

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH  
GAUTENG DIVISION, JOHANNESBURG**

AFRICA

Reportable: Yes  
Of Interest to other Judges: Yes

Case Number: 2021/ 27241

28 November 2023      Vally J

In the matter between:

**ABSA BANK LTD**

Applicant

and

**GRAVITATE MULTI VIDEO CONTENT (PTY) LTD**

First Respondent

**JUSTICE KUDUMELA N.O.**

Second Respondent

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**JUDGMENT**

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Vally JIntroduction

[1] The applicant, ABSA Bank Ltd (ABSA), is a major creditor of the respondent, Gravitare Multi Video Content (Pty) Ltd (Gravitare). During June 2021 it applied for the provisional winding-up of Gravitare. On 17 August 2021, before the application could be heard, an application was brought to this court to place Gravitare into business rescue.<sup>1</sup> This court granted the application on 21 November 2021. It has been in business rescue since then. By operation of law the effect was that the

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<sup>1</sup> According to the founding affidavit the application resulted from a resolution of the board of directors of Gravitare (board). However, three applicants brought the application, two of whom are directors and shareholders and one is a creditor.

winding-up application was put into abeyance. In terms of s 133 of the Companies Act 71 of 2008 (Act) a moratorium is placed on all legal proceedings against Gravitare.<sup>2</sup> ABSA now seeks the authority of this court to resume the winding-up application. At the same time, it asks the court to order the winding-up of Gravitare. Should Gravitare be placed in winding-up the business rescue proceedings would effectively be terminated.

[2] ABSA, therefore, applies for leave to continue with its winding-up application as well as the upliftment of the s 133 moratorium. As the winding-up application was brought before Gravitare was placed in business rescue, and as the facts concerning the business rescue proceedings could only have arisen after Gravitare

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<sup>2</sup> Section 133 of the Act reads:

- (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
- (a) with the written consent of the practitioner;
  - (b) with the leave of the court and in accordance with any terms the court considers suitable;
  - (c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
  - (d) criminal proceedings against the company or any of its directors or officers; or
  - (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
  - (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner
- (2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
- (3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

was placed in business rescue, ABSA applies for leave to file a supplementary affidavit to support the claim for the winding-up of Gravitare.

[3] The application is premised on the fact that ABSA advanced monies to Gravitare: firstly, with a R19m loan; secondly, by funding an Instalment Sale Agreement (Instalment Agreement) in the amount of R4 180 275.40, and thirdly by granting it an overdraft facility. As a result, Gravitare became indebted to it in the amount of R14 087 165.61, which remains outstanding, due and is payable. Due demand has been made to Gravitare. It has not been paid. As a result, it is entitled, *ex debito justiae* to a winding-up order.<sup>3</sup>

[4] The application to uplift the moratorium and to continue with the liquidation proceedings is opposed by the second respondent, Mr. Justice Kudumela (Mr.Kudumela), whose involvement and role in Gravitare is more fully detailed below. He filed his notice of intention to oppose the application on 8 April 2022, but only filed his answering affidavit on 24 August 2022. Accordingly, he seeks condonation for its late filing.

#### Business rescue

[5] The business rescue application was premised, *inter alia*, on two important facts: Gravitare experienced financial distress and had stopped conjectured trading. The financial distress was to a very large extent caused by a deadlock in the management of Gravitare: the management, it is said, was paralysed. The prime reason underlying the application was a conjecture that despite the difficulties

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<sup>3</sup> *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* [2022] ZASCA 143 (24 October 2022) at [40].

endured by Gravitare, it could, nevertheless, be 'nursed back to solvency'. It was anticipated that the appointment of the Business Rescue Practitioner (BRP) would resolve the deadlock at management level, and the business could thereafter profitably operate. ABSA was served with the application but elected not to oppose it. The application was granted on 22 November 2021. The second respondent, Mr Kudumela, was appointed as the BRP.

[6] On 23 November 2021, ABSA's attorneys wrote to him informing him that it was a creditor of Gravitare; that Gravitare had breached the Instalment Agreement; that it had cancelled it; that Gravitare was indebted to it; that it was now demanding full payment of all monies owed to it, and that it sought access to assets in terms of certain rights conferred upon it by the said Instalment Agreement. He did not respond to the letter. On 6 December 2021 ABSA's attorney had a telephonic conversation with him, during which he undertook to respond to the letter. On 7 December 2021, the BRP issued a notice addressed to all creditors indicating that a first creditors' meeting would be held on 13 December 2021. He invited ABSA to the meeting. On 9 December 2021 he sent an email to ABSA's attorneys informing them that its claim would be dealt with at the scheduled meeting. ABSA's representative was not able to attend the meeting. On 15 December 2021, the attorney contacted him telephonically. During that conversation he informed the attorney that he was investigating ABSA's claims and would be seeking legal advice regarding the claims.

[7] On 13 January 2022 the BRP sent an email to the attorneys of ABSA wherein he annexed a voting form of a resolution to be taken by the creditors of

Gravitate. The resolution was to extend the time for the BRP to deliver a business rescue plan (Plan) to 18 February 2022. The reason for the extension of time was that the BRP had 'yet to receive ALL claims from creditors', and he 'also wishes to first be given the opportunity to revise and or dispute some of the received claims.' The attorneys responded by asking for a copy of the minutes of the meeting of 13 December 2021. The BRP failed to provide the minutes. On 21 January 2022 a representative of ABSA sent an email to the BRP imploring him to furnish details of the whereabouts of the assets so that ABSA could acquire possession thereof. He failed to respond to the email. Further correspondence was sent to him in this regard, but he ignored them. The attorneys wrote to him on 26 January 2022 repeating their request for information on the whereabouts of, and access to, the assets. He ignored the messages. The attorneys wrote again on 27 January 2022 repeating the same request. He finally responded on 31 January 2022 saying he 'had to take counsel's advice regarding [the] letter and [he] will respond immediately after counsel's advice.' On 1 February 2022 the attorneys sent an email to him again reminding him of the numerous requests for access to the assets. At the same time they informed him that ABSA did not support the call for an extension of time for the publication of the Plan, and that he was in breach of the provisions of the Act by not publishing it. Again, he failed to respond to the email. Two more emails were sent to him – one on 9 February and one on 15 February – repeating the same request. Both emails went unanswered. ABSA appointed an agent, Mr de Kok, to liaise with the BRP on the whereabouts of the assets. Upon making contact with him on 14 February 2022, Mr de Kok was informed that he – the BRP – was taking advice from his legal counsel and would revert. Despite the promise he failed to revert. On 17 February 2022 the BRP wrote to ABSA's attorneys stating that he

did not receive ABSA's votes regarding his proposed resolution of 13 January 2022; that he was seeking advice; that he would revert, and that 'it would be difficult to complete the Plan without an amicable way forward with Absa.' On 18 February 2022 he wrote to creditors of Gravitare, including ABSA, requesting an extension of time until 31 March 2022 because (i) he was yet to receive plans from the creditors, (ii) was still taking legal advice on ABSA's decision to cancel the Instalment Agreement and (iii) no Plan was possible until 'the matter with Absa' is resolved. On 21 February 2022 ABSA's attorneys wrote a lengthy letter to the BRP recording that he had failed to respond to many of the emails sent to him by the attorneys and by employees of ABSA; that he had failed to permit ABSA to collect its assets or to even allow ABSA to inspect them for valuation purposes; that he had failed to perform his duties in terms of the Act and that ABSA would, if it did not receive an adequate response to its requests, institute proceedings against him. He failed to respond to the letter.

[8] It bears mentioning at this stage that the BRP recognised ABSA as a creditor from the moment he was appointed, despite saying that he was busy investigating its claim. And very early on in his tenure as the BRP he sent ABSA a 'proxy vote' asking it to indicate its view on extending the deadline for the delivery of the Plan. Also, the directors that brought the business rescue application had in that application recognised ABSA as a creditor.

[9] One month later, on 22 March 2022, ABSA duly served the present application on the BRP. The BRP responded with an answering affidavit on 24

August 2022, and, on the same day, made an application for condonation for the late filing of the answering affidavit.

#### Condonation application

[10] The BRP claims that he did not unduly delay in filing his answering affidavit. He says that he formally declared a dispute with ABSA on 1 April 2022 over its breach of another agreement concluded between ABSA and Gravitare, an Enterprise Sale Agreement (ESD Agreement). The dispute should be dealt with through arbitration in terms of the ESD Agreement. He has engaged with ABSA between 4 April 2022 and the end of June 2022 in an endeavour to get ABSA to agree to refer the dispute concerning ABSA's alleged breach of the ESD Agreement to arbitration. He did not file the answering affidavit because he believed that the best way to deal with Gravitare's affairs was to pursue the dispute resolution process in terms of the ESD Agreement. Further, he had terminated the services of his previous attorneys and had appointed his present attorneys. He does not say when this was done. He simply says that his present attorneys were instructed to instruct counsel to consider the matter, and he was only able to secure a consultation with counsel on 28 July 2022. He needed to obtain funds to oppose the application, and to pursue the arbitration, as Gravitare does not trade and does not have funds. He has succeeded in securing funds. He does not say how much funds he has secured and from whom. He claims that Gravitare has a *bona fide* defence to ABSA's claims, which needs to be pursued. Hence, the late filing of the answering affidavit should be condoned.

[11] The BRP fails to mention that: (i) he was informed on 4 April 2022 that he should raise any issues he has with ABSA in his answering affidavit; (ii) on 4 May 2022 he was informed that ABSA was determined to proceed with the liquidation application; (iii) on 26 May his erstwhile attorney was served with a notice setting down this application on the unopposed roll of 25 August 2022; (iv) on 1 July 2022 he was told once again that he had failed to serve his answering affidavit which was due for some time already; (v) on 28 July 2022 his present attorney wrote to the attorney of ABSA requesting to be given access to the Caselines files for purposes of attending to the matter; (vi) three weeks later, on 22 August 2022, his attorney contacted ABSA's attorney asking for copies of two annexures to the founding affidavit as the ones on Caselines were not legible, and (vii) on 15 August 2022 he issued his July 2022 report wherein he states that he would be responding to 'Absas liquidation in due course'. These factual omissions constitute a failure to comply with his duty of candour to this court. The omitted facts also reveal that he was aware on 4 April 2022 that the clock for the filing of his answering affidavit was running. Thereafter, once the time period had expired, he was reminded on numerous occasions that he was in default and needed to apply for condonation, which application would be opposed. He simply ignored all these reminders.

[12] The BRP is required to explain his delay in full. The explanation must cover the entire period of the delay. Moreover, the explanation must be reasonable.<sup>4</sup> This he has not done. He simply opted to provide a broad superficial explanation in the hope that it would suffice.

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<sup>4</sup> *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) at [22].



[13] He says that he was seeking legal advice on ABSA's claim, but this he commenced doing in January 2022, well before the present application was instituted. He says that he declared a formal dispute in April 2022, and was hoping to secure ABSA's co-operation in referring the dispute to arbitration. However, ABSA told him immediately, in robust language, that it was of the view that he did not have the authority to proceed to arbitration and that it remained committed to continuing with this application. It had reminded him on numerous occasions to file his answering affidavit, but he just ignored them. He does not explain to this court why he failed to heed the reminders. As soon as ABSA served upon his erstwhile attorneys a notice of set down on the unopposed roll he should have known that it was determined to pursue this application. Having been told from the inception that his efforts to initiate arbitration proceedings were stillborn, it was not only unreasonable, but foolhardy, for him to still try to secure its co-operation. In fact, not once did he inform ABSA that he would not file his answering affidavit because he was still trying to secure its co-operation. This exposes him to the allegation that he engineered this version at the time the answering affidavit was drafted. Put differently, the inference that his explanation was an afterthought is not an unreasonable one.

[14] The inadequacy of this explanation justifies a dismissal of this application for condonation, unless he is able to put up a *bona fide* defence to ABSA's claim which has a very good prospect of success.<sup>5</sup> However, if the explanation is so bad, the court is entitled to ignore the merits of the defaulting party's case:

' ... the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be

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<sup>5</sup> *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C – F.

that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. ... But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits.<sup>6</sup>

[15] The BRP does not address the issue of prospect of success in his condonation explanation. He says that he incorporates the entire contents of his answering affidavit into the founding affidavit supporting his application for condonation. This really is inappropriate. Nevertheless, I will, adopting a benign view, assume that he means to say that he attends to the issues of the *bona fide* defence and its prospect of success in the answering affidavit, and therefore I will have regard to it.

[16] The BRP raises four points *in limine* in his answering affidavit. They are, unfortunately not articulated intelligibly and are presented in a garbled manner. However, they can be summed up as follows:

- (i) In terms of the ESD agreement any dispute between ABSA and Gravitare has to be referred to arbitration. ABSA has failed to comply with the terms of the ESD agreement, as a result of which Gravitare has a substantial claim against ABSA. A dispute to this effect has been referred to arbitration. By pursuing the winding-up application ABSA is attempting to stultify Gravitare's claim against it. To achieve this ABSA 'is simply misusing (i.e. in *fraudem legis*) the [Act] in an attempt to obtain a winding-up order in (sic)

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<sup>6</sup> *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 767J – 768B; See also: *Collett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC).

circumstances.' For this reason, the winding-up application should be dismissed.

- (ii) ABSA has failed to join parties who have a substantial and direct interest in the winding-up application. They are the three shareholders of Gravitare who resolved to place Gravitare into business rescue. As such, the winding-up application is not properly before court.
- (iii) The directors of Gravitare as well as himself - the BRP - have a direct and substantial interest in the application and therefore should have been joined to the application. Failure to do so results in the application suffering from a fatal misjoinder.
- (iv) The court should dismiss the application on the basis of the first, alternatively the second or the third points *in limine*. And the Companies and Intellectual Property Commission (CIPC) should be joined to the proceedings.

[17] The points *in limine* are, quite frankly, bereft of any merit. There is no legal obligation on ABSA to join any party to the winding-up application. Its case is that Gravitare is indebted to it; the debt is due and payable; Gravitare is unable to pay it and is therefore commercially and factually insolvent. In addition, Gravitare's shareholders and directors are engaged in a conflict which is not only bruising but which has paralysed its operations (a fact that is admitted in the business rescue

application), to the point where it has ceased to trade. It is on these two grounds that ABSA asks this court to place Gravitare in final winding-up. None of the points *in limine* disturb this cause of action.

[18] Unfortunately, the unintelligibility is not limited to the points *in limine* raised by the BRP. It pervades his entire answering affidavit.

[19] Additionally, the affidavit is replete with allegations based on hearsay and with argumentative submissions.

[20] The BRP contends that Gravitare has a claim of R25 782 151.50 against ABSA as a result of ABSA failing to provide work to Gravitare, which it was obliged to do in terms of the ESD agreement. It is this claim that he wishes to pursue. Relying solely on the claim, he denies that Gravitare is factually insolvent. He says that the claim, which if determined in Gravitare's favour, would extinguish ABSA's claims against Gravitare. He fails to address the issue in any detail. Had he done so he would have realised that the ESD Agreement contains a number of provisions immunising ABSA from the very claim he says he wishes to pursue. He says that the claim is for loss of gross profits. He gives no details of how he calculates the gross profits. In any event and much more importantly he - and his legal representatives - ought to know that a loss of gross profits does not constitute recoverable damages suffered by an innocent party. There are therefore very slim, if any, prospects of success for the claim he says Gravitare has against ABSA.

[21] To sum up:

- a. His explanation for the delay in filing his answering affidavit is woefully inadequate;
- b. He is unable to demonstrate that Gravitare has a *bona fide* defence which has any real prospect of success against ABSA's application for its winding-up.
- c. Gravitare has no funds to finance the litigation he intends to institute.
- d. It cannot seriously be disputed that Gravitare is indebted to ABSA and that it is unable to pay the debt.
- e. In short, Gravitare does not have a *bona fide* defence to the winding-up application of ABSA.

[22] Consequently, the application for condonation for the late filing of the answering affidavit should be dismissed. There is however a matter to which this court cannot turn a blind eye. It is for this reason that the answering affidavit should be admitted. It concerns the conduct of the BRP as revealed by the undisputed facts. It is to that, that I now turn.

#### The Act and the conduct of the BRP

[23] The conduct of the BRP has to be assessed according to the duties imposed upon him by the Act.

[24] In terms of s 141 of the Act, a BRP must 'as soon as is practicable after being appointed, ... investigate the company's affairs, business, property, financial situation and after having done so, consider whether there is any reasonable

prospect of the company being rescued.’ He is therefore obliged to assess the prospect of the company continuing with its operations in the future given that it is experiencing financial distress. Section 147 of the Act compels a BRP to ‘convene and preside, over a first meeting of the creditors’ within 10 days of his appointment. At that meeting he is to inform the creditors as to whether he believes the company can be rescued. The BRP claims to have held such a meeting, but has failed to furnish any evidence to demonstrate the veracity of his claim. He does not annex a copy of the minutes of the meeting. He claims to have informed the meeting that he believes that there is a reasonable prospect of rescuing the company. In my view, the belief must be grounded in facts. A BRP must collect and collate the facts (some of them, would no doubt be tentative) concerning the financial distress experienced by the company within 10 days of his appointment; analyse those facts in order to form an opinion or hold a belief (the word employed in the Act) as to whether there is a reasonable prospect of the company being rescued or not. The reasons for the belief would have to be rational (i.e. grounded in facts) at the very least, and would have to be lucidly articulated. In other words, there must be some conviction to the belief.

[25] In the present case, the BRP would have had knowledge of, and access to, the liquidation and the business rescue applications, where he would have discovered that Gravitare does not trade and is enmeshed in a paralysing conflict between some of the shareholders and directors. A third relevant fact would have been that ABSA did not oppose the application for business rescue. His belief, however, would have to be independent of what the applicants for business rescue and ABSA held or said in the two applications. If the belief and the reasons thereof

were orally presented, then these would have to be reflected in the minutes of the meeting. As the BRP has not annexed the minutes of the meeting there is no way of knowing whether there is any substance to his belief.

[26] A BRP is obliged to,

‘after consulting the creditors, other affected persons, and the management of the company, ... prepare a business rescue plan for consideration and possible adoption at a meeting of the creditors.

...

The business rescue plan must be published within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by-

- (a) the court, on application by the company; or
- (b) the holders of a majority of the creditors' voting interests.’<sup>7</sup>

[27] The BRP did not publish the Plan within the prescribed 25 days of his appointment. He was reminded on numerous occasions that he had not delivered the Plan. He simply ignored the reminders.

[28] A business rescue process is designed to have a limited timespan. It is not ‘intended to continue indefinitely.’<sup>8</sup> It is designed to address the issue of the financial distress experienced by the company expeditiously,<sup>9</sup> and to eventually conclude with a resolution that either rescues the company, or with a termination of the business rescue process. Section 132(3) of the Act provides that if business rescue proceedings are not completed within three (3) months of those proceedings commencing, or ‘the court on such longer period, on application by the’ BRP may allow, then the BRP must prepare and update a report by the end of each and every month for as long as the proceedings endure. He must deliver that report to the

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<sup>7</sup> Section 150(5) of the Act.

<sup>8</sup> *Gupta v Knoop NO and Others* 2020 (4) SA 218 (GP) at [27].

<sup>9</sup> *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) at [10].

court if the process commenced by an order of court, or to the CIPC in all other cases, and to all other affected persons. In this case the proceedings continued for almost two years and still continue. The BRP does not dispute that the court has not extended that lifespan of the business rescue proceedings beyond the three-month period prescribed in s 132(3) of the Act.

[29] He was informed by representatives of ABSA on 10 May and 24 May 2022 that he failed to comply with his obligations as prescribed in the Act. He ignored the messages. On 1 July 2022 a representative of ABSA wrote a lengthy letter to him informing him, *inter alia*, that he had not filed and/or published a single report with the Commission. On 5 July 2022 at 23:42 the BRP sent an email to certain persons, including the attorney of the applicant, attaching reports for the months of May and June 2022. On the same day at 23:44 (2 minutes later) he sent another email to the same persons annexing the reports for the months of March and April 2022. Thereafter, he sent the July 2022 report on 15 August 2022, the August 2022 report on 15 October 2022, the September report on 18 October 2022. There are no reports for the months following, i.e. for October 2022 to October 2023. At this point it is necessary to mention that the BRP saw fit to file a supplementary affidavit – which he sought to have admitted, the day before the hearing on 13 November 2023- to which he annexed the Plan. He could have annexed the missing reports to that affidavit, if they exist. The supplementary affidavit is dealt with in greater detail below.

[30] The reports, as is shown in the discussion below, are devoid of any substantial facts. All the reports consist of three paragraphs. The first one is an



'Introduction' which merely iterates that the report is presented in terms of s 132(3) of the Act. The second paragraph is designated 'Disposal of the Company'. It is the paragraph that constitutes the substance of the report, and it is the contents thereof that are intended to comply with the BRP's statutory duty to furnish a report 'on the progress of the business rescue proceedings and to update' it monthly. The third paragraph merely informs creditors that should they have any queries regarding the report they should contact him per his email address. As the first and third clauses add no value to the reports they are not quoted in the discussion that follows.

[31] The March 2022 report, which is titled 'First Business Rescue Report'<sup>10</sup> states:

- '2 Disposal of the Company
  - 2.1 The BRP held the meeting of the first creditors and also received claims from creditors. During the first creditors meeting with creditors, The BRP indicated that the reasonable prospects of rescuing the company will be depended on the dispute resolution with ABSA and or source potential investors.
  - 2.2 The BRP has since issued three proxy votes for the extension of business rescue plan due to the ongoing dispute resolution between Gravitare and ABSA.
- 3 Conclusion
 

Creditors may email the BRP on ... should they have queries regarding this report.' (Quotation is verbatim.)

[32] The report as we know was only furnished on 5 July 2022 at 23:42. It does not give any details of the meeting, nor are the minutes of the meeting attached. It does not provide the list of creditors with the amounts claimed by creditors; a list of assets or a statement that it has no assets; information that Gravitare does not

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<sup>10</sup> While I comment on the contents of the report, it is important to bear in mind that these reports were not presented to ABSA until July 2022 and only after ABSA accused him of failing to deliver them as per his obligation in terms of s 132(3)(b)(i) of the Act.

trade, and the names of the three creditors with proxy votes. They are also not informed how much his fees are, and who is paying them. Importantly, no decision is taken on the prospect of saving Gravitare.

[33] The April 2022 report, which is titled 'Second Business Rescue Report', states:

- '2 Disposal of the Company
  - 2.1 The BRP wishes to advise that his efforts for dispute resolution still continues.
  - 2.2 The BRP also wishes to that ABSA filed for the application to continue winding-up the company.' (Quotation is verbatim.)

[34] There is no longer any reference to the 'proxy votes' he issued to three creditors asking them to indicate if they agree to extend the time period allowed for the delivery of the Plan. He provides no details of his 'efforts for dispute resolution', which presumably is a reference to his declaration of a dispute with ABSA. He does not inform the creditors that he has declared a formal dispute with ABSA and intends to invoke the arbitration clause. This is very important, as he intends to incur costs on behalf of Gravitare, and they need to know about it so that they can decide if they approve of his conduct.

[35] The May 2022 report, which is titled 'Third Business Rescue Report', states:

- '2 Disposal of the Company
  - 2.1 The BRP hereby advises that he called for the creditors meeting on the 24<sup>th</sup> of May in terms of the section 145(1d) and as an independent person allowed creditors to vote for or against the winding-up of the company.

- 2.2 The BRP will be responding to the winding-up application on the basis of the votes of the creditors' votes.' (Quotation is verbatim.)

[36] It has to be remembered that ABSA had written to him on more than one occasion informing him that he was in breach of his statutory duties. He has not placed any evidence before this court demonstrating that he had called for this meeting that was allegedly held on 24 May 2022. He also does not say in his report which creditors attended the meeting, what the resolution was that he placed before the meeting, which creditors voted on the resolution and what the result of the votes was. Instead, he informs the creditors that he will be 'responding to the winding-up application on the basis of' the votes'. But since he does not say what the result of the voting was, no creditor is enlightened as to whether the steps he intends to take are consistent with the vote.

[37] The June report, which is titled 'Third Business Rescue Report', - in fact all reports that follow are titled 'Third Business Rescue Report - reads:

- 2 Disposal of the Company
  - 2.1 The BRP is yet to file the answering affidavit for the winding-up application since he was still counsel advices.' (Quotation is verbatim.)

[38] There is no indication as to when he sought counsel's advice, who is paying for the services of counsel or how he intends to fund the expenditure he has already incurred or is just about to incur. This being a report for creditors it is important that he places such information before them as it has consequences, which could be prejudicial to their interests. He is thus duty-bound to bring it to their attention.

[39] The July 2022 report, titled 'Third Business Rescue Status Report' reads:

‘2 Disposal of the Company

2.1 The BRP hereby advice that he secured the services of the legal counsel team who will be responding to ABSA’s liquidation application in due course.’  
(Quotation is verbatim)

[40] He does not provide a copy of the advice he has obtained from counsel justifying his decision to adopt this particular course of action. He fails to mention that he has been harangued by ABSA for failing to file the answering affidavit. He does not mention that he is way out of time with the filing of his affidavit and that he will be applying for condonation. He does not say when the affidavit will be filed – in fact the affidavit was only filed on 24 August 2022 – a whole three weeks after he told creditors he would be filing it. He does not say who is funding the costs he has incurred and continues to incur.

[41] The August 2022 report, ‘Third Business Rescue Status Report’ reads:

2 Disposal of the Company

2.1 The BRP hereby advice that the BR’s appointed legal team filed an answering affidavit and founding affidavit on the August 24<sup>th</sup>.

2.2 The BRP will be waiting for ABSA’s answering affidavit.’  
(Quotation is verbatim.)

[42] He does not attach the answering affidavit or the founding affidavit (he obviously meant to say the application for condonation) to the report for creditors to consider the merits of his opposition, and the merits of his application for condonation.

[43] The September 2022 report, ‘Third Business Rescue Status Report’ is the only one that provides some detail about his efforts to rescue Gravitare. It reads:

- '2 Update on ABSA's application for the re-enrollment of liquidation application
- 2.1 The BRP has filed an opposing affidavit on 24 August 2022, with an application for the condonation for the late filing of same. The answering affidavit is attached hereto.
  - 2.2 By agreement the application was removed from the unopposed motion roll with the Court ruling that the costs be costs in cause. A copy of the Court order is attached.
  - 2.3 ABSA has as yet not filed a replying affidavit to the BRP's answering affidavit, and the BRP has been informed that ABSA is out of time for filing the same.
  - 2.4 ABSA, as yet, has not enrolled the re-enrollment of the liquidation application on the opposed motion roll, and no communication has been received from ABSA of its intention to do so.
- 3 ABSA's Claims against Gravitare and Gravitare's counter claim against ABSA
- 3.1 Upon receiving legal advice, the BRP wish to bring to the attention of all affected parties that ABSA's claims are disputed on the grounds *inter alia* that the overdraft agreement has lapsed on 28 February 2018 and is of no force and effect, that ABSA is in breach of its Financial and Banking undertakings and aspects thereof *inter alia* that ABSA has breached the [ESD agreement].
  - 3.2 The BRP also wishes to highlight that according to the prevailing evidence, ABSA's breach of the [Agreement] has caused Gravitare a total sum of ZAR 25,782.151.50 (exclusive of VAT) in loss of gross profits (*Twenty-five million, seven hundred and eighty-two thousand, one hundred fifty one rand and fifty cents*).
  - 3.3 The counter claim significantly exceeds ABSA's (invalid) claims against Gravitare.
  - 3.4 ABSA has as yet not responded to the averments as contained in the answering affidavit.
  - 3.5 ABSA has so far not acceded to requests of the BRP for institution of the dispute resolution procedures as agreed in the [ESD Agreement].
  - 3.6 A formal claim will be lodged against ABSA for payment of the ZAR 25,782,151.50.
- 4 Loan to related party: Call-up and demand for repayment

- 4.1 Gravitate has made a loan of ZAR 9,056,180 to Gravitate Investment properties (Pty) Ltd (balance reflected in the Financial Statements as at 31 March 2020) and will call up the loan.
- 4.2 The BRP will be responding to the winding-up application on the basis of the votes of the creditors' votes.
- 4.3 It is expected that the loan proceeds would be in excess of ZAR 7,000.000.00.

## 5 Conclusion

It is proposed that the BRP consult with the affected persons and the directors in order to prepare a business rescue plan considering what is stated above.

A formal demand for the repayment of the loan will be made in the week.' (Quotation is verbatim.)

[44] A scrutiny of the report reveals a number of shortcomings therein. Some of the pertinent ones are:

### Paragraph 3

- a. He does not attach the legal advice he received so that creditors can themselves assess the validity or reasonableness thereof.
- b. He refers to 'prevailing evidence' of a claim by Gravitare of R25 782 151.50 but fails to outline the evidence so the creditors are not able to assess the validity or reasonableness of the claim thereof.
- c. He fails to mention that the claim that is unliquidated will still have to be proved.
- d. He says the claim is for gross profits but should know that a loss of gross profits does not constitute the damages a party is entitled to.

### Paragraph 4

- e. The first time he mentions an asset in the form of a loan is in this report. He also, for the first time, refers to the 'Financial Statements as at 31 March 2020'. These are not annexed to the report. There is no evidence that he has ever furnished these to the creditors.
- f. He provides no details about his expectation for the proceeds of the loan to exceed R7m, making it impossible for the creditors to assess the reasonableness of this expectation.

#### Paragraph 5

- g. This is the second time he refers to the outstanding Plan. The first time was in his March 2022 report, and there he says that he issued 'three proxy votes for the extension' of the Plan. Having said nothing of the votes thus far, and now asking creditors to agree to the extension of the time to deliver the Plan, the only inference that can be drawn is that he has not been able to secure authorisation from the creditors for an extension of the time period set out in s 150(5). The fact that he was seeking authorisation from the creditors is also evidence that he certainly was not authorised by a court order to extend the time.

[45] Those are some of the specific issues that arise from the BRP's reports. But there are fundamental problems with all of them. None of the reports contain any real or meaningful account of Gravitare's business operations, financial status

or of the BRP's efforts to raise post commencement finance. A BRP must at all times be completely open, transparent and candid with the creditors and with employees, if there are any. His reports must reflect this openness, transparency and candour. He must indicate what assets the company has, which particular asset is encumbered and to which creditor it is encumbered, what its liabilities are and which liability. They must contain all the information concerning the financial distress it experiences so that the affected persons – employees and creditors – can take an informed view on the future of the company. The reports do not inform the creditors of why the Plan was still not finalised or when it will be finalised.

An application to file a supplementary affidavit

[46] This matter was heard on Monday 13 November 2023. On the afternoon of Friday 10 November 2023, the BRP's attorneys sent an email to my registrar attaching an application to file a supplementary affidavit. The application was served on ABSA's attorneys the same day. The notice of motion, founding affidavit and annexures thereto consist of 144 pages. The application was not indexed, nor paginated. ABSA had no opportunity to address the contents of the affidavit and asked that it should be disallowed. There is, however, an important reason for allowing it. It is to show that the averments contained therein raise serious questions about the candour of the BRP.

[47] The BRP claims that the reason for filing the application only on 10 November 2023 was because 'the facts and the evidence contained in' the affidavit 'only came into existence after 24 January 2023, the date on which the replying affidavit in the intervention and condonation application was filed.' This is simply



untrue. Annexed to the affidavit are six letters he is said to have received from entities he claims are creditors of Gravitare. One letter is undated, three are dated 12 December 2022 and two are dated 13 December 2022. This is before 24 January 2023 which is when he filed his replying affidavit. The letters could have been explained in, and annexed to, that affidavit. The contents of the letters are really the same. They all say that they support the continuation of the business rescue process, and that the publication of the Plan 'can be extended until the dispute between ABSA and Gravitare is finalised.' Furthermore, while given an open ended mandate not to deliver the Plan until the dispute with ABSA was 'finalised' he saw fit to deliver one on 31 August 2023.

[48] In the Plan he says that he had a 'First employees' meeting on 13 December 2021', but later on says that a 'first meeting with the Employee was convened on 04 November 2021.' Nowhere does he annex the minutes of the meeting – not to his reports, his answering affidavit, his replying affidavit or his supplementary affidavit. It is therefore not possible to establish when, if at all, this meeting was held. In none of his reports does he make any reference to employees. He does not identify the employees, inform the creditors of who the employees are, how much remuneration the employees receive, what the employees did during the business rescue process and how he paid them.

[49] The supplementary affidavit does not assist the BRP's case at all. On the contrary, it has the opposite effect.

Should Gravitare be liquidated?

[50] The following facts, which are not or cannot be seriously disputed, regarding Gravitare are revealed in the papers:

- a. It has not traded for a considerable time;
- b. It does not have funds;
- c. Its shareholders and directors have been engaged in a paralysing dispute;
- d. It has no immovable property;
- e. It owes ABSA in excess of R14m which it is unable to pay, hence it is factually and commercially insolvent.

[51] For these reasons, the applications to uplift the moratorium and to place Gravitare in a final winding-up<sup>11</sup> has to be granted.

### Costs

[52] The applicant asks that the costs of the application for the upliftment of the moratorium, and the costs of pursuing the winding-up application after the appointment of the BRP, be paid by the BRP personally on a punitive scale, which are to include the costs occasioned by the employment of two counsel. I agree with the applicant that the BRP should be mulcted with such costs. He has demonstrated a flagrant and reckless disregard for his statutory and fiduciary duties. He simply regarded himself as not being bound by any law. As an officer of the court he should have known better, and better was expected of him. He was reminded on numerous occasions by representatives of ABSA about his status as an officer of the court, and about his role, function, statutory and common law duties as a BRP.

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<sup>11</sup> The application was initially for a provisional winding-up, but after all the affidavits were exchanged and filed and on the facts revealed above there was no purpose in delaying the issuing of a final order.

He simply ignored these reminders. Worse, the supplementary affidavit which he so casually filed on the eve of the hearing, demonstrates that he has failed in his duty to be open, transparent and candid with this court.

### Order

[53] The following order is made:

- a. The application for condonation by the second respondent for the late filing of the answering affidavit is granted.
- b. The application to file a supplementary affidavit is granted.
- c. The applicant is granted leave in terms of s 133(1) of the Companies Act, 71 of 2008 to continue with its application for the winding-up of the first respondent.
- d. The applicant is granted leave to file a supplementary affidavit in the winding-up application.
- e. The first respondent is placed in final winding-up in the hands of the Master of this Court.
- f. The costs of the application for leave in terms of s 133(1) of the Companies Act, 71 of 2008 to continue with the application for the winding-up of the first respondent (application for leave) are to be paid by the second respondent on a scale as between attorney client which are to include the costs of two counsel where two counsel were employed
- g. The costs of the application prior to the application for leave are to be costs in the winding-up.

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Vally J

Gauteng High Court, Johannesburg

Date of hearing:	13 November 2023
Date of judgment:	28 November 2023
For the applicant:	G Amm (Heads compiled by A Bham SC with G Amm)
Instructed by:	Werksmans Attorneys
For the respondents:	Johan Fourie
Instructed by:	Saltzman Attorneys