The respondents sought an order that R615 million be paid into the NTT's accounts and that the payment be reflected as a subordinated non-interest bearing loan account. This counter application was belatedly instituted in June 2024, long after the main application was instituted.

- [126] I pause to reiterate that the only issue for determination in this application is whether the parties had reached an agreement that COSATMA would fund an amount of R615 million. This funding dispute emanated between the parties after the second draft plan was availed by the BRP.
- [127] At the hearing of this matter, counsel for the respondent requested that the counter application be referred to oral evidence or alternatively to trial. His argument was foreshadowed by the fact that it was permissible in law to approach the court before the hearing of the matter. He submitted that the balance of probabilities favoured the respondent's version that an agreement of R615 million was reached between the parties.
- [128] The respondents' case is premised on an alleged oral agreement concluded between the applicant's and BRP's legal representatives on 15 September 2023. As first prize, the first, third, fourth and fifth respondents seek payment from the applicants in the amount of R615 million. Upon amending their notice of motion, they seek in the alternative, an amount of R550 million. Their view is that this dispute can be resolved merely on the papers and without the need for oral evidence.
- [129] The applicant, on the other hand, sought for the dismissal of this application on the basis that: firstly, the disputes of fact were foreseeable; and secondly, the allegation of an agreement is devoid of merit.
- [130] The respondents' broad argument was premised on the understanding that funding on the part of COSATMA was obligatory. The applicant was at all times aware that funding from COSATMA was necessary for the NTI companies to remain in operation. Even the GTAC report recommended the funding issue had to be coordinated amongst the shareholder, management, the employees and the GPDRT.
- [131] Insofar as the evidence was presented, both parties relied on common correspondence and the chronology of events that occurred. I however pause to mention that the negotiations were conducted between the parties' legal representatives, who advised that they acted on the instructions of their respective clients, in this case the BRP and COSATMA.
- [132] The following turn of events are common cause, namely:
- 132.1 on 31 July 2023, both parties' legal representatives agreed that the plan would be prepared on the basis that funding would be provided by the applicant and the plan would thereafter be circulated to the applicant's legal representatives for their comments and discussion. This eventually resulted in the revised plan being circulated to the applicant's legal representatives on 18 August 2023;
- 132.2 on 30 August 2023 the applicant's legal team considered the revised plan and advised the applicant that there was an "in principle" agreement with the applicant for the funding of R500 million to recapitalize the company. The applicant's counsel had effected certain amendments to the draft revised plan. Paragraph 3.4 of the plan made mention of R500 million, and read:

“This process has been meaningful and successful to the extent that the BRP has reached an agreement in principle with the shareholder for the injection of R500 million to recapitalize the company. The basis of the agreement with the shareholder, the injection of the capital required, and the conditions attached are dealt with hereinafter”;

132.3 on 18 August 2023 a revised plan was circulated to the applicant’s legal representatives. The applicant’s legal representatives effected certain amendments;

132.4 on 12 September 2023 in response to the amendments a detailed memorandum was sent to the applicant’s attorneys;

132.5 on 13 September 2023 a further meeting took place to discuss and debate the applicant’s comments to the revised business rescue plan as well as the respondents’ attorney’s memorandum of 12 September 2023.[49] Although the meeting commenced, it was not finalized. An adjournment was sought until 15 September 2023.

[133] The parties part ways in respect of what transpired at the meeting on 15 September 2023. The respondents’ version is that at the meeting held on 15 September 2023 it was resolved that the applicant would provide capital in the sum of R615 million which would be allocated to pay the creditors and the recapitalize the companies in the manner provided for in the revised plan. Accordingly, the respondents in paragraph 251 of their affidavit alleged:

“A further meeting was held on Friday, 15 September 2023, at the Pretoria chambers of senior and junior counsel for the applicant,

with Mr Hlahla also in attendance. My legal representatives and I were in attendance and at this meeting the comments and final queries were discussed and resolved. It was agreed that the applicant would make available capital in the sum of R615 million to be allocated towards paying creditors and to recapitalize the companies in the manner provided in the then revised plan.”

[134] But at paragraph 252 they merely allege that only a request for the extensive funding was crafted jointly by both parties’ legal representatives:

“At the meeting, it was indicated that the applicant was willing to provide finance to an amount of R550 million. Having done the necessary calculations and projections, it was estimated (by me) that funding in the amount of R615 million would be required, and this was discussed and explained to the applicant’s representatives. In order to facilitate the process, a letter was prepared and sent during the meeting (from my attorney to the applicant’s attorney). The letter was prepared in conjunction with the applicant’s attorney, proposed the wording to be used, for purposes of presenting the request for funding in the amount of R615 million to the applicant. A copy of this letter is attached as “THS52””

[135] Thereafter on 18 September 2023, the amended business rescue plan was once again transmitted to the applicant’s legal representatives (“TH53”).

[136] In argument, the applicant drew my attention to the following facts:

136.1 firstly, Mr Hlahla, only had a mandate to negotiate up to R550 million. It was upon this basis that ‘THS52’ was jointly prepared by both parties’ legal representatives whereby a request was made for more funding in the amount of R650 million;

136.2 secondly, the relevant extract in Annexure ‘THS52’, a letter addressed to Mr Hlahla (the attorney of the applicant) read:

“The parties have in principle agreed the salient terms of the business rescue plan. However, we understand from you, Mr Hlahla, that the MEC has only provided him with the mandate to offer a total of R550 million to rescue the company.

As illustrated to you, this figure is not sufficient given the delays between the making of the offer in July, and the anticipated date of the adoption of the proposed plan. Given the increases in post-commencement finance, which was exacerbated by the delayed payment of the MEC and the non-payment of the GPDRT of standing kilometers in the amount of R104,924,303,42, the minimum amount required to persuade a sufficient number of creditors to vote in favour of the proposed plan is R615 million”

136.3 thirdly, it was highly improbable that the parties could have come to an agreement as the BRP was well aware that the funding was conditional. The applicant had insisted that certain conditions be included in the plan, namely that: no employee should be dismissed as part as the business rescue plan; the ABS contract should not be ceded; and the BRP should acknowledge that he has no right to interfere in the applicant’s decision as to the identity of the directors that were to be appointed for the NTI companies. It was argued that the said conditions were recorded in the second proposed draft rescue plan[50] but not in the third plan (‘TSH1’);

136.4 more importantly, on 15 September 2023, at the “without prejudice meeting”, when the BRP’s attorney made the counter-offer of R615 million, the applicant could not accept this counter offer as approval had to be sought to increase the amount. Annexure ‘THS52’ illustrated that only a request for R615 million was made to Mr Hlahla. There was no approval at that stage.

[137] At the end of the day, the issue for determination is whether or not the probabilities are in favour of the applicant, namely that an agreement had been entered into on 15 September 2023, that an amount of R615 million was agreed upon with the applicant.

[138] I have also noted that the applicant’s counsel indicated his disagreement with the contents of the relevant clause contained in the revised plan (‘TH53’) which read:

“... the amount of R615 million (less the business rescue cost) being the total of the distribution amount and the Opex amount, provided by the shareholder for the recapitalization of the company in accordance with the provision of this BR plan, which amount the shareholder has deposited into DSMH’s Trust Account held at a registered bank. The amount will be treated as a normal subordinated shareholder’s loan account, having no fixed term of repayment and is non-interest bearing.”[51];

The applicant’s counsel noted that the “amount needs to be discussed”. This infers that there could have been no confirmation of the R615 million funding amount, at the time.

[139] The BRP was well aware that confirmation had to be sought. Accordingly the BRP had through various communiques, namely on 2 October 2024, on 17 October 2024, and on 30 October 2024, sought such confirmation.

[140] To further illustrate this point, on 2 October 2024 the respondents' attorney expressed concerns in not receiving the applicant's confirmation regarding the funds. It recorded that there was no reply to the 15 September 2023 letter "whereby a minimum amount of R615 million would be required to persuade a sufficient number of creditors to vote in favour of the BR plan, given the continuous accumulation of PCF, including employees' salary claims".

[141] The BRP argued that it was reasonable to draw an inference that the applicant acquiesced to the amount of R615 million as he received no response after 15 September 2024. In my view, such assumption is clearly devoid of merit. The BRP was well aware that approval was required from COSATMA for the increased amount of R615 million.

[142] The aforesaid clearly illustrates that funding of R615 million could not have been agreed upon, in particular:

142.1 Annexure "THS52" merely records motivation for funding of R615 million. No approval was granted in this regard;

142.2 on 26 October 2023, the BRP, in the circular to the employees (which sets out the legal status of the business rescue proceedings), the BRP informs the employees that confirmation of the funding was awaited:

"On 15 September 2023 –

the last working session with the COSATMA legal team, in order to agree final salient terms of the business rescue plan;

On 18 September 2023 –

final amended business plan, incorporating the salient terms submitted to COSATMA legal team, for purposes of final instructions and confirmation of funding."[52];

142.3 the BRP, in the progress report, issued communication that there are governmental procedures that has to be followed for the R615 million funding to be released.[53]

142.4 the legal team, when considering the draft plan (Annexure "THS3"), had commented that the amount of R615 million funding had to be discussed;

142.5 in addition, other factors that had a bearing on the approval of the funding amount remained in dispute, namely the status of the recapitalization amount. The respondents held the view that the amount would not be an injection of capital, instead it would be a loan to the company and the loan would survive the adoption and implementation of the business rescue plan and will only become repayable once the company is financially able to do so.[54]

The Supreme Court of Appeal in Novartis^[55] reiterated the principle that:

“When parties are in the course of negotiating a contract and reach an agreement by offer and acceptance, the fact that there are a number of outstanding matters material to the contract upon which the parties may not have yet agreed upon may well prevent the agreement from having contractual force”;

142.6 lastly, even if the legal representatives negotiated that an amount of R615 million was required, it could by no means be an agreement that could be implemented upon. The legal representatives were only able to confirm funding upon receipt of the approval from COSATMA. No such approval surfaced. Mr Hlahla clearly could, in law, not have agreed to the amount without the necessary approval.

[143] The alternative relief sought, in my view, also has no merit. The pleadings lack the relevant allegations. It was never alleged that the parties reached an agreement of R550 million. All that was pleaded was that Mr Hlahla had the mandate to authorise an amount of R550 million. Moreover at no point had the respondents accepted the R550 million funding. Instead they made a counter proposal. It is settled law that for any agreement to be concluded, there must have been acceptance of the offer from the respondents.^[56]

[144] I have noted the BRP’s argument that he was not bound to the conditions imposed by COSATMA as it was not in the best interest of the entities and moreover the applicant, as a shareholder of state entities that required public funding, had no authority to demand that the conditions be adhered to. On this point, I again express that the BRP failed to appreciate that the COSATMA remains an affected party, and was entitled to deliberate in discussions regarding the plan. The BRP was obliged to confer with COSATMA before dispensing with the said conditions.

[145] The proposition in law stands that consultation was not intended to be a mere formality. This means that engagement after the decision-maker reached his decision is not compatible with a true consultation.

[146] On the conspectus of the evidence, I find that on the balance of probabilities it is not in favour of the respondents. The allegation that an agreement came into being, is devoid of merit. Accordingly, this counter application should be dismissed with costs.

[147] In exercising my discretion, there is no reason why the BRP should not be burdened with a costs order. The BRP, as the first respondent, is thus ordered to pay the costs of the counter application.

H. KOOVERJIE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant

(The Member of the Executive Council for COSATMA): Adv. NGD Maritz SC

Adv. JL Myburgh

Adv. AA Basson

Adv. J Hlongwane

Instructed by:

De Swardt Myambo Hlahla Attorneys

Counsel for the intervening applicant:

Adv. H Mukhavela

Instructed by:

The State Attorney North West

Counsel for the first to fifth respondents

(The Business Rescue Practitioner and the Companies): Adv. AJ Daniels SC

Adv C de Villiers-Golding

Instructed by:

Richter Attorneys

Counsel on behalf of Tansnat Coachlines (Pty) Ltd

and Ziggy Investments CC:

Adv. A Govender

Adv. M Dafel

Instructed by:

Cuzen Randeree Dyasi Inc

Counsel for the applicant (The Member of the Executive

Council for COSATMA) in the counter application: Adv NGD Maritz SC

Adv AA Basson

Instructed by:

De Swardt Myambo Hlahla Attorneys

Counsel for the first, third, fourth and fifth respondents

in the counter application:

Adv N Cassim SC

Date heard:

3-5 September 2024

& 26 September 2024 (counter application)

Date of Judgment:

21 November 2024

[1] In terms of the definitions in the PFMA, as the executive authority of the provincial department, he is accountable to the provincial

legislature for that department.

[2] provincial public entity is defined as: “(a) provincial government business enterprise ... which is accountable to a (iii) provincial legislature.”

[2] provincial public entity is defined as:

“(a) provincial government business enterprise ... which is accountable to a

(iii) provincial legislature.”

[3] The NTI companies are obliged by virtue of the Constitution to provide affordable commuter services and employment opportunities to the financially disadvantaged individuals of the community.

[4] Affected parties include shareholders who are entitled to notification of court proceedings, decisions, meetings and other relevant events concerning the business rescue proceedings and they may participate in court proceedings and formally in business rescue proceedings (Section 146 of the Act).

[5] SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017 (5) SA 1 (CC) at paragraph 9-11

[6] Annexure ‘FA10’ to the founding affidavit

[7] The Act specifically sets down time periods within which a BRP is required to execute his duties, namely: (i) the business rescue practitioner, upon his appointment, must inform all regulatory authorities of the commencement of the business rescue (Section 140(1)(a) of the Act); (ii) within 10 business days of being appointed, the BRP must give notice

of and convene and preside over separate meetings with the creditors and employees of the company (Sections 147 & 148 of the Act); (iii) within 10 days after the publishing of a business plan the BRP must convene and preside over a meeting of creditors and any other holders of the voting interest, for purposes of considering the plan (Section 151(1) of the Act); (iv) at least 5

business days before the meeting, the practitioner must deliver a notice of the meeting to all affected persons setting out the date, time and place of the meeting, the agenda and the summary of the rights of the affected persons to participate and vote at the meeting (Section 152 of the Act). The meeting may be adjourned

from time to time as is necessary or expedient until a decision regarding the companies' future has been taken (Section 151(3) of the Act).

[7] The Act specifically sets down time periods within which a BRP is required to execute his duties, namely:

(i) the business rescue practitioner, upon his appointment, must inform all regulatory authorities of the commencement of the business rescue (Section 140(1)(a) of the Act);

(ii) within 10 business days of being appointed, the BRP must give notice

of and convene and preside over separate meetings with the creditors and employees of the company (Sections 147 & 148 of the Act);

(iii) within 10 days after the publishing of a business plan the BRP must convene and preside over a meeting of creditors and any other holders of the voting interest, for purposes of considering the plan (Section 151(1) of the Act);

(iv) at least 5 business days before the meeting, the practitioner must deliver a notice of the meeting to all affected persons setting out the date, time and place of the meeting, the agenda and the summary of the rights of the affected persons to participate and vote at the meeting (Section 152 of the Act). The meeting may be adjourned

from time to time as is necessary or expedient until a decision regarding the companies' future has been taken (Section 151(3) of the Act).

[8] Section 140(3)(a) and Section 140(3)(b) reads: "(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 sections 75 to 77." See also *African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others* 2015 (5) SA 192 (SCA) at paragraph 35

[8] Section 140(3)(a) and Section 140(3)(b) reads:

"(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 sections 75 to 77."

See also African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others 2015 (5) SA 192 (SCA) at paragraph 35

[9] Diener N.O. v Minister of Justice and Correctional Services and Others 2019

(4) SA 374 CC at paragraphs 54

[10] The applicant's stance in paragraph 31 of the founding papers was: "31 After recent meetings involving the Provincial Legislature for the North West Province, COSATMA, SATAWU ... a unanimous decision was reached, enough is enough. We collectively concluded that we can no longer tolerate a situation where the BRP disregards the laws of the country, undermines the rights and dignity of the NTI companies' employees, creditors and commuters and show disrespect towards political structures established by the Constitution and other legislation to ensure transparency, accountability and said management of revenue, expenditure, assets and liabilities of the NTI public entities."

[10] The applicant's stance in paragraph 31 of the founding papers was:

"31 After recent meetings involving the Provincial Legislature for the North West Province, COSATMA, SATAWU ... a unanimous decision was reached, enough is enough. We collectively concluded that we can no longer tolerate a situation where the BRP disregards the laws of the country, undermines the rights and dignity of the NTI companies' employees, creditors and commuters and show disrespect towards political structures established by the Constitution and other legislation to ensure transparency, accountability and said management of revenue, expenditure, assets and liabilities of the NTI public entities."

[11] Knoop N.O. v Gupta and Another 2021 (3) SA 88 (SCA) at paragraph 19 to 23

[12] my underlining

[13] my underlining

[14] Sackville West v Nourse and Another 1925 (AD) at 535 where it was stated: "A person in a fiduciary, like a trustee, is obliged in dealing with ... the money of a beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks."

[14] Sackville West v Nourse and Another 1925 (AD) at 535 where it was stated:

"A person in a fiduciary, like a trustee, is obliged in dealing with ... the money of a beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks."

[15] Section 145(1)(b) "each creditor is entitled to- (b) participate in any court proceedings arising during the business rescue proceedings."

[15] Section 145(1)(b) "each creditor is entitled to-

(b) participate in any court proceedings arising during the business rescue proceedings."

[16] Annexures 'TZ8', 'TZ9' and 'TZ10' to Tansnat's answering affidavit

[17] TZ13 of Tansnat's answering affidavit, paragraphs 13, 14 and 15

[18] In paragraph 48.4 of the replying affidavit the applicant alleged: "Once it is found that Tansnat had overstated its claim to the amount of R336 million, it cannot be disputed that this is a serious

overstatement which justify a probable inference of fraud, in that Tansnat could not have reasonably and honestly believed its claim to be valid."

[18] In paragraph 48.4 of the replying affidavit the applicant alleged:

"Once it is found that Tansnat had overstated its claim to the amount of R336 million, it cannot be disputed that this is a serious

overstatement which justify a probable inference of fraud, in that Tansnat could not have reasonably and honestly believed its claim to be valid."

[19] It is not disputed that the HOD requested Provincial Treasury to conduct a verification audit of the creditors' claims in the NTI companies, particularly as the BRP refused to account to COSATMA's HOD to the Portfolio Committee as well as Provincial

Treasury.

[20] African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others 2015 (5) SA 192 (SCA)

[21] Vantage Goldfields (Pty) Ltd v Arqomanzi (Pty) Ltd 2023 (4) SA 368 (SCA) at paragraph 25

[22] The funding issue forms the genesis of the counter application, and will be traversed with in such application.

[23] Annexure 'FA28' to the founding affidavit

[24] In Cross-Med Health Centre (Pty) Ltd (in business rescue) and Others v Cross-Med Mthatha Private Hospital (Pty) Ltd and Another 2018 JOL 40146, the court reaffirmed that a practitioner has the right not to be obstructed in the exercise of his duties, and if they are so

obstructed they have a right to apply to court for relief enabling them to perform their functions. This relief may take the form of the removal of a director who impeded the practitioner in the performance of his duties.

[25] Section 135(1)(a) reads: "Any remuneration, reimbursement for expenses, or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings but it is not paid to the employee: (a) the money is regarded to be post-commencement financing."

[25] Section 135(1)(a) reads:

“Any remuneration, reimbursement for expenses, or other amount of money relating to employment becomes due and payable by a company to an employee during the company’s business rescue proceedings but it is not paid to the employee:

(a) the money is regarded to be post-commencement financing.”

[26] Section 144(2) states: “To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee immediately before the beginning of these proceedings, and had not been paid to the employee before the beginning of these proceedings, the employee is a preferred unsecured creditor ...”

[26] Section 144(2) states:

“To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee immediately before the beginning of these proceedings, and had not been paid to the employee before the beginning of these proceedings, the employee is a preferred unsecured creditor ...”

[27] In *Madodza (Pty) NLtd v Absa Bank Ltd and Others* 2012 ZAGPPH 161, 15 August 2012, the court was seized with the issue whether the enforcement action falls within the ambit of the moratorium. The court orders were obtained prior to the commencement of the business rescue proceedings. The court considered this issue against the

purpose of business rescue stating that the end result sought is to have the business continue as a going concern, thus attempting to secure and balance the opposing interest of creditors, shareholders and employees. It encapsulates a shift from creditors interests to a broader range of interest. The rationale is to preserve the business coupled with the experience and skill of employees. The court agreed with the contention raised by the applicant that execution and enforcement actions may not be instituted, and if already commenced, should be stopped until the written consent of the BRP or with the leave of the court. The fact that the BRP undertook to honour the pre-enforcement claims without uplifting the moratorium is an irregularity.

[28] THS1, paragraph 23.3

[29] my underlining

[30] *Cloete Murray N.O. and Another v Firststrand Bank Ltd t/a Wesbank* (20104/2014) [2015] ZASCA 39 (26 March 2015) at paragraph 32 the court stated: “[32] As to the meaning of the phrase ‘enforcement action’, in my view, Wesbank correctly submitted that, in our legal parlance, ‘enforce’ or ‘enforcement’, usually refers to the enforcement of obligations. In the context of s 133(1) of the Act, it is significant that reference is made to ‘no legal proceeding, including enforcement action’. (My emphasis.) The inclusion of the term ‘enforcement action’ under the generic phrase ‘legal proceeding’, seems to me to indicate that ‘enforcement action’ is considered to be a species of ‘legal proceeding’ or, at least, is meant to have its origin in legal proceedings. This conclusion is strengthened by the fact that s

133(1) provides that no legal proceeding, including enforcement action, ‘may be commenced or proceeded with in any forum’. (My emphasis.) A ‘forum’ is normally defined as a court or tribunal (see the Concise Oxford Dictionary 12 ed (2011)) and its employment in s 133(1) conveys the notion that ‘enforcement action’ relates to formal proceedings ancillary to legal proceedings. such as the enforcement or execution of court orders by means of writs of execution or attachment.”

[30] Cloete Murray N.O. and Another v Firstrand Bank Ltd t/a Wesbank (20104/2014) [2015] ZASCA 39 (26 March 2015) at paragraph 32 the court stated:

“[32] As to the meaning of the phrase ‘enforcement action’, in my view, Wesbank correctly submitted that, in our legal parlance, ‘enforce’ or ‘enforcement’, usually refers to the enforcement of obligations. In the context of s 133(1) of the Act, it is significant that reference is made to ‘no legal proceeding, including enforcement action’. (My emphasis.) The inclusion of the term ‘enforcement action’ under the generic phrase ‘legal proceeding’, seems to me to indicate that ‘enforcement action’ is considered to be a species of ‘legal proceeding’ or, at least, is meant to have its origin in legal proceedings. This conclusion is strengthened by the fact that s 133(1) provides that no legal proceeding, including enforcement action, ‘may be commenced or proceeded with in any forum’. (My emphasis.) A ‘forum’ is normally defined as a court or tribunal (see the Concise Oxford Dictionary 12 ed (2011)) and its employment in s 133(1) conveys the notion that ‘enforcement action’ relates to formal proceedings ancillary to legal proceedings. such as the enforcement or execution of court orders by means of writs of execution or attachment.”

[31] Dr E Levenstein, South African Business Rescue Procedure, page 9-94

[32] His conduct was contrary to Section 55 of the PFMA

[33] Head of Department of COSATMA

[34] Annexures ‘FA52’ to ‘FA54’ to COSATMA’s founding affidavit

[35] my emphasis

[36] Section 55(1)(a) of the PFMA stipulates that: (i) the accounting authority for a public entity must keep full and proper records of the financial

affairs of the public entity.

[36] Section 55(1)(a) of the PFMA stipulates that:

(i) the accounting authority for a public entity must keep full and proper records of the financial

affairs of the public entity.

[37] North West Provincial Government

[38] At paragraph 404.2 and 404.3 of the answering affidavit

[39] read with Section 5(4) of the Companies Act

[41] Section 188 of the Constitution requires the Auditor-General to audit and report on the accounts, financial statements and financial

management of all national and provincial departments.

[42] The term “control” is defined in the PFMA as “the ability to exercise powers to govern the financial and operating

policies of the entity”, namely to appoint or remove some or all of the members of the board of directors, or the governing body, appoint or remove the entity’s CEO, to cast all or the majority of the votes at meeting of the board, or equivalent

governing body, or to control all or the majority of the voting rights at the general meeting of the entity.

[43] Section 51(1)(a) of the Act

[44] Wightman t/a as JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paragraphs 11-13: “11. The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge. 12. Recognizing that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . .”

[44] Wightman t/a as JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paragraphs 11-13:

“11. The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.

12. Recognizing that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . .”

[45] Media 24 Books (Pty) Ltd v Oxford University Southern African (Pty) Ltd 2017 (2) SA (1) SCA as at paragraph 37

[46] In Commissioner for the South African Revenue Services v Louis Pasteur Investments (Pty) Ltd (in provisional liquidation) and Others 2022

- (5) SA 179 at paragraph 86 and 87, the court held: “86. The special position of a business rescue practitioner is set out in section 140(3)(a) and (b)

of the Act. Besides the duties and liabilities of a director of a company, the business rescue practitioner is also an officer of the court and expected to conduct himself with the utmost good faith and to provide an objective and reasoned approach in assessing the state of the business and then deciding whether or not to continue with business rescue. 87. The practitioner must act at all times in the furtherance of the purpose for which he was appointed and as soon as it becomes apparent that the company is unlikely to continue in existence on a solvent basis or if there is unlikely to be a better return to the company’s creditors or shareholders, to then apply to convert the business rescue to liquidation proceedings. He is specifically enjoined to do so by virtue of the office that he holds.”

[46] In Commissioner for the South African Revenue Services v Louis Pasteur Investments (Pty) Ltd (in provisional liquidation) and Others 2022

- (5) SA 179 at paragraph 86 and 87, the court held:

“86. The special position of a business rescue practitioner is set out in section 140(3)(a) and (b)

of the Act. Besides the duties and liabilities of a director of a company, the business rescue practitioner is also an officer of the court and expected to conduct himself with the utmost good faith and to provide an objective and reasoned approach in assessing the state of the business and then deciding whether or not to continue with business rescue.

87. The practitioner must act at all times in the furtherance of the purpose for which he was appointed and as soon as it becomes apparent that the company is unlikely to continue in existence on a solvent basis or if there is unlikely to be a better return to the company’s creditors or shareholders, to then apply to convert the business rescue to liquidation proceedings. He is specifically enjoined to do so by virtue of the office that he holds.”

[47] *Stander and Others v Schwulst and Others* 2008 (1) SA 81(C) paragraphs 35 to 37 The court therein dealt with a trustee who was removed due to his improper conduct. The court at paragraph 37 stated: “As regards the payment of trustees own costs in such cases, if he is removed for improper conduct or breach of trust, it would be obviously unjust for the trust estate to have to bear the expense of his unsuccessful defence ,,,”

[47] *Stander and Others v Schwulst and Others* 2008 (1) SA 81(C) paragraphs 35 to 37

The court therein dealt with a trustee who was removed due to his improper conduct. The court at paragraph 37 stated:

“As regards the payment of trustees own costs in such cases, if he is removed for improper conduct or breach of trust, it would be obviously unjust for the trust estate to have to bear the expense of his unsuccessful defence ,,,”

[48] *Vantage Goldfields SA (Pty) Ltd & Others v Arqomanzi (Pty) Ltd* [2022] ZASCA 185 (22 December 2022) paragraph 34 stated: “In support of its argument Lombard relies on s 145(1)(b) of the Companies Act, which provides that every creditor during business rescue proceedings is entitled to participate in any court proceedings arising during business rescue proceedings. Lombard further contends that affected parties, such as Lombard, who participated and opposed the application on reasonable grounds, ought not to be discouraged from doing so through the granting of costs orders against them. The argument is misplaced. Section 145(1)(b) does not ‘encourage’ affected persons to become involved in such

litigation, but merely affords an affected person the right to participate. If affected persons elect to enter the fray of

litigation and actively participate therein, they do so at their own peril”.

[48] *Vantage Goldfields SA (Pty) Ltd & Others v Arqomanzi (Pty) Ltd* [2022] ZASCA 185 (22 December 2022) paragraph 34 stated:

“In support of its argument Lombard relies on s 145(1)(b) of the Companies Act, which provides that every creditor during business rescue proceedings is entitled to participate in any court proceedings arising during business rescue proceedings. Lombard further contends that affected parties, such as Lombard, who participated and opposed the application on reasonable grounds, ought not to be discouraged from doing so through the granting of costs orders against them. The argument is misplaced. Section 145(1)(b) does not ‘encourage’ affected persons to become involved in such

litigation, but merely affords an affected person the right to participate. If affected persons elect to enter the fray of

litigation and actively participate therein, they do so at their own peril”.

[49] THS50 and THS51 of the answering affidavit

[50] Annexure “TSH3” to the respondents’ answering affidavit,

[51] my underlining

[52] My underlining

[53] On 29 September 2023, in the progress report to all the affected persons, the BRP records: “The BRP team has extensively engaged with the shareholder with regards to the revised option A.

This process involves high level, qualitative and quantitative discussions with the primary focus on rehabilitating the company

from its financially distressed position. This process has been meaningful and successful to the extent that the BRP, after

much negotiation, interaction, and extensive engagement with the shareholder and his legal representatives, are in the final stages of reaching an in-principle agreement on a workable BR plan, bearing in mind the social responsibility of the company. In this regard the complexities and governmental procedures to be followed to sanction the business plan and ultimate release of funds need to be borne in mind.”

[53] On 29 September 2023, in the progress report to all the affected persons, the BRP records:

“The BRP team has extensively engaged with the shareholder with regards to the revised option A.

This process involves high level, qualitative and quantitative discussions with the primary focus on rehabilitating the company

from its financially distressed position. This process has been meaningful and successful to the extent that the BRP, after

much negotiation, interaction, and extensive engagement with the shareholder and his legal representatives, are in the final stages of reaching an in-principle agreement on a workable BR plan, bearing in mind the social responsibility of the company. In this regard the complexities and governmental procedures to be followed to sanction the business plan and ultimate release of funds need to be borne in mind.”

[54] The BRP advised COSATMA that it has no voting rights in respect of the third plan. The BRP proffered that the financial means provided by the applicant constitutes a shareholder’s loan and that such loan should be subordinated, in terms of Section 145(4)(b) of the Act. The applicant, by virtue of its constitutional mandate, cannot seek to control the business rescue process through its vote. The financial contributions made by the applicant therefore did not constitute a post-commencing finance loan. Instead the funding constituted loans made by shareholders of the company. The applicant held a contrary view, namely that: (i) the BRP had at all times recognized the applicant as a post-commencement financier. It involved the applicant in the decisions pertaining to the plan; (ii) it was also pointed out that in terms of the revised business plan of 18 September 2023. The BRP recognised that COSATMA is a

creditor for the full value of the PCF

which it provided and COSATMA should be given a related party vote for the full extent of the PCF.

[54] The BRP advised COSATMA that it has no voting rights in respect of the third plan. The BRP proffered that the financial means provided by the applicant constitutes a shareholder's loan and that such loan should be subordinated, in terms of Section 145(4)(b) of the Act. The applicant, by virtue of its constitutional mandate, cannot seek to control the business rescue process through its vote. The financial contributions made by the applicant therefore did not constitute a post-commencing finance loan. Instead the funding constituted loans made by shareholders of the company.

The applicant held a contrary view, namely that:

- (i) the BRP had at all times recognized the applicant as a post-commencement financier. It involved the applicant in the decisions pertaining to the plan;
- (ii) it was also pointed out that in terms of the revised business plan of 18 September 2023. The BRP recognised that COSATMA is a creditor for the full value of the PCF

which it provided and COSATMA should be given a related party vote for the full extent of the PCF.

[55] *Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at paragraph 44

[56] In *African Banking Corporation of Botswana matter supra* at paragraph 21 the court cited *DH Brothers Industries (Pty) Ltd v Gribnitz* 2014 (1) SA 103 KZR paragraph 40-41 with approval "... In order to give rise to obligations on the part of both parties, an offer requires acceptance ... the

words offer and purchase when used together must mean that a contract is envisaged and, for such a contract to be

concluded, there must be an acceptance or agreements ..."

[56] In *African Banking Corporation of Botswana matter supra* at paragraph 21 the court cited *DH Brothers Industries (Pty) Ltd v Gribnitz* 2014 (1) SA 103 KZR paragraph 40-41 with approval

"... In order to give rise to obligations on the part of both parties, an offer requires acceptance ... the

words offer and purchase when used together must mean that a contract is envisaged and, for such a contract to be

concluded, there must be an acceptance or agreements ..."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2024/1236.html>

CASE PAGE https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-business_rescue_practitioner_removal-agpphc-2024-039123-24--6a3ea5193b1caa912980fbdd

Prepared on 11 October 2026 · Esheria