

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D531/2023**

In the matter between:

**OPTIMUM COAL TERMINAL (PTY) LTD  
(IN BUSINESS RESCUE)**

**FIRST APPLICANT**

**OPTIMUM COAL MINE (PTY) LTD  
(IN BUSINESS RESCUE)**

**SECOND APPLICANT**

**NATIONAL UNION OF MINeworkERS**

**THIRD APPLICANT**

and

**RICHARDS BAY COAL TERMINAL (PTY) LTD**

**FIRST RESPONDENT**

**TEMPLAR CAPITAL LTD**

**SECOND RESPONDENT**

**LIBERTY COAL (PTY) LTD**

**THIRD RESPONDENT**

**NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

**FOURTH RESPONDENT**

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**ORDER**

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The following order is issued:

- [1] The application for an interim interdict is dismissed.
- [2] The costs of the first and fourth respondents to be paid by the first and second applicants, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel where so employed.
- [3] As between the first respondent and the second and third respondents, they are each to pay their own costs.

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## JUDGMENT

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**Hiralall AJ**

**Introduction**

[4] This is an application in which the first and second applicants (both in Business Rescue), (hereinafter referred to as “OCT” and “OCM” respectively, or as the applicants collectively), seek an urgent interim order, pending the final determination of the pending arbitration proceedings between the parties, interdicting:

- (a) the first respondent (hereinafter referred to as “RBCT”) from preventing or in any way interfering with OCT’s right to use the Richards Bay Coal Terminal (hereinafter referred to as “the Terminal”) and other assets more fully described in the papers;
- (b) RBCT from transferring OCT’s right to use the Terminal and other assets as described, and
- (c) RBCT from initiating a transfer of ownership of OCT’s Shareholder’s Interest (as defined in the Shareholders’ Agreement).

[5] OCT, whose Export Entitlement through the RBCT has been suspended since 2018 except for a temporary and conditional upliftment of

the suspension from January 2022 to January 2023, asserts that the suspension should have been lifted in July 2021 when its outstanding dues, including wharfage fees, were paid in full. OCM, a sister company of OCT, is dependent on OCT's Export Entitlement for export of its coal and supports the application as the second applicant.

[6] Liberty Coal (Pty) Ltd and Templar Capital Ltd (Liberty Coal and Templar Capital respectively) support the applicants' claim, and contend, through Daniel McGowan ('McGowan'), that the refusal to restore OCT's Export Entitlement will prejudice their vested rights in OCM and OCT arising from the statutorily adopted Business Rescue Plans. The erstwhile employees of OCM and the mini-pit contractors, through NUM, support the application and contend that if OCT's Export Entitlement is not restored, they will suffer prejudice.

[7] There are a number of issues that run parallel to OCT's assertion.

[8] RBCT contends that quite apart from OCT being a defaulting shareholder in respect of its outstanding dues, there are other Events of Default and breaches which remain unremedied which justify the continued suspension of OCT's Export Entitlement. The NPA opposes the relief sought by the applicants on account of the preservation orders it has obtained against the shares in OCT and OCM, and the business of OCM, and the claims of Templar Capital against OCM amounting to R1.3 billion.

### **Background**

[9] RBCT owns and operates a coal terminal at the port of Richards Bay from which coal destined for export by various mining companies is loaded onto vessels for export from South Africa. OCT, like the various mining companies who use the Terminal, is a Shareholder of RBCT in terms of a Shareholders' Agreement according to which OCT is entitled to the use of the Terminal for the export of coal. The Shareholders' Agreement contains core fundamental principles agreed upon by its Shareholders, which address

governance and their access to and shared use of the Terminal including the following:

- (a) a registered RBCT Shareholder must be the owner of the RBCT shares registered in its name;
- (b) a registered RBCT Shareholder must be a Coal Exporter and in a Coal Exporter vertical control structure or joint venture, as defined in clause 1.1.14 of the Shareholders' Agreement;
- (c) a registered RBCT Shareholder must be part of and controlled within a vertical two company Shareholders' Group approved by RBCT in terms of clause 1.1.49 of the RBCT Shareholders' Agreement;
- (d) a registered RBCT Shareholder must be solvent and liquid; and
- (e) a registered RBCT Shareholder must meet its financial obligations to RBCT, so as to keep the Terminal operating on a commercially break-even basis and not place additional financial burdens on any of the other competing coal mining companies which are Shareholders of RBCT.

[10] Tegeta Exploration and Resources (Pty) Ltd (hereinafter referred to as "Tegeta") is the sole shareholder of OCT and OCM. OCT and OCM, together with Tegeta, constitute an approved Shareholders' Group in terms of clause 1.1.49 of the Shareholders' Agreement.

[11] During 2018, OCT and OCM together with Tegeta, became unbanked in South Africa. At around the same time, the board of directors of OCT and OCM adopted resolutions that the companies voluntarily begin Business Rescue proceedings. Tegeta is also in Business Rescue.

[12] During 2018, OCT failed to pay its wharfage fees on three occasions. It was issued with Remedy Notices in accordance with the Shareholders' Agreement, and upon failure to pay its indebtedness, Default Notices together

with the suspension of OCT's Export Entitlement in February 2018 and November 2018.

[13] Following the February 2018 suspension of OCT's Export Entitlement, and an urgent court application relating to such suspension, the following order was issued by the High Court, Durban, on 30 May 2018:

- '2. That the respondent is to uplift, with immediate effect, the suspension of the applicant's rights under and in terms of the Shareholders Agreement operative between the parties.
3. Within 14 (fourteen) days of this order, applicant will deposit R10 million into the applicant's attorneys of record trust account for the benefit of the respondent to serve as security for any amounts which might become due and payable to the respondent by the applicant arising from a debt incurred by applicant to respondent during the period that the applicant is under Business Rescue.
4. Should the applicant default and fail to pay the respondent any money that becomes due and payable under the Shareholders agreement, the applicant is directed to instruct its attorney of record to release the funds held in trust as security to the extent of the amount owing.
5. Once the Business Rescue terminates the applicant will inform the respondent of such termination.
6. The respondent shall have 60 (sixty) days thereafter within which to advise applicant's attorney (in writing) of any claim that respondent alleges it has in respect of a debt incurred by applicant during the Business Rescue and failing such notification the applicant's attorney shall release the fund still in its trust account to the party/ies entitled thereto.
7. Each party shall pay their own costs.
8. This order does not affect any of the parties' rights under the Shareholders Agreement.' (my underlining)

RBCT subsequently lifted the suspension.

[14] On 28 November 2018, RBCT issued the second Remedy Notice to OCT in respect of an overdue operating cash recall in the sum of R6 633 082.14. Following non-payment, on 30 November 2018 RBCT issued a second Default Notice to OCT.

[15] On 13 December 2018, RBCT issued a third Remedy Notice to OCT in respect of an amount of R9 404 172.00 which was due and payable to RBCT for the December 2018 cash recalls. This was followed with a third Default Notice to OCT on 20 December 2018.

[16] OCT's Export Entitlement thereafter remained suspended from November 2018 until 31 January 2022.

[17] There followed numerous communications and engagements between OCT/OCM and RBCT around upliftment of the suspension and successful continuation of the Business Rescue proceedings, including discussions around Templar Capital Ltd and Liberty Coal (Pty) Ltd taking over OCT/OCM. These engagements resulted ultimately in an Interim Period Agreement which was concluded on 26 November 2021. In terms of this agreement, OCT's suspension would be lifted temporarily from 25 January 2022 until 28 March 2022 when it was envisaged the proposed 'End Game' would be achieved. The 'End Game' incorporated the following transactions:

- (a) The transfer of OCM's Coal Business from OCM to Liberty Coal subject to RBCT lifting OCT's suspension (Transaction 1);
- (b) Within 24 hours of transferring OCM's Coal Business to Liberty Coal, the transfer of OCT's shareholder interest in RBCT to OCT2 (Transaction 2);
- (c) Simultaneously with the transfer by OCT of OCT's shareholder interest in RBCT to OCT2, the transfer by OCT of OCT's shares in OCT2 to Liberty Coal, and the creation of a new Shareholders' Group comprising Liberty Coal and OCT2 (Transaction 3).

[18] On 3 March 2022, OCT informed RBCT of the NPA's application for a preservation order during December 2021, that judgment was expected by 24 March 2022 and that, depending on the outcome thereof, various consequences for OCT might follow, specifically the inability to implement the proposed transactions in relation OCT and OCM. OCT requested an extension of the Drop-Dead Date of 28 March 2022 to 29 December 2022, which request was granted until 30 June 2022.

[19] There were further extensions until 30 September 2022, 31 December 2022 and 31 January 2023.

[20] Importantly, the Interim Period Agreement was subject to various conditions including resolute conditions, as were the various extensions thereof. The applicants, through the business rescue practitioners, agreed to all of the conditions imposed.

[21] The 'End Game' was not achieved by 31 January 2023 which was the final Drop-Dead Date and OCT's Export Entitlement was re-suspended.

[22] According to the applicants, its outstanding wharfage fees were paid to RBCT during July 2021. RBCT was therefore not entitled to refuse to uplift the suspension, or even later lift the suspensions temporarily and conditionally. Furthermore, once the Interim Period Agreement lapsed, the dispute was governed by the provisions of the Shareholders' Agreement which meant that as its dues had been paid in July 2021, it was entitled to upliftment of the suspension.

[23] According to RBCT, OCT was a permanent defaulting shareholder. RBCT had reserved its rights in the 30 May 2018 court order, and when OCT defaulted again in November 2018, the suspension was reinstated, so it was asserted. Furthermore, there were other unremedied Events of Default where OCT was concerned; OCM was no longer a Coal Exporter as defined in the Shareholders' Agreement; a compliant Shareholders Group Structure enabling OCT's Export Entitlement under the Shareholders' Agreement was not achieved, and the 'End Game' was not achieved by the Drop-Dead Date

of 31 January 2023. Accordingly, the Interim Period Agreement lapsed through effluxion of time, failure of OCT to provide RBCT with information requested in paragraph 5 of its letter dated 29 September 2022, and its failure to satisfy RBCT that it had met the requirements of the resolute conditions in the Interim Period Agreement.

*The applicants' version*

[24] According to the applicants, prior to the commencement of Business Rescue proceedings in February 2018, OCM used to conduct large scale open cast drag line and underground mining operations to produce and supply coal of a certain grade to the export and inland markets.

[25] OCM's ability to conduct its large-scale opencast and underground mining operations changed fundamentally when it commenced business rescue proceedings in February 2018: At this time OCM had no banking facilities, no capital, no cash flow, a mine and equipment in a state of neglect and disrepair requiring extensive repair, replacement and refurbishment. It was unable to pay its creditors and key contractors had de-established from site. The underground mining contractors did not pay their personnel and underground operations ceased. The opencast came to a halt with the funds running out for maintenance, diesel, explosives and drilling contractors. The employees were frequently on strike because they were not being paid, and the union forced OCM's management to leave the mine at one stage. Eskom was unpaid and switched off the power to the mine. The security company was unpaid and did not prevent theft with the result that copper thieves stripped the mine of copper cables. All mining contracts were cancelled, and personnel changed without pay. The net result was a mine without power, money or technical staff, angry personnel, angry creditors and angry communities.

[26] In order to preserve OCM and OCT's Business Rescue proceedings, and the potential for the respective creditors to be paid, the business rescue practitioners concluded contracts with several contractors to mine the so-called mini-pits at OCM. This was done to generate crucial revenue which



would be used to preserve OCM while other rescue options were being explored. Royalty prices were based on the price and forward curve of the API4 price at the time, as well as the average price of coal for a 20MJ/KG product sold and purchased by Eskom, justifying a royalty of R60 per run-of-mine (ROM) ton for high grade export coal and R30 per ton for Eskom grade coal. The forward curve of the API4 index shows that in 2019 and 2020 the curve stayed static and year on year it dropped. This was because, at that time, there was a lot of world pressure on coal pollution and mining companies were trying to sell off their mines to reduce their exposure to coal. Importantly, the total estimated cost per mini-pit to commence coaling, inclusive of equipment, would be around R200 million. Neither OCM nor OCT had the money or resources required to mine the mini-pits.

[27] Shortly after the mini-pit operations commenced, Templar Capital Limited (“Templar Capital”), led by McGowan, proposed a plan to the business rescue practitioners to save OCM and OCT. Until April 2020, McGowan had been actively pursuing attempts to dispose of Centaur Venture Limited’s (“CVL”) claims against OCM to potential bidders for the OCM/OCT assets, and, save to attempt thereby to protect CVL’s exposure to OCM, had no personal or other interest in OCM/OCT’s business rescue proceedings. Following settlement of an arbitration between CVL and Eskom in March 2020, the rejection of a bid to buy OCM/OCT from Lurco, and the subsequent failure of the CVL/Lurco concession arrangement, it became clear to McGowan in May 2020 that OCM was at serious risk of being unable to achieve a successful business rescue, leading to a consequent liquidation, which would result in a complete loss of CVL’s claim.

[28] It was only then that McGowan conceived of a plan to rescue OCM and OCT, pursuant to which the debt-equity swap structure was investigated and developed in consultation with the business rescue practitioners and the current Liberty Group structure was established which included Templar Capital. After taking cession of CVL’s claim against OCM in June 2020, Templar Capital was OCM’s largest creditor with a claim of roughly R1.3 billion. It proposed that it would convert its debt in OCM to equity in a new

company called New OCM which subsequently became Liberty Coal (Pty) Ltd which would assume all OCM's creditor liabilities on a compromised basis. Simultaneously, but pursuant to an adopted Business Rescue Plan, Liberty Coal would also acquire OCT's assets, which consisted exclusively of its RBCT Export Entitlement.

[29] On 28 September 2020, and pursuant to Templar Capital's proposal, the majority of OCM's creditors adopted the Business Rescue Plan proposed in respect of OCM. The plan was meant to be implemented by 28 March 2022 whereafter the phased capital investment and restoration of its mining operations would commence. The mini-pit contracts were not meant to continue indefinitely and are all of fixed duration, terminating in 2023 and 2024. The only thing that prevented implementation by the end of March 2022 was the preservation order. But for the preservation order, OCM would be in the process of restoring its mining operations. This would have been expedited and facilitated by inter alia the revenue generated from the mini-pit operations to meet OCM's ongoing expenses and the planned refurbishment of critical infrastructure including but not limited to the coal wash plant and water treatment plant etc. One of the conditions of the OCM Business Rescue Plan was that Liberty Coal acquire OCT's entitlement to export coal through the Terminal. If it did not, the plan would fail. Accordingly, both the OCT and OCM Business Rescue Plans made provision for this.

[30] Pursuant to a meeting held on 27 January 2021 between OCT business rescue practitioners, representatives of RBCT and of Templar Capital, OCT addressed a letter to RBCT on 9 February 2021 wherein it briefly outlined an envisaged plan to resolve the Events of Default by OCT and thereby facilitate the rescue of OCT. In this letter, OCT set out: Templar Capital's Corporate structure; the status of OCM's business rescue proceedings; and OCT's proposal of remedying the Events of Default, and requested RBCT to provide various confirmations to OCT.

[31] OCT's proposal of remedying the Events of Default included the following:

- (a) Templar Capital proposed making available to OCT a post commencement finance facility (“PCF facility”) in an amount sufficient to settle in full RBCT’s claims against OCT, both pre and post commencement of OCT’s business rescue, and any other costs attributable to the OCT linked entitlement, the aim being to fully and finally discharge such RBCT liabilities.
- (b) Pursuant thereto, it was envisaged that Templar Capital through Liberty Coal would be the major independent creditor of OCT and in a position to determine the outcome of any Business Rescue Plan to be proposed to OCT’s other creditors by the business rescue practitioners.

[32] In this regard it was envisaged that such Business Rescue Plan would incorporate at least the following principles:

- (a) OCT would establish a new entity incorporated in South Africa, OCT2, wholly owned by OCT such that OCT2 formed part of a Shareholders Group as defined in the Shareholders' Agreement;
- (b) OCT would dispose of its entire shareholding in RBCT (together with the associated Shareholder interest) to OCT2 in exchange for shares in OCT2 in terms of s 42 of the Income Tax Act 58 of 1962, as amended;
- (c) Liberty Coal would acquire from OCT its entire shareholding in OCT2 and assume from OCT its remaining verified liabilities to its creditors, including the PCF claim; and
- (d) The PCF claim assumed by Liberty Coal from OCT would be converted to fixed equity in Liberty Coal.

[33] The rationale for the restructure was to facilitate a Business Rescue Plan for OCT that would inter alia:

- (a) remedy the Events of Default by OCT and achieve the business rescue objectives referred to in s 128(1)(b) of the Companies Act 71 of 2008 ('the Companies Act');
- (b) Ensure that the Liberty Coal group qualifies to acquire and hold a direct shareholding interest in RBCT in terms of the provisions of the Shareholders' Agreement; and
- (c) Enable Templar Capital, together with the respective business rescue practitioners of OCM and OCT, to be in a position during the interim to facilitate and support the successful implementation of the adopted OCM Business Rescue Plan and the longer-term viability of the planned establishment of sustainable mining operations at OCM, on a basis that allows for operating revenue to be generated in both OCM and OCT, limits further debt being incurred by OCT to RBCT and manages and controls OCT's ongoing compliance with its financial and other commitments under the Shareholders' Agreement.

[34] OCT therefore proposed remedial steps to resolve its Events of Default which included the following:

- (a) the immediate discharge in full of the RBCT liabilities by way of the PCF facility;
- (b) future wharfage fees and related charges once the suspension was lifted; and
- (c) with regard to potential future cash calls on OCT, these would be addressed as and when they arose. It could reasonably be accepted at that stage that any funding required to meet OCT's ongoing and other obligations to RBCT would be forthcoming from Templar Capital TCL and its partners.

[35] According to the applicants, two important things appear from the letter of 9 February 2021:

- (a) First, as early as February 2021, the OCT business rescue practitioners had expressly and unambiguously informed RBCT of how OCM was conducting its mining operations. Paragraph 4.1.5 of the letter stated as follows:

'A fundamental precondition to the advance by TCL of the proposed PCF Facility to OCT is that, in tandem with settlement by OCT of the RBCT liabilities, the current suspension of OCT's utilization of its port allocation is lifted (either in whole or in substantial part), so as to enable qualifying coal currently being extracted from OCM's mining area under interim mining arrangements with third parties to be exported through RBCT in terms of OCT's port allocation, and thereby inter alia generate revenue to discharge on an ongoing basis OCT's financial obligations to RBCT and limit the incurral of further debt in this regard.' (emphasis added)

In addition, this was reflected in its Business Rescue Plan.

- (b) Second, in paragraph 4.2 of the letter, OCT specifically dealt with existing Events of Default and the proposed resolution thereof. Importantly the only default listed was the admitted failure to pay OCT's wharfage fees. While it was open for RBCT to deny this in any subsequent correspondence it did not do so. As at February 2021 and after expressly being informed that OCM's mining operations were being conducted through the mini-pit mining contractors, RBCT did not deny that OCT's only Event of Default was the failure to pay wharfage fees.

[36] In RBCT's response letter dated 16 February 2021, it held the view that in order to properly consider OCT's proposal it would require further clarification and information from OCT. RBCT required clarity on the following: when OCT's suspension should be uplifted; OCM's monthly tonnage of coal mined and produced for sale over the past 12 months; confirmation that all OCT's outstanding indebtedness to RBCT under the Shareholders' Agreement would be settled before the suspension was uplifted; and

confirmation that the PCF facility would be used to settle 100% of OCT's indebtedness to RBCT.

[37] In addition, RBCT also requested OCT to provide it with information and supporting documents demonstrating that:

(a) OCM is operational and mining coal in the Republic of South Africa. To this end, and as an important feature in this application, RBCT asked for information showing that:

'OCM (and the OCM Business) is operational and mining coal in the Republic of South Africa, and is capable of getting coal to the Terminal for lawful export through the Terminal (see clause 1.1.14.1)'

This, according to the applicants, showed that RBCT was not concerned about who mined the coal and could not have thought that OCM was doing so itself because the presence of the mini-pit contractors had been disclosed to it.

(b) Following the sale and transfer of the OCM business by OCM to Liberty Coal, that Liberty Coal would be a Coal Exporter (as contemplated in clause 1.1.14.11 of the Shareholders' Agreement;

(c) Liberty Coal would control OCT2 and the basis of such control; and

(d) Provide RBCT with a detailed organogram showing all the companies in the 'group of companies' in relation to OCT2.

[38] There followed extensive communications between OCT and RBCT in contemplation of OCT paying its outstanding debts to RBCT and the proposed structure in which the Liberty Group would take over OCM and in the process acquire OCT's shareholding and export entitlement in RBCT. Importantly, in considering the application for the upliftment of the suspension, RBCT knew of Templar Capital's involvement and said that it (Templar Capital) could trigger the upliftment of the suspension by paying RBCT. This appears from RBCT's letter dated 28 April 2021. In addition, it knew of the involvement of the mini-pit contractors as appeared from its letter dated 23 July 2021.

[39] On 25 June 2021, RBCT informed OCT that it would uplift the suspension that was in place on the later of various events, which included the cession of all RBCT's claims to Liberty Energy, the date that Liberty Energy paid a R10 million security deposit to RBCT, and the date on which the transactions under the adopted OCM Business Rescue Plan became unconditional. Importantly, however, RBCT imposed certain resolute conditions, on the happening of which OCT's suspension would 'immediately and automatically' be reinstated.

[40] According to the applicants, once a suspension has been lifted, another suspension can only be imposed on the occurrence of a new event of default, and then only once RBCT has strictly complied with its obligations to place the shareholder in default.

[41] OCT's indebtedness to RBCT was paid in full during July 2021. Consequently, in a letter to RBCT on 27 July 2021, OCT recorded that: 'OCT is entitled in our view to expect, in all the circumstances, to be treated as a shareholder in good standing and accordingly obtain full reinstatement under the RBCT Shareholders' Agreement of its Linked Entitlement within 60 days thereafter'.

[42] On 12 November 2021, Liberty provided a R10 million security for OCT's future debts to RBCT and took session of RBCT's proven claims against OCT of approximately R96 million having made payment of that amount to RBCT.

[43] On 25 November 2021, and pursuant to a request by OCT's business rescue practitioners, RBCT amended the conditional approval that it had given to OCT on 25 June 2021 specifically, for the temporary upliftment of the suspension to end on 28 March 2022, which was referred to as the so-called Drop-Dead Date. In addition, RBCT unilaterally added various other resolute conditions, the occurrence of which would, according to RBCT, immediately and automatically reimpose OCT's export suspension.

[44] While the OCT business rescue practitioners agreed to this, they did so only because of the unfair bargaining position that RBCT had created for itself and the deleterious consequences of not doing so. OCT's Business Rescue Plan was adopted on 25 January 2022 and on the same date RBCT lifted the suspension of OCT's Export Entitlement for a temporary period until 28 March 2022.

*The first respondent's version*

[45] According to RBCT, OCT was owned by Glencore's OCH prior to the revision in 2013 of the Shareholders' Agreement when the definition of Coal Exporter was introduced. OCT was not a Coal Exporter in terms of clause 1.1.14.1, it was a 'shell company'. The vertical-control structure of OCH and OCT did not then comply with any of the four Coal Exporter structures set out in clause 1.1.14 of the Shareholders' Group. This non-compliant OCH/OCT/OCM structure was an existing tri-angle structure prior to the 2013 RBCT Shareholders' Agreement, it was 'indulged' only on the basis that OCH controlled both sister companies OCT/OCM, and OCM at that time qualified as a Coal Exporter in terms of clause 1.1.14.1 of the Shareholders' Agreement. The historical 'notional horizontal link' between OCM which was then a Coal Exporter in terms of clause 1.1.14.1 and OCT was tolerated.

[46] According to RBCT, the Guptas captured ESKOM and forced OCH, OCM and OCT into Business Rescue in 2015, and Tegeta acquired the shares in sister companies OCM/OCT from OCH out of forced Business Rescues. The RBCT Board, to be consistent at the time, permitted the Glencore/OCH 'notional horizontal link' between OCT/OCM to continue to be indulged under the Gupta/Tegeta 'notional horizontal link' between OCM/OCT, while OCM was a Coal Exporter in terms of clause 1.1.14.1. That, according to RBCT, was the *de facto* position until 2018 when OCT was again placed into Business Rescue.

[47] OCT was 'financially distressed' in February 2018 because OCT and its direct and indirect holding companies, which were then, and remain now,



part of the Gupta empire of companies in South Africa, became unbanked in South Africa and they remain so unbanked.

[48] In order to be placed under Business Rescue in February 2018, OCT was 'financially distressed' in terms of Chapter 6 of the Companies Act. At that time, OCT was already immediately unable to pay its debts. Furthermore, since the appointment of the business rescue practitioners of OCT, *de facto* control of OCT and of its direct holding company Tegeta, vested in the respect of the business rescue practitioners, and both Tegeta and OCT lost control of OCT's business to the business rescue practitioners.

[49] As a result of OCT being placed into Business Rescue, the following Events of Default, as defined in clause 21 of the Shareholders' Agreement and breaches in relation to OCT occurred:

- (a) OCT being placed into Business Rescue is an Event of Default in terms of clause 21.1.7 of the Shareholders' Agreement which is not capable of remedy and does not require a remedy notice as contemplated by clause 21.2.
- (b) The cessation of control by Tegeta and OCT of the OCT business in favour of the business rescue practitioners meant that OCT was no longer a member of an RBCT approved two-company Shareholders Group in terms of clause 1.1.49 of the Shareholders' Agreement. This resulted in an Event of Default in relation to OCT in terms of clause 21.1.3 of the Shareholders' Agreement which is not capable of remedy and does not require a remedy notice as contemplated by clause 21.2 of the Shareholders' Agreement. The Event of Default persists unless and until OCT comes out of Business Rescue.
- (c) OCT's breach of clause 22: in January/February 2018, OCT failed to advise RBCT that due to the 'unbanking' it was unlikely to be able to avoid an Event of Default (the pending non-payment of wharfage fees being an Event of Default in terms of clause 21.1.1.8).

- (d) OCT committed an act of insolvency under clause 21.1.9, which was incapable of remedy, when OCT director George van der Merwe stated in his affidavit attached to the Notice of Beginning of Business Rescue Proceedings filed on 17 February 2018 that OCT was unable to pay its debts as and when they fell due and payable within the immediately ensuing six months.
- (e) OCT's failure in February/March 2018 to pay wharfage fees was an Event of Default in terms of clause 21.1.1.8 which was incapable of remedy at the time because OCT was unbanked, placed into Business Rescue and had no access to cash. Notwithstanding that the failure to pay wharfage fees was at the time incapable of remedy, RBCT issued a remedy notice to OCT on 27 February 2018 in terms of clause 21.2 to afford OCT a 10 business-day period to pay the outstanding wharfage fees, which OCT could not pay and indeed failed to pay.

[50] OCT was confirmed as a defaulting Shareholder from 14 March 2018, the suspension date in terms of the first default notice. OCT's entitlement to use the Richards Bay Coal Terminal was suspended in terms of clauses 21, 23.1.1 and 23.1.2 of the Shareholders' Agreement as per the default notice dated 14 March 2018, and this position remains to date. The court order of 30 May 2018, at paragraph 7 thereof, confirmed that the order does not affect any of the parties' rights under the Shareholders' Agreement.

[51] During October/November 2018, OCM's coal mining business, under the control of the business rescue practitioners of OCM finally ground to a halt breaking the critical 'notional horizontal link' between OCM and OCT.

[52] In failing to pay its November 2018 cash recall, OCT breached the conditions of RBCT's May 2018 upliftment of the suspension and the court order. As at October 2018 further Events of Default had occurred and the Second Default Notice issued on 30 November 2018 detailed them confirming OCT's status as a defaulting Shareholder. This meant that the earlier May 2018 upliftment of suspension fell away, and the suspension reinstated:

(a) OCT breached clause 22 of the Shareholders' Agreement by failing to advise RBCT that due to the final collapse of the OCM coal mining business it was unlikely to avoid an Event of Default, being the pending non-payment of wharfage fees.

(b) OCT's further act of insolvency under clause 21.1.9, which was incapable of remedy, when Mr S Kerr, an OCT/ Burgh Group representative, confirmed to RBCT that OCT was not in a position to pay, and would not be paying that November wharfage fees.

(c) OCT's failure in November 2018 to pay wharfage fees was incapable of remedy because OCM's coal mining business had collapsed, OCM and OCT remained unbanked and OCT had no cash. RBCT had, on 31 May 2018, already put OCT on notice that the upliftment of its suspension pursuant to the 30 May 2018 court order was conditional upon there being no further Events of Default. The failure of OCT in November 2018 to pay the wharfage fees due amounted to another Event of Default in terms of clause 21.1.1.8.

(d) The earlier Event of Default, where OCT ceased to be part of an approved Shareholders Group, ie the Tegeta/OCM/OCT triangular structure, when all three entities were placed into business rescue under the control of the business rescue practitioners and/or under the management and control of the Burgh Group, persisted.

(e) OCT's being placed under business rescue was an Event of Default incapable of remedy. As long as it was financially distressed in terms of the Companies Act and unable to meet its obligations as and when they fell due and payable for the immediately ensuing six months, and required to be placed in business rescue and kept under the statutory business rescue regime, the Event of Default in clause 21.1.7 prevails.

[53] OCT also did not pay the December 2018 cash recall. RBCT initiated and implemented a further temporary transfer in terms of clause 17 in November 2018 without objection by OCT.

[54] According to RBCT, the discussions with McGowan and OCT early in 2021 focused on a structure for Liberty Coal that would be compliant with the requirements for Coal Exporter and Shareholders Group status in terms of the Shareholders' Agreement, and other important considerations. RBCT is not entitled to approve proposed structures that do not comply with the prescribed requirements in the Shareholders' Agreement. The Tegeta/OCM/OCT non-compliant 'horizontal control structure' approved only in respect of the Tegeta/OCM/OCT for reasons stated earlier would not be permitted to endure under any Liberty Coal structure then still to be proposed to RBCT. The applicants were always aware, also through Juanito Damon who sat of the RBCT board, of the application of the Coal Exporter and Shareholders Group definitions, and that the board rejected other Shareholders' 'restructuring proposals' when they were noncompliant.

[55] RBCT also emphasized that any proposed OCT Business Rescue Plan had to resolve to RBCT's satisfaction the historical and any new Events of Default before RBCT could end the suspension of OCT and its Export Entitlement. McGowan was informed that RBCT would only consider lifting the OCT suspension before Liberty Coal acquired OCM's mining business in the context of achievement promptly of an approved 'End Game' structure that resolved all of OCT's Events of Default, since having OCT as a permanent suspended defaulting Shareholder (including in business rescue) was untenable and could not endure indefinitely as it was in violation of the Shareholders' Agreement. It was further proposed and agreed that Templar Capital through Liberty Energy would buy RBCT's claims against OCT so that RBCT is not a creditor of OCT, and that Liberty Energy would put up a R10 million security deposit.

[56] On 28 April 2021, RBCT indicated that it was satisfied from what OCT had proposed that it appeared that the proposed Liberty Coal and OCT2 Vertical Control Structure would in principle, if implemented, meet the control requirements of a compliant controlled SPV structure, subject to RBCT approvals. Following a representation by McGowan that the 'End Game' would be achieved by 30 September 2021, and a formal application to uplift

the suspension together with the implementation of the proposed 'End Game', RBCT on 24 June 2021 approved the proposed transfer of OCT's Shareholder interest in RBCT to OCT2 provided that the new Shareholder group comprising Liberty Coal and OCT2 was implemented within 24 hours of the transfer.

[57] OCT requested RBCT to consider lifting its suspension in anticipation of the 'End Game' being achieved by 30 September 2021. RBCT agreed in June 2021 to lift the suspension only on condition that the 'End Game' was first achieved.

[58] Following extensive discussions, and threats of litigation, during June to November 2021, RBCT and OCT agreed on 26 November 2021 that the suspension could be lifted temporarily if certain suspensive conditions were met, and this would endure for a limited period from 25 January 2022 until 28 March 2022. This was based on the representation that the 'End Game' would be achieved by that date and subject to a number of Resolutive Conditions set out in the RBCT/OCT 26 November 2021 Interim Period Agreement. At all times before and during the Interim Period, OCT was still a Defaulting Shareholder. On 25 January 2022, the revised OCT Business Rescue Plan was adopted by its creditors. On 26 January 2022, RBCT confirmed to OCT that its suspension had been uplifted with effect from that date as agreed.

[59] It was shortly after the Interim Period Agreement was entered into that the NPA launched its asset preservation applications in respect of Templar Capital's R1.3 billion claim against OCM, OCM's business and Tegeta's shares in OCT and OCM.

[60] There were thereafter further extensions to the upliftment of the suspension of OCT's Export Entitlement at OCT's request.

[61] An extension of the Interim Period was granted by RBCT until 30 June 2022 which was the Drop-Dead Date subject to eight resolutive conditions. The 'RBCT/OCT 25/26 November 2021 Interim Period Agreement' together

with the 29 March 2022 amendments were referred to as the RBCT/OCT Interim Period Agreement.

[62] A further extension of the Drop-Dead Date was requested by OCT from 30 June 2022 to 30 June 2023. RBCT requested information from OCT in order to assess its request and ascertain whether or not the purpose for which the suspension was temporarily lifted, ie, to provide temporary interim cash relief to OCT and OCM to facilitate the business rescue and to achieve the 'End Game', was being achieved. OCT informed RBCT that:

- (i) OCM entered into independent mining arrangements with seven mini-pit contractors before February 2022 when international coal prices, due inter alia to the invasion of Ukraine, rose;
- (ii) OCM receives a fixed royalty per metric ton ('mt') from the mini-pit contractors which amount was agreed upon on the then-prevailing market related pricing;
- (iii) The mini-pit contractors take on all of the risk and cost of mining and rehabilitation, in return, OCM receives the fixed royalty per ton when coal is dispatched across the weighbridge;
- (iv) the level of production has increased from 55,000 mt of run of mine coal during August 2020 to 573,000 mt of run of mine coal in May 2022;
- (v) OCT receives a fixed trade margin per ton for facilitating the export of the product mined at OCM;
- (vi) the Curator is aware of the contractual arrangements and has been provided with the agreements he is entitled to;
- (vii) all revenues generated by OCM and OCT have been fully accounted for by the business rescue practitioners in accordance with their obligations;

- (viii) not being able to export coal mined at OCM under the OCT entitlement will have an immediate adverse commercial impact on OCM and OCT, OCM's contractors and affected persons;
- (ix) any proposal to preclude OCT/OCM from utilizing OCT's entitlement whilst the companies remain under business rescue will be directly and materially prejudicial to the obligations imposed on the business rescue practitioners and OCM's Curator to preserve the value of the businesses pending finalisation of the NDPP's legal proceedings.

[63] RBCT learnt on 23 June 2022, from correspondence from the Curator, that notwithstanding what OCT had informed it, OCM is not generating any revenue from the export of coal through the Terminal. The Curator explained that because of the limited fixed rate that OCM is paid by the mini-pit contractors, the revenue currently being generated, in most part, does not flow or accrue to OCM at all. This was a surprising revelation to RBCT and the first indication that there was more going on than had originally appeared. On 28 June 2022, the NDPP launched two asset forfeiture applications in respect of all shares held by Tegeta in OCM, all shares held by Tegeta in OCT, the OCM business, and Templar Capital's R1.3 billion claim against OCM. These two applications remain pending.

[64] Nonetheless, on 30 June 2022 RBCT agreed to extend the Interim Period for a further three months until September 2022 subject to the condition that OCT's business rescue practitioners provide certain material information and documents to assist it in understanding the operation of the OCT business and how the 'End Game' was sought to be achieved.

[65] The Curator filed his first interim report on 6 July 2022 raising the concern that OCM is not mining and producing coal and is not a Coal Exporter.

[66] On 6 September 2022, OCT requested the extension of the Interim Period to 30 June 2023, and noted that the implementation of the 'End Game' was in abeyance pending the finalisation of the NDPP's forfeiture application.

The business rescue practitioners also contended that in their view the granting of leave to appeal in relation to the preservation order suspends the operation of the order. OCM also objected to being treated differently to other Shareholders by RBCT and being requested to prove that it is a Coal Exporter.

[67] On 7 September 2022, RBCT raised concerns with OCT that the actual arrangements between OCM and the mini-pit contractors revealed that OCM was not mining and producing coal itself, and was not capable of doing this, and if so, it ceased to be a Coal Exporter in terms of the Shareholders' Agreement. Furthermore, it appeared to be conducting a 'leasing business' where mini-pit contractors mine, produce and export coal for themselves using OCM's mining license and OCT's entitlement, where the real economic benefit of doing so was not accruing to either OCM or OCT. RBCT further stated that paragraph 6.13.3 of the OCT Business Rescue Plan clearly envisaged that during the Interim Period OCM would operate its mines, and through the export of coal, generate revenues, and that shortly after the adoption of the Business Rescue Plan, the phased restoration of the Optimum Mine would be commissioned to bring the mine back into full operation on an accelerated basis.

[68] In response, Liberty Coal confirmed that its original intention remained and was to rebuild and operate OCM for its own account and benefit pursuant to acquiring the OCM business and assets. It recorded that it intends to produce export coal and to achieve a debt free position within five to six years of acquiring OCM's business and assets.

[69] On 17 September 2022, OCT's business rescue practitioners replied to RBCT's letter:

- (i) reiterating that OCM remains a Coal Exporter;
- (ii) stating that in terms of its mining right, OCM is entitled to appoint third parties to render mining and related services in connection with the exploitation of its mining right and to determine the terms thereof;



- (iii) noting that contractor arrangements are common, widespread and well-established features of mining operations in South Africa;
- (iv) contending that paragraph 6.13.3 of the OCT Business Rescue Plan does not envisage that OCM will begin a phased restoration. Instead, it always contended that the Liberty parties would be responsible for the restoration phase; and
- (v) stating that they cannot decide to bring any part of the Optimum Mine into production without Liberty Coal's consent due to its contractual rights arising from the 'End Game'.

[70] On 29 September 2022, RBCT granted to OCT an extension of the Interim Period's 'Extended Drop-Dead Date' in relation to the lifting of OCT's suspension to 31 December 2022:

- (i) subject to OCT, OCM, Liberty Coal and other mini-pit contractors cooperating with RBCT as contemplated in paragraph 5 of RBCT's Extension Letter to OCT dated 29 September 2022, as amended, and providing all relevant information that had been sought by RBCT.
- (ii) RBCT recorded further that there would be no further extensions beyond 31 December 2022.
- (iii) RBCT stated further that the 'End Game' was subject to the outcome of the NDPP applications and that it intended to conduct a reassessment of OCT, OCM, Liberty Coal and the mini-pit contractors' positions to determine whether OCM is a Coal Exporter, and how the economic benefits of lifting the suspension of OCT's entitlement were being, and would be, lawfully applied. It recorded further that this assessment would include a site visit.

[71] On 5 October 2022, OCT requested RBCT to amend its conditional extension from 31 December 2022 to 31 January 2023 to provide time to OCT and OCM for logistical arrangements which would have to be made should RBCT refuse to extend the date *'beyond which RBCT would not grant any more extensions'*.

[72] On 2 November 2022, RBCT extended the expiry of the Interim Period from 31 December 2022 to 31 January 2023 at OCT's request and extended the date for cooperation and provision of information from 31 October 2022 to 18 November 2022. It recorded further that 'no further extensions shall be considered beyond 31 January 2023 unless OCT, OCM, Liberty Coal and the mini-pit contractors comply in full with paragraph 5 of the September 2022 extension letter [by 18 November 2022]'

[73] During October and November 2022, RBCT conducted an assessment of the operations at the Optimum Mines in order to make sense of what it was being told by OCT; the successful asset preservation applications launched by the NDPP, and the first interim report of the Curator appointed by the court to preserve the assets following the successful asset preservation applications.

[74] Analysis of the information provided by that time revealed that OCM was not in fact mining and producing coal as it had represented to RBCT but was instead 'leasing' its mining rights to mini-pit contractors to do so in exchange for a limited royalty income. These documents revealed that the real economic benefit of the sale and export of coal through the terminal by the mini-pit contractors exploiting OCT's Export Entitlement was not accruing to OCM as contemplated in the 'End Game' set out in the Business Rescue Plan.

[75] The facts were concerning for RBCT because they indicated that by virtue of the leasing arrangements OCM was not a Coal Exporter in terms of the Shareholders' Agreement. Consequently, it had no right to export coal through the terminal. Secondly, it appeared that the economic benefit of

selling the coal in the international market and exporting coal through the terminal using OCT's entitlement was not being used for the purposes set out in the Business Rescue Plans which required the bringing back into operation of OCM's coal mining business as a critical component of the 'End Game' that had been approved by RBCT in its original approval letter to OCT dated 25 June 2021.

[76] On 21 October and 3 November 2022, OCT selectively provided RBCT with limited requested documentation in respect of the mini-pit contractors agreements, excluding all of the Liberty Coal documents. Significant information requested was not provided. On 8 and 9 November 2022, RBCT conducted a site visit to OCM in order to assess the operations. On 24 November 2022, the RBCT board met and considered OCT's status and the assessment of the mini-pit operations and implications in relation to the interim period.

[77] On 30 November 2022, RBCT informed OCT of its concerns as recorded above and the outcome of the assessment, and gave notice to OCT of the cessation of its rights to export coal through the RBCT Terminal as of 31 January 2023 for three self-standing grounds.

- (i) Termination of the Interim Period by effluxion of time;
- (ii) OCT's failure to comply with paragraph 5 of the letter of 29 September 2022, and to provide necessary and relevant information to RBCT; and
- (iii) OCT's failure to satisfy RBCT that it has met the requirements of the resolute conditions in the Interim Period Agreement.

[78] RBCT recorded that the assessment was based on limited information and documents volunteered in October and November 2022. OCT, OCM, the mini-pit contractors and Liberty Coal did not, by 18 November 2022, provide RBCT with all the information and documents requested by RBCT in paragraph 5 of its extension letter to OCT dated 29 September 2022, which cooperation was required to be met as a material condition in paragraph 4

read with paragraph 5 of the extension letter in relation to RBCT agreeing to extend the extended Drop-Dead Date from 30 September 2022 to 31 December 2022, and then to 31 January 2023.

[79] RBCT concluded by recording that in its assessment, from the information available to it, OCM was not itself mining or producing any coal and was therefore not a company which mined and produced coal in terms of clause 1.1.14.1 of the Shareholders' Agreement and was not meeting the requirements of a Coal Exporter in terms of clause 1.1.14.1 of the Shareholders' Agreement.

[80] No evidence was presented to RBCT thereafter by OCT that OCM itself mined and produced coal as prescribed in clause 1.1.14.1. All the evidence showed instead that the mini-pit contractors, as separate entities, were the entities which mined and produced coal for themselves using OCM's mining rights.

[81] The consequences of OCM not meeting the requirements of a Coal Exporter in terms of the provisions of the Shareholders' Agreement, and OCT not providing RBCT with information and documentation verifying OCM's status as a Coal Exporter, which failure was not capable of remedy and constitutes a new Event of Default in relation to OCT, include the following:

- (i) The first resolute condition agreed in the Interim Period Agreement applies, and OCT is thereby already automatically re-suspended in accordance with the terms and conditions of the said agreement;
- (ii) the second resolute condition agreed in the Interim Period agreement applies, and OCT is thereby also already automatically re-suspended in accordance with the terms and conditions of the said agreement;
- (iii) the historical link between OCT and OCM remains broken, and the basis for RBCT's previous indulgence in relation to OCT itself not being a Coal Exporter in terms of the Shareholders' Agreement (and being an

embedded defaulting Shareholder in RBCT) and the use by OCT of its Export Entitlement remains critically absent; and

- (iv) Transaction 1 of the critical 'End Game' transactions described in paragraph 3.1 of RBCT's original approvals letter dated 25 June 2021 fails and Transaction 1 cannot be achieved because it requires OCM to currently meet the requirements of a Coal Exporter as envisaged by clause 1.1.14.1 of the Shareholders' Agreement, which it does not. If OCM were to transfer its mineral rights to Liberty Coal, the 'End Game' would not be implemented or achieved: Transfer of the leasing business and continuation of these arrangements would not achieve a vertical control structure contemplated in clause 1.1.14.3 of the Shareholders' Agreement - a risk of new OCT2 contemplated in Transactions 2 and 3 becoming a new embedded Defaulting Shareholder replacing an existing embedded Defaulting Shareholder (OCT) which is not possible and is not permitted under the Shareholders' Agreement.

[82] The letter concluded as follows:

'RBCT hereby in terms of this letter, read with and in accordance with the terms and conditions of the RBCT/OCT Interim Period Agreement confirms the automatic termination of the Interim Period and the automatic re-suspension of OCT and OCT's Export Entitlement in terms thereof, and confirms that as a result of such automatic re-suspension OCT is currently not entitled to export coal through the Terminal and hereby notifies OCT that it has until 31 January 2023 to cease all of its coal exporting activities through the Terminal.'

[83] Following the assessment conducted in October and November 2022, RBCT concluded on a conspectus of the evidence, supported by the affidavits of the NDPP in the preservation and forfeiture applications, the findings in the judgment in the preservation application, and the first report of the Curator, that the use by OCT of the Export Entitlement appeared not to be *bona fide* aimed at providing the necessary capital for OCM. OCM was benefiting in only nominal royalty amounts, paid by third parties using OCM's mining rights.

[84] There was, according to RBCT, no obligation on it to resuscitate the automatically lapsing Interim Period or to enter into a new temporary Interim Period and issue a new notice to OCT in terms of clause 23.1.2 so as to allow the mini-pit contractors or other unknown third parties to continue enriching themselves and sell and export their coal using OCT's entitlement, at the loss and expense of OCM.

### **Issues to be decided**

[85] Reasons for granting the NPA's application to intervene are provided in this judgment.

[86] The following issues must be decided

- (a) Non-joinder of Tegeta and the Curator;
- (b) The answering affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, together with the issues raised with regard to allegations of RBCT against Daniel McGowan;
- (c) The main application
  - (i) Urgency
  - (ii) The interdict
  - (iii) Costs

### **The NPA application to intervene in these proceedings – ruling**

[87] At the hearing of the main application on 24 March 2023, I heard the arguments of the NPA represented by Mr *Chaskalson SC*, and Mr *Wickins SC* for the applicants, and granted the NPA's application to intervene in the main application. I indicated that I would give reasons in my judgment. These are the reasons.

[88] In *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others*,<sup>1</sup> the Constitutional Court held that:

'[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial

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<sup>1</sup> *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4; 2017 (8) BCLR 1053; 2017 (5) SA 1 (CC).

interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. *But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.*

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.” (My emphasis.)

[89] The NPA contends that it has a right to intervene which is based on a clear legal interest in the relief claimed by the applicants since: \

- (a) it has obtained an asset preservation order preventing dissipation from the business of OCM;
- (b) the RBCT entitlement was being used by the business rescue practitioners to facilitate the dissipation of value from the business of OCM through the mini-pit contracts; and
- (c) the attempt to resurrect the lapsed contractual right of OCM to use the historical OCT RBCT Export Entitlement was thus an attempt to facilitate the ongoing dissipation of value from the business of OCM in breach of the preservation order obtained by the NPA and in violation of the public

interest against the dissipation of proceeds of crime, which public interest the NPA is statutorily obliged to protect.

[90] The NPA contends further that while in other circumstances the NPA would have left it to the Curator to protect the preserved property from dissipation of value, the Curator has been neutralized by death threats apparently designed to prevent him from hindering the present operation of the many pit contracts. Accordingly, so it is asserted, it is incumbent upon the NPA to intervene to protect the public interest against the dissipation of value from the business of OCM which is liable to forfeiture as the embodiment of proceeds of crime and is the instrumentality of money laundering offences.

[91] Although the NPA is in favour of the ultimate lifting of the suspension of OCT's Export Entitlement, it supports the steps taken by RBCT to suspend the OCT Export Entitlement as matters stand, and contends that the public interest would not be served by granting the applicant's the interim relief that they seek. It seeks a dismissal of the main application.

[92] It does not deal with the merits of the application in its papers and confines itself to submissions on the balance of convenience. The application for intervention is premised on the contention that the public interest tilts the balance of convenience firmly against the interim relief sought by the business rescue practitioners because such interim relief is calculated to dissipate value from assets restrained as proceeds of crime while an application for forfeiture of those assets is pending.

[93] To this end, it asserts that:

- (a) the business of OCM was acquired with the proceeds of crimes committed by the Gupta family and their associates in the Trillian Group of Companies, The Regiment Group of Companies, Albertime (Pty) Limited and Centaur Ventures Ltd, which at the time was a joint venture of the Centaur Group of McGowan and the Gupta family;



- (b) Templar Capital held claims aggregating to R1.3 billion against OCM and it used these claims to control the business rescue processes of OCM and OCT which is the entity holding the OCM linked Export Entitlement through the Richards Bay Coal Terminal. The Business Rescue Plans which the applicants seek to implement in respect of OCM and OCT are interdependent and are based on the conversion of Templar Capital's claims against OCM into equity in Liberty Coal;
- (c) Liberty Coal is one of the mini-pit contractors benefiting to the tune of hundreds of millions per month at the expense of OCM;
- (d) the Templar Capital claims were the proceeds of money laundering crimes under ss 5 and 6 of Prevention of Organised Crime Act 121 of 1998 ('POCA') being the laundered proceeds of crimes perpetrated by the Gupta family and their associates;
- (e) given that the Templar Capital claims are themselves proceeds of crime:
  - (i) the OCM and OCT Business Rescue Plans are both unlawful;
  - (ii) by engaging in the various transactions that have been concluded to implement the OCM Business Rescue Plan, which requires the conversion of the template claims into equity in liberty, the deponent to the founding affidavit Mr Knoop and his fellow business rescue practitioners of OCM have repeatedly committed money laundering crimes under s 5 of POCA;
  - (iii) despite the fact that the High Court has now made findings that have the logical corollary that implementation of the Business Rescue Plans amounts to a money laundering offence, the business rescue practitioners remain committed to implementing these plans. They have appealed the preservation orders and have launched an application to the High Court for an order that would establish that the preservation orders have no effect pending the appeal.

- (f) at present, the export allocation of OCT is being used not for the benefit of OCM or its creditors but rather to dissipate value from OCM at the expense of the creditors and in conflict with the purposes of the restraint order. Thus, the current use of the allocation subverts the purposes both of the preservation order and of the business rescue process itself. Until such time as the business rescue practitioners have made new arrangements which ensure that the export allocation of OCT is used for the benefit of OCM, the public interest requires that steps be taken to prevent that allocation being used to effect further dissipation of value from OCM.

[94] The applicants, OCT and OCM, contend that the NPA is not entitled to intervene in these proceedings as it is not a party to the primary dispute between the applicants and RBCT which is contractual in nature, and that it has no legal interest in the outcome of the application.

[95] The applicants contend further that the allegations of dissipation are entirely unfounded, that the mini-pit contracts are valid, binding and enforceable, that the Curator acknowledges this in his first report and has been unable to suggest any basis on which these contracts could be lawfully varied or amended other than by agreement between the parties, and that the contention that monies are being unlawfully dissipated is untrue. It is incorrect, so it is asserted, that the application has 'implications for property which is under restraint orders' as contended by the NPA. Importantly, the NDPP does not suggest that OCT acquired its rights in the Shareholders' Agreement with RBCT in an unlawful manner as the Shareholders' Agreement was concluded on 12 April 2013, long before the Guptas became involved in the Optimum Group of Companies in 2016 which is when the alleged unlawful conduct commenced.

[96] The applicants also contend that Templar Capital has not used its claims to control the business rescue processes.

[97] It was submitted by the applicants that the NDPP's real complaint relates to the manner in which it is believed OCT will exercise its contractual rights in the event RBCT is interdicted from interfering therewith, and that that is not an issue in these proceedings since the NDPP can pursue whatever remedies she may in the event that OCT exercises its contractual rights in a manner that infringes her rights.

[98] It is common cause that the Pretoria High Court issued preservation of property orders on 23 March 2022 in favour of the NDPP under case numbers 62601/2021 and 62604/2021 in respect of the business of OCM, all of the shares in OCT and OCM, and all of the claims of Templar Capital (Pty) Ltd against OCM.

[99] The judgments record the following:

(a) The judgment in 62604/2021:<sup>2</sup>

'[86] We therefore conclude as follows: The property concerned in this application includes all of Tegeta's shares in OCM and OCT as well as the business of OCM. There is sufficient evidence indicating that Tegeta obtained the funds to acquire these properties from several sources which were channeled through various transactions. Taking into account the evidence in this regard, as well as the undisputed objective facts, the NDPP has demonstrated that Tegeta obtained the funds to acquire the Optimum property through fraud, money laundering, corruption and theft. In our view, the NDPP has established a prima facie case that there are reasonable grounds to believe that the properties concerned are the proceeds of unlawful activities.'

(b) The judgment in 62601/2021:

'[103] The evidence adduced by the NDPP therefore indicates that the CVL claims in respect of the abovementioned contracts were funded by advances to CVL on the Griffin Line loan, recycled proceeds of the Centaur Mining fixed deposit and recycled proceeds of the Trillian fixed deposit. This evidence stands completely uncontradicted.

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<sup>2</sup> Paragraph 86 of the judgment 62604/2021.

[104] It is contended by the NDPP that the CVL claims in the hands of Templar are therefore the proceeds and instrumentality of the money laundering offences created by sections 5 and 6 of POCA as well as the proceeds of these crimes.

[105] Taking into account the evidence as well as the undisputed objective facts, we are satisfied that the NDPP has made out a *prima facie* case that there are reasonable grounds to believe that these claims are the proceeds of the crime of money laundering.'

[100] Although the applicants have been granted leave to appeal the judgments of the Pretoria High Court, the judgments and the orders granted are still extant and have not been suspended pending appeal. The NPA relies on these judgments, the findings therein and the preservation orders which, in my view, it is entitled to do for the purposes of the intervention application. It is not necessary in this intervention application to rehash and reconsider all the evidence presented in the preservation applications or to determine the entire dispute between the applicants and RBCT.

[101] The applicants contend that the highwater mark of the NDPP case is that the high court's findings have the logical corollary that implementing the Business Rescue Plans amounts to a money laundering offence and that this conclusion is unfounded. I find that the NDPP is entitled to draw such a conclusion from the judgments of the high court, which is not necessarily the conclusion of this court at this point in the proceedings.

[102] A further reason to grant the application for the NPA's intervention is that the Curator is no longer available to intervene in these proceedings having resigned his appointment in December 2022 following death threats against him from unknown sources. It would have been the function of the Curator to oversee the preservation of the property detailed in the judgments of the Pretoria High Court.

[103] According to the applicants, the Curator acknowledges in his first report that the mini-pit contracts are valid, binding and enforceable. However, the

Curator has also said on affidavit,<sup>3</sup> albeit not in these proceedings, that ‘the mini-pit contracts are profoundly uncommercial and in his view amount to dissipation of the value of the property:

‘21.8 The current impasse between the BRP’s of OCT and me is furthermore illustrated by my recent engagements with the BRP’s and exchange of correspondence with them, in respect of the fact that the overwhelming part of the economic benefit generated by the mining and sale of the OCM Coal Resource does not accrue to OCM (per annexure PVDS 23 hereto). In this regard, I:

...

21.8.4 recorded that the royalty received by OCM for the exploitation of its mineral reserve (a royalty of R45 – R65 per ton, against coal prices of approximately R5,000 per ton), is a very significant dissipation of value which I am obliged to address...’

He goes on to state as follows:

‘21.9 The BRP’s of OCM inter alia:

21.9.1 stated that I am not empowered to renegotiate “any contract” on behalf of OCM;

21.9.2 requested me not to contact any of the mini-pit contractors to renegotiate any agreements, without first contacting them; and

21.9.3 stated that my proposal amounted to interference with the BRPs of OCM’s conducting of the business of OCM and also an attempt to take over the business.

21.10 I advised them that given their response, I would consider whether to

21.10.1 withdraw my consent to the mini-pit mining and stop mini-pit mining contracts with immediate effect; or

21.10.2 work with the BRPs of OCM and the contractors to negotiate fair contracts that make sense and provide for a proportionate distribution of value, which allows the continuation of operations on the mine and ensures stability.

...

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<sup>3</sup> Page 1560 of the indexed papers.

22.1 Since inception of my appointment, I have made numerous requests to the BRP's for various information and documentation. Over a long period of time, many of these requests were either only responded to in part, or not at all. ...'

[104] The NPA's application to the Pretoria High Court for a preservation order was brought in terms of the POCA, the purpose of which is to *inter alia* introduce measures to combat organized crime and money laundering, to provide for the prohibition of money laundering, to provide for the recovery of the proceeds of such unlawful activity, and for the civil forfeiture of criminal assets that are the proceeds of unlawful activity. The need for this piece of legislation is based on the recognition that money laundering, amongst other listed criminal activities, infringes on the rights of the people as enshrined in the bill of rights, that it poses a danger to economic stability and has the potential to inflict social damage, and that it is necessary to criminalize the management of enterprises which are involved in a pattern of racketeering activity because it is usually very difficult to prove the direct involvement of crime leaders. The judgment and order of the High Court, although pending appeal, is still extant, and more importantly, was based on evidence presented to it from which it made certain *prima facie* findings. It is therefore in the public interest to allow the NPA to intervene in these proceedings for the reason that it has an interest to protect and has provided a nexus for its interest in OCT's export entitlement.

[105] The application by the NPA to intervene in these proceedings is granted. Their papers filed on record to date will stand as papers in the main application.

### **Non-joinder of the Curator and Tegeta**

#### *The Curator*

[106] It is now settled law that any party who has a direct and substantial interest in the subject matter of a case must be joined in the proceedings to

safeguard their interests. In *ABSA Bank Limited v Naude N.O and Others*,<sup>4</sup> the Supreme Court of Appeal formulated the test thus:

'[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That is the position here. If the creditors are not joined their position would be prejudicially affected...'  
(Footnotes omitted.)

[107] Insofar as the Curator is concerned, I have addressed above the NPA's interest in the outcome of the application. The Curator was appointed by the court in terms of s 42 of the POCA with the specific function of preserving the property detailed in the order. As stated earlier, the NPA has provided a nexus for its interest in OCT's export entitlement. The same applies with regard to the Curator whose function it is to preserve the property, and he would have an interest in the outcome of the proceedings since the interest which he protects (even if the court order does not cover OCT's Shareholder Interest as the applicants contend) could be prejudicially affected by an adverse order of the Court.

[108] It is common cause that the Curator appointed by the High Court resigned during December 2022, and there is currently an application pending for a new Curator.

[109] This is a further reason to have granted the application of the NPA to intervene.

[110] I find that the failure of the applicants to join the Curator in these proceedings is not fatal to its case. The preliminary point raised by RBCT in this regard is dismissed.

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<sup>4</sup> *ABSA Bank Limited v Naude N.O and Others* [\[2015\] ZASCA 97](#); 2016 (6) SA 540 (SCA) para 10.

### *Tegeta*

[111] Tegeta is the holding company of OCT and OCM. On the basis that it is part of an approved shareholders group under the Shareholders' Agreement, one would have expected it to be joined in these proceedings.

[112] However, the point was not pursued further in RBCT's heads of arguments. I do not make a finding in this regard.

### **The answering affidavits of the second and third respondents**

[113] RBCT contends that the affidavit deposed to by McGowan, filed in these proceedings on behalf of Templar Capital and Liberty Coal, the second and third respondents respectively, is impermissible and ought not to be accepted as Templar Capital and Liberty Coal are applicants masquerading as respondents. It was submitted that the affidavit unequivocally and impermissibly supports and seeks to bolster the case that is made out by the applicants, and should not be admitted in these proceedings as it is prejudicial to RBCT. It was submitted further that the said affidavit should be ignored because it does not assist the court and is scandalous. The court was referred to the judgment in *Kruger and Others v Aciel Geomatics (Pty) Ltd*<sup>5</sup> which will be dealt with later.

[114] Templar Capital and Liberty Coal, through McGowan, assert that they joined the fray on account of certain allegations made by Waller, the CEO of RBCT against the two companies and McGowan. I will deal with this issue later.

[115] The question of the status of Templar Capital and Liberty Coal's answering affidavit must be considered first.

[116] Templar Capital and Liberty Coal assert that the issue relating to OCT's right to export coal through RBCT includes the harm that may result if

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<sup>5</sup> *Kruger and Others v Aciel Geomatics (Pty) Ltd* [2016] ZALAC 92 cited with approval in *Matlou v High Commission of Nigeria and Others* [2020] ZAGPPHC 424.



OCT's entitlement is removed in respect of which Templar Capital and Liberty Coal were entitled to respond. They contend that they are cited for their interest in the matter, which arises from the vested rights they have in OCM and OCT arising from the statutorily adopted Business Rescue Plans. In this regard, they cite the judgment in *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited*<sup>6</sup> at paragraph 10 thereof where it cites with approval the judgment in *Absa Bank Limited v Naude* quoted earlier in this judgment.

[117] First it should be noted that the main application before the court in *Golden Dividend* was one (by ABSA) to set aside a Business Rescue Plan. The issue that was determined on appeal was whether the non-joinder of the other creditors was fatal to the granting of that application. The facts there are disparate to the present case where the applicants seek relief that, if granted, will not affect Templar Capital and Liberty Coal adversely. The applicants, together with Templar Capital and Liberty Coal, have a common goal in mind. This is evident from the affidavit of McGowan. Furthermore, the application does not seek relief which adversely affects their rights. On the contrary, the applicants seek to advance the interests of Templar Capital and Liberty Coal amongst other things.

[118] I therefore do not agree with the submission that Templar Capital and Liberty Coal were entitled to be joined as respondents because of their interest arising from the Business Rescue Plan. If Templar Capital and Liberty Coal wished to exercise their rights, they ought to have applied to intervene as applicants in the case.

[119] Second, the following is stated in *Kruger and Others v Aciel Geomatics (Pty) Ltd*<sup>7</sup> in circumstances similar to the position which presents itself here.

"[5] ... Mr. Watt-Pringle submitted that the applicants are not entitled to rely in these proceedings on the untested evidence presented by GSA, since it formed no part of the founding affidavit and therefore no part of their case. Further, he submitted that GSA's counsel is not entitled to claim in argument on behalf of GSA the relief sought by the applicants in their notice of motion. In other words, GSA is not permitted to

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<sup>6</sup> *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited* [2016] ZASCA 78.

<sup>7</sup> *Kruger and Others v Aciel Geomatics (Pty) Ltd* [2016] ZALAC 92.

assume the role of a Trojan horse, acting in every way as if it is a co-applicant without claiming any relief in its own name, and thus seeking to avoid any liability for costs.”

The Court went on to say that:

‘[11] In my view, the above submissions are indeed correct. I may add that in the affidavit filed by it GSA, not only did it seek to support the said appellants’ case but went on to ask for the “relief as prayed for in the notice of motion”. Once GSA sought the relief asked for by the said appellants it was no longer placing evidence before the Court *a quo* it was making itself an applicant in the proceedings. In allowing the affidavits filed by GSA in the form they did the Court was, in effect allowing a further founding affidavit. The respondent in the Labour Court thus suddenly found itself fending itself not only against the applicants but also against a co-respondent. What is it then to do: answer the applicant’s papers and answer the co-respondent’s papers? This clearly goes against the fundamental principle in our law that it is the founding affidavit filed in support of a motion that makes the case which the respondent must meet. Allowing a co-respondent to file answering papers in which it seeks the relief sought by an applicant while not seeking to be an applicant in the proceedings cannot and is not permissible nor is it open to a court to allow such procedure on any grounds. The Court does not have a discretion to do so. Allowing the GSA affidavit not only prejudiced the respondent but placed the respondent in a position where it had to conduct a defence on two fronts; one against the applicants and one against a co-respondent. This is untenable because GSA and the applicant effectively formed a tag-team against the respondent.

[12] Since the affidavits constitute pleadings and evidence in motion proceedings, Counsel for the respondent set out the principles that apply to motion proceeding, although these principles should be trite, it is worth repeating them:

- (a) An applicant in motion proceedings must make out its case in its founding affidavit, which constitutes both the particulars of claim and evidence in support of the relief claimed;
- (b) it follows from the above principle that the respondent against whom relief is sought is only obliged and entitled to deal with the case in applicant’s founding affidavit;
- (c) The rule in *Plascon Evans* is that the applicant can only succeed on the basis of facts in its founding affidavit which is not disputed in the answering affidavit, read with additional facts deposed to in the respondent’s answering affidavit;

(d) There is however a qualification to the rule in (c) above, which is that the applicant cannot seek to make out a cause of action based on allegations in the answering affidavit, which did not form part of its case in the founding affidavit. A corollary to the rule that the respondent is only obliged in its answering affidavit to deal with the case made out in the founding affidavit and no other.

(e) *A fortiori*, a respondent is not obliged to deal with allegations made in a co-respondent's affidavits which may happen to support the applicant's case. The reasons for this are twofold:

(i) firstly, there is no *lis* between a respondent and its co-respondent. Since the co-respondent is not entitled to claim any relief unless it enters the fray as an applicant and files a notice of motion, there is nothing for the respondent to oppose.

(ii) secondly, the respondent is only obliged to deal with the case in applicant's founding affidavit.'

[120] I align myself with the views expressed above.

[121] Although Templar Capital and Liberty Coal, through McGowan, do not specifically express that they seek the relief as prayed in the notice of motion, the content of their affidavit shows in no uncertain terms that that is the relief sought. RBCT is not required to answer the case presented by its co-respondent.

[122] For the above reasons the 'answering affidavit' of 3 February of Templar Capital and Liberty Coal is not admitted and must be disregarded. The following affidavits are consequently also disregarded:

- (a) the affidavit of RBCT of 13 February in answer to Templar Capital and Liberty Coal's 'answering affidavit',
- (b) the 'replying affidavit' of 20 February of Templar Capital and Liberty Coal, and
- (c) the 6 March Supplementary Affidavit of RBCT; the application to admit this supplementary affidavit is dismissed.

[123] Finally, I do not agree with the submission of *Mr Bham SC*, for Templar Capital and Liberty Coal, that the only reason that they filed an answering affidavit was that Waller, the CEO of RBCT, invited them to do so. It is clear from what has been stated above in relation to the 'answering affidavit' of Templar Capital and Liberty Coal that this was not the case.

[124] *Mr Bham* submitted that the stance adopted by Templar Capital and Liberty Coal was that the court has to ignore everything which Waller says in his answering affidavit in relation to Templar Capital, Liberty Coal and McGowan, and if that happens, then the court does not have to have regard to anything that Templar Capital and Liberty Coal have said; that RBCT cannot have it both ways.

[125] There are two issues here.

[126] As I understand it, one of the issues relates to the allegations made in paragraphs 143 and 144 of RBCT's affidavit in answer to that of McGowan (for Templar Capital and Liberty Coal). This issue appears to have been resolved prior to the hearing of this matter. In any event, the affidavit containing this complaint has not been admitted in these proceedings.

[127] This leaves us with the complaints of Templar Capital and Liberty Coal in relation to the allegations contained in paragraphs 3, 16, 17, 18, 19, 20, 27, 114, 115, 116, 120 and 240 of RBCT's answering affidavit in the main application.

[128] The procedure for an application to strike out is stated in Rule 6(15) of the Uniform Rules of Court which provides as follows:

'(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.'

[129] In *DE van Loggerenberg & E Bertelsmann Erasmus: Superior Court Practice*, it was stated:

'The application must be on notice in terms of subrule (11). The application must clearly indicate the passages to which objection is taken and set out the grounds of objection shortly. The application should be set down for hearing at the same time as the hearing of the main application.'

[130] Templar Capital and Liberty Coal have not filed such an application. They have no *lis* with RBCT, their 'answering affidavit' to RBCT's answering affidavit is not permitted and has been disregarded, the purported application to strike out does not comply with the rule 6(15) and is not an application to strike out.

### **The main application**

#### **Urgency**

[131] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Rule 6(12) of the Uniform Rules which provides that the applicant must set forth explicitly the circumstances which render the matter urgent and the reasons why it could not be afforded substantial redress at a hearing in due course.

[132] It has been held that mere lip service to the requirements of Rule 6(12) (b) will not do and that an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm.<sup>8</sup>

[133] In *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others*,<sup>9</sup> the court stated as follows:

'[64] It seems to me that when urgency is in issue *the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course*. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

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<sup>8</sup> *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).

<sup>9</sup> *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [2014] 4 All SA 67 (GP); See also *Rokwil Civils (Pty) Ltd and Others v Le Sueur N.O and Others* [2020] ZAKZDHC 35 para 16.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.’ (My emphasis.)

[134] In *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*,<sup>10</sup> the court stated as follows:

‘[8] In assessing whether an application is urgent, this Court has in the past considered various factors, including, among others:

- (a) the consequence of the relief not being granted;
- (b) whether the relief would become irrelevant if it is not immediately granted;
- (c) whether the urgency was self-created.’ (Footnotes omitted.)

[135] I proceed to consider the issue of urgency along the lines of the above authorities.

#### *The delay*

[136] The following was stated in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*<sup>11</sup> with regard to urgency:

‘[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. *A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course.* A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.’

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<sup>10</sup> *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2019 (9) BCLR 1104 (CC) para 8.

<sup>11</sup> *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196.

[137] According to OCT and OCM, there was no urgency with regard to launching this application until they received a final response from RBCT on 20 January 2023 that it would not depart from its 30 November 2022 decision to suspend OCT's Export Entitlement on 31 January 2023. There were repeated attempts after 30 November 2022 at securing an amicable resolution of the matter but RBCT remained steadfast in its decision principally because of the so-called 'pending unlawfulness of the mini-pit operations' which was entirely unreasonable and misguided.

[138] The applicants contend that the application could not be launched earlier than it was because RBCT communicated its final position to OCT on 20 January 2023 and it would have been premature to do so before that date. RBCT's board still had to consider the additional information provided at the meeting on 12 December 2022 as well as the managerial and legal teams' recommendations. The board meeting was convened for 17 January 2023 and its decision would be communicated to OCT and OCM on 20 January 2023. OCT and OCM could not have elicited a response any sooner and had to wait for the decision before knowing what their final position was.

[139] In support of this contention, the applicants referred the court to *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others*:<sup>12</sup>

'[37] Another of the city's contentions was that the urgency the applicants relied on was self-created and ought not to be entertained. Even if it were accepted that urgency arose as early as October 2013, it was only prudent and salutary that the applicants first sought to engage the city before they rushed off to Court. That engagement, as mentioned above, produced the agreement of 2 November 2013.'

[140] I align myself with the views expressed above. No doubt, it is prudent and salutary to engage one's opponent with a view to resolving the dispute

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<sup>12</sup>*South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726; 2014 (4) SA 371 (CC).

before rushing off to court. It saves on time, cost and risk to avoid litigation where a dispute can be resolved through negotiation.

[141] However, I am of the view that based on the facts, and importantly on the contentions of the applicants themselves, they ought to have considered launching the application sooner if they wished to proceed on the basis of urgency. On the basis that the applicants contend that there were no Events of Default, and more importantly that they were in an unfair bargaining position and subjected to oppressive terms and conditions in the Interim Period Agreement, the applicants ought to have acted with haste. They had already referred a dispute to arbitration following on the letter dated 30 November 2022, the exact issues being unavailable to the court, but there was clearly a dispute that could not be resolved.

[142] It was clear from RBCT's letter dated 30 November 2022 that its decision was made. It was resolute in the stance that it had taken and it was highly improbable that its decision would change.

[143] According to RBCT, the information at its disposal showed that OCM was not itself mining or producing coal. It was therefore, so it was contended, not 'a company which mines and produces coal' in terms of clause 1.1.14.1 of the Shareholders' Agreement and was therefore not a Coal Exporter within the definition ascribed to it in the Shareholders' Agreement. Consequently, the historical 'link' between OCT and OCM was broken, and the basis for RBCT's previous indulgence in relation to OCT not itself being a Coal Exporter was absent.

[144] Additionally, according to RBCT, its approval of the 'End Game' was now also subject to the NDPP's preservation orders and the outcome of the applications for forfeiture to the State in terms of the POCA, and whether or not implementation of the 'End Game' would be an offence under the POCA. RBCT'S letter dated 30 November 2022 recorded the following:

'25. As mentioned above, OCT,OCM and the '*mini-pit contractors*' (including Liberty Coal) did not by Friday, 18 November 2022 provide RBCT with all the information and documents requested by RBCT in paragraph 5 of RBCT's Extension Letter to



OCT dated 29 September 2022, which cooperation was required to be met as a material condition in paragraph 4 read with paragraph 5 of the RBCT Extension Letter to OCT dated 29th September 2022 (as amended) in relation to RBCT agreeing to extend the Extended Drop-Dead Date from 30 September 2022 to 31 December 2022 and then to 31 January 2023. Key information requested by RBCT and not made available to RBCT, includes the following:

25.1 ...

25.3 the respondents' respective responses to the NDPP's various serious allegations made in the asset forfeiture applications, so RBCT is currently not in a position to assess the respondents' respective responses to the serious allegations made by the NDPP against them, including that Transaction 1 of the '*End Game*' described in RBCT's Original Approval Letter dated 25 June 2021 is a crime under POCA, that OCM has been used as a money-laundering vehicle in a money-laundering scheme, and the allegations in relation to Daniel McGowan's involvement/s and relationship/s, where Daniel McGowan is the controlling mind behind Templar Capital and Liberty Coal, seeking to acquire control of OCM's business). ...'

[145] The above letter was preceded by various other correspondences on the issues referred there. RBCT's letter dated 29 September 2022 recorded inter alia the following:

'3.2 The NDPP claims (in Case No 62604/2021), among other things, that the "*end - game*" in particular the sale by OCM of the business of OCM to Liberty Coal and the implementation of the OCM Business Rescue Plan, is illegal and an offence under the prevention of organized crime act, 121 of 1998 ("POCA"), and the NDPP seeks forfeiture to the state of the shares in OCM, the shares in OCT and the business of OCM in terms of section 48 of POCA.

...

3.4 the claims and allegations regarding the commission of offences under POCA made by the NDPP, and the implications and consequences thereof, in both applications (under Case No 62604/2021 and the parallel Case No 62601/2021 in respect of Templar Capital Limited's R1.3 bn claim against OCM), require RBCT to pause and re-assess what was represented to RBCT as, and intended to be, a short temporary position and Interim Period in relation to OCT ending 28 March 2022 that

now appears to be turning into an open-ended indefinite “*permanent*” Interim Period and position for OCT, OCM, Liberty Coal and unknown mini-pit contractors.

3.5 This re-assessment by RBCT of the position of OCT, OCM, Liberty Coal and the mini-pit contractors, and duration of the Interim Period, in the context of the RBCT Shareholders' Agreement and prevailing circumstances is intended to take place in October/November 2022, with the cooperation of OCT, OCM, Liberty Coal and the mini-pit contractors, as contemplated in this September 2022 Extension Letter.’

[146] Pertinently, OCT knew its legal remedies. According to RBCT, OCT had threatened legal action and stated in its letter dated 5 October 2022 that: ‘in light of the imminent festive season and court recess from 4 December, an adverse decision by RBCT’s brought on 24 November 2022 will, realistically, not leave much time for such matters to be dealt with, either properly or at all, before the 31st December 2022; nor allow OCM and OCT to take steps to attempt to mitigate their own damages, including if necessary by way of urgent legal proceedings...’. On 2 December 2022, OCT addressed a letter to RBCT and recorded ‘it is apparent that there is now a dispute and/ or a controversy and/ or difference that exists between us...As such, it is likely that we will have to arbitrate the dispute as contemplated in clause 20 of the RBCT Shareholders' Agreement. In addition, there may be substantial ancillary litigation that will need to be instituted against RBCT.’

[147] I am required to consider, despite the delay, the consequence of the relief not being granted and whether the applicants can or cannot be afforded substantial redress at a hearing in due course.

[148] On this score, it is common cause that OCT’s Export Entitlement was suspended from December 2018 for some three years before it was temporarily lifted for the first time on 25 January 2022. There were obviously consequences for OCM but clearly coal was still mined at OCM, albeit not by OCM itself, and it was dealt with by alternative means which earned OCM fees in royalties.

[149] There is also a pending arbitration hearing, which if expedited, will afford the applicants substantial redress in due course.

[150] I find that the urgency which the applicants now claim is self-created and the applicants are not without substantial redress in due course.

[151] The application should be struck off the roll for the above reasons.

### **The interdict**

[152] It is trite that the requirements for an interim interdict are: (a) a *prima facie* right, albeit open to some doubt; (b) a well-grounded apprehension of irreparable harm; (c) the balance of convenience favouring the applicant; and (d) the existence of no other satisfactory remedy.

[153] It is also trite that in an application for a temporary interdict, the applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt.<sup>13</sup>

[154] In *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others*,<sup>14</sup> the Constitutional Court held that:

'...before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict.'

[155] In *National Gambling Board v Premier of KwaZulu-Natal and Others*,<sup>15</sup> court stated as follows:

'[41] An applicant for an interim interdict must show a *prima facie* right to the main relief pending which the interim interdict is sought. ...'

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<sup>13</sup> *Webster vs Mitchell*, 1948 (1) SA 1186 (WLD).

<sup>14</sup> *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* [2020] ZACC 10; 2020 (8) BCLR 916; 2020 (6) SA 325 (CC). See also *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A); *Resilient Prop (Pty) Ltd v Eskom Holdings Soc Ltd* 2019 (2) SA 577 (GJ) at 52

<sup>15</sup> *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156 CC.

[156] I proceed along the lines enunciated in the above authorities.

*A prima facie right albeit open to some doubt*

[157] The question whether OCT has a *prima facie* right to the relief which it seeks involves a number of issues which will be addressed below.

[158] The applicants contend that once the wharfage fees had been paid to RBCT via the PCF Facility, RBCT was not entitled to refuse to uplift the suspension of OCT's Export Entitlement, or to uplift the suspension of those rights temporarily and conditionally each time. The issues raised by the applicants are as follows:

- (a) RBCT was not entitled to 'reinstate the original suspension' of OCT's Export Entitlement in November/ December 2018, as it stated in its letter dated 30 November 2018, since the previous suspension of OCT's Export Entitlement had been lifted unconditionally following the issue of the 30 May 2018 court order;
- (b) OCT was not a defaulting shareholder once its dues were paid via the PCF Facility and RBCT was not entitled to uplift the suspension *temporarily and conditionally* in January 2022 in terms of the Shareholders' Agreement.
- (c) RBCT's imposition of the conditions and periods of the upliftment of the suspension constitute oppressive and unfairly prejudicial conduct against OCT as a minority shareholder;
- (d) Section 25(1) of the Constitution prohibits the arbitrary deprivation of property, including incorporeal rights such as OCT's Export Entitlement. Although OCT paid its outstanding dues, it was deprived of its rights on arbitrary grounds arising from the NDPP's unproven allegations in relation to which RBCT has no contractual right; and
- (e) Having regard to s 15(7) of the Companies Act read with clause 3.3 of the Shareholders' Agreement, the agreements are inconsistent with

chapter 6 of the Companies Act because they will have the effect of scuppering OCM and OCT's Business Rescue Proceedings.

[159] According to RBCT:

(a) OCT's Export Entitlement was suspended because OCT failed to pay its November and December 2018 dues;

(b) Additionally, there were certain Events of Default raised in the first Default Notice which were not remedied, and RBCT had reserved its rights in terms of the Shareholders' Agreement at paragraph 7 of the court order.

The Business Rescue Proceedings itself was an Event of Default. The consequence of the Business Rescue Proceedings was a further Event of Default: that control of Tegeta and OCT was transferred to the business rescue practitioners as a result of which OCT was no longer part of an approved Shareholders Group. Further, OCT failed to inform RBCT that due to the unbanking, it was unlikely to be able to avoid an Event of Default (the clause 22 breach). Furthermore, OCT committed an act of insolvency. Additionally, OCT had failed to comply with the terms of the court order.

(c) The Interim Period Agreement that was concluded on 26 November 2021 lapsed through effluxion of time; OCT failed to comply with paragraph 5 of the letter dated 29 September 2022 and to provide necessary and relevant information to RBCT; and OCT failed to meet the requirements of the resolutive conditions in the Interim Period Agreement.

[160] Much has been made, by counsel on both sides, of the question whether RBCT was entitled to 're-suspend' OCT's Export Entitlement in November and December 2018. I am of the view that this debate is irrelevant to the main issue to be decided which is whether RBCT was entitled to refuse to lift OCT's suspension of its Export Entitlement after payment of the November and December 2018 dues via the PCF Facility, which failure resulted ultimately in the permanent suspension of OCT's Export Entitlement.

[161] For the sake of completeness, I deal with the alleged Events of Default in the First Default Notice, relied on by RBCT for this contention, as follows:

- (a) Insofar as Business Rescue Proceedings being an Event of Default is concerned, the wording of clause 21.1.7 of the Shareholders' Agreement makes specific reference to Business Rescue Proceedings of a Shareholder pursuant to the issue of an order by the High Court. Established case law requires that the said clause be interpreted in terms of the language used and considered within its contractual context with proper regard to the purpose of the clause.<sup>16</sup>
- (b) Insofar as the statement of George van der Merwe constituting an act of insolvency is concerned, firstly, his statement was made in pursuance of an application for OCT to be placed into Business Rescue and within the parameters of Chapter 6 of the Companies Act. He stated that OCT would not be able to pay its debts *as and when they fell due and payable within the immediately ensuing six months*.

[162] RBCT relies on clause 21.1.9 which is detailed earlier and section 8 of the Insolvency Act 24 of 1936 which provides that a debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts. Clearly, clause 21.1.9 intends a true act of insolvency to be an Event of Default that is, where the debtor is unable to pay any of its debts, and does not envisage being able to pay it in the future. This is not what Van der Merwe's statement amounts to.

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<sup>16</sup> In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 25, the court stated: '...The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.' (Footnote omitted.)

[163] Chapter 6 of the Companies Act provides the following definition for 'financially distressed':

'(f) "**financially distressed**", in reference to a particular company at any particular time, means that—

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;'

[164] Factually speaking, it is clear the OCT and OCM were in a dire situation. However, to ascribe the interpretations to Van der Merwe's statement in the Business Rescue application, which RBCT postulates, would amount to an absurdity in terms of the Shareholders' Agreement in relation to clauses 21.1.7 and 21.1.9, and the law.

[165] As to the contention that control of Tegeta and OCT was transferred to the Business Rescue Practitioners as a result of which OCT was no longer part of an approved Shareholders Group, to my mind, Tegeta remains in control through the business rescue practitioners as it did through the directors. It is trite that the business rescue practitioners merely perform the work that the directors should be performing. It was after all, a resolution by the board of directors that initiated the Business Rescue Proceedings.

[166] In determining whether the applicants have a *prima facie* right to the relief sought, the following issues must be decided:

- (a) Whether RBCT was entitled to uplift the suspension *temporarily and conditionally* in January 2022 (in terms of the Shareholders' Agreement),
- (b) The Interim Period Agreement and the issue of waiver;
- (c) Whether OCM is a Coal Exporter;

- (d) Whether the imposition of the conditions and periods of the upliftment of the suspension constitute oppressive and unfairly prejudicial conduct;
- (e) Was OCT deprived of its rights to the Export Entitlement on arbitrary grounds in contravention of s 25(1) of the Constitution, arising from the NDPP's unproven allegations;
- (f) Whether under s 15(7) of the Companies Act read with clause 3.3 of the Shareholders' Agreement, the agreements are inconsistent with chapter 6 of the Companies Act because they will have the effect of scuppering OCM and OCT's Business Rescue Proceedings; and
- (g) Whether the Interim Period Agreement that was concluded on 26 November 2021 lapsed through effluxion of time; whether OCT failed to comply with paragraph 5 of the letter dated 29 September 2022 and to provide necessary and relevant information to RBCT; and whether OCT failed to meet the requirements of the resolute conditions in the Interim Period Agreement.
- (h) Whether RBCT has not acted *arbitrio bon viri* and in good faith

*Whether RBCT was entitled to uplift the suspension temporarily and conditionally*

[167] It is common cause that the December 2018 suspension of OCT's Export Entitlement endured for over three years until 25 January 2022 when, following the conclusion of the RBCT/OCT 25/26 November Interim Period Agreement, it was lifted for a limited period and subject to certain suspensive conditions being met, and subject further to a number of resolute conditions.

[168] It was submitted by Mr *Wickins* SC that RBCT was not entitled to uplift the suspension temporarily and conditionally, that once the outstanding dues of OCT were paid to RBCT, there was no reason to not uplift the suspension as there were no other outstanding Events of Default. The matter is, however, not as simple as that.



[169] On the facts presented, payment of the outstanding dues was linked to an elaborate proposed 'End Game' and it was this that resulted in the Interim Period Agreement for reasons which linked to the Shareholders' Agreement as will be seen below. Arising from the proposed 'End Game' were issues such as whether the proposed structure would be compliant with the provisions of clause 1.1 of the Shareholders' Agreement. Clearly further issues arose during the course of the various extensions granted in order to advance the 'End Game' such as whether there was a historical 'notional horizontal link' between OCM (which was then a Coal Exporter in terms of clause 1.1.14.1) and OCT; whether this 'notional horizontal link' was tolerated by RBCT or had in fact met the requirements of the Shareholders' Agreement; and whether it is a requirement that a Shareholder is a Coal Exporter in terms of clause 1.1.14 of the Shareholders' Agreement.

[170] According to RBCT, in relation to the above requirements, OCT was previously owned by Glencore's OCH prior to the revision in 2013 of the Shareholders' Agreement when the definition of Coal Exporter was introduced. OCT was not a Coal Exporter in terms of clause 1.1.14.1. The vertical-control structure of OCH/ OCT did not comply with any of the four Coal Exporter structures set out in clause 1.1.14 or the Shareholders Group structure set out in clause 1.1.49. As this non-compliant OCH/OCT/OCM structure was an existing triangle structure prior to the 2013 RBCT Shareholders' Agreement, it was indulged only on the basis that OCH controlled both sister companies, OCT and OCM, and OCM at that time qualified as a Coal Exporter in terms of clause 1.1.14.1 of the Shareholders' Agreement. The historical 'notional horizontal link' between OCM (which was then a Coal Exporter in terms of clause 1.1.14.1) and OCT was tolerated.

[171] According to the applicants it is incorrect to say that there was any 'indulgence' with regard to the triangle company structure of OCH/OCT/OCM as this state of affairs existed since prior to 2013 and is an approved structure as contemplated in clause 1.1.14.3 of the Shareholders' Agreement. RBCT communicated its acceptance of that structure to OCT and OCM in writing. In so doing, it expressly and unequivocally waived its right to take issue with the

structure, which constitutes the basis upon which OCT has exercised its rights in terms of the Shareholders' Agreement and which is entirely permissible in terms thereof. According to the applicants, RBCT cannot now call it an indulgence and attempt to deprive OCT of its contractual rights when its true complaint has nothing to do with the structure and everything to do with the mini-pit contracts.

[172] On the basis that the OCT and OCM sister companies are controlled by Tegeta, I am not in agreement with the applicants that the triangle company structure complies with clause 1.1.14.3 of the Shareholders' Agreement. It seems more probable that the structure was indeed indulged for the sake of consistency.

[173] That RBCT was entitled to scrutinize the Shareholders' Group structure in considering the upliftment of OCT's Export Entitlement is clear from the fact that this was no longer OCT, an approved Shareholder of RBCT, simply paying an overdue debt. OCT's debt was to be paid via a complex arrangement between OCT, OCM and Liberty Coal where Liberty Coal would take over the business of OCM and the shares of OCT which was akin to admission of a new Shareholder to RBCT, in my view.

[174] The correspondence between the parties in early 2021 evidences a focus on strict compliance by both parties with the Shareholders' Agreement, so much so that an 'End Game' was agreed to ensure that there was an almost simultaneous transfer of OCM's Coal Business and OCT's shares to Liberty Coal thus assuring compliance with clause 1.1.14.3.

[175] It was clearly the prospect of facilitation of the 'End Game', which was said to be in pursuance of the Business Rescue Plans of OCT and OCM, that resulted in the *temporary* lifting of OCT's Export Entitlement suspension. That RBCT was not entitled to lift OCT's suspension of the Export Entitlement permanently until the 'End Game' was accomplished is again clear from the provisions of the RBCT Shareholders' Agreement. Simply put, there was going to be no payment of the outstanding dues of OCT to RBCT without

Liberty Coal being allowed to take over OCM and OCT. There would be no interest in payment of OCT's dues without access to its Export Entitlement through the 'End Game', hence the Interim Period Agreement. The fact that the payment was already made in July 2021 does not take the matter further. It was linked to achievement of the 'End Game'.

*The Interim Period Agreement and waiver*

[176] It appears from the terms of the Interim Period Agreement that it was concluded for a limited period specifically with a view to advancing the aims of the Business Rescue Plans of OCT and OCM and the 'End Game', and to resolving the issue of payment of RBCT's dues.

[177] The Revised OCT Business Rescue Plan was adopted on 25 January 2022. The suspension was lifted for a temporary period from 25 January 2022 to 28 March 2022 subject to the 'End Game' being achieved by that date.

[178] Paragraphs 3 and 4 of the letter from RBCT to OCT dated 25 November 2021 record the following, which are amongst the various conditions contained in the agreement, which indicate the circumstances prevailing at the time:

'3. RBCT has received a written motivated request from OCT dated 9 November 2021 to consider lifting the OCT suspension earlier for an interim period before 28 March 2022. ...

4. Having regard to the submissions to date including the material representations made to RBCT regarding the 'end game' (as illustrated in Schedule 1 to the RBCT Approvals Letter attached) and achieving the 'end game' by 28 March 2022, the provisions of the OCT Business Rescue Plan published on 26 October 2021 ('OCT Business Rescue Plan'), the discussions with the OCT Business Rescue Practitioners, ('OCT BRPs) and representatives of the Liberty Coal group of companies on the morning of 5 November 2021, and the anticipated urgent proceedings (to interdict and postpone the OCT creditors' meeting convened for 10 November 2021 to vote on the OCT Business Rescue Plan) subsequently independently launched by the directors of Tegeta against the OCT Business Rescue

Practitioners among others in the afternoon of 5 November 2021, RBCT hereby notifies OCT that during the 'Interim Period' only, and subject to the Resolutive Conditions in paragraph 5 below, the suspension of OCT and OCT's Entitlement shall be temporarily lifted by RBCT for the purposes of OCT during the Interim Period exporting OCM's coal through the Terminal for the purposes contemplated by the Revised OCT Business Rescue Plan. For the purposes hereof, and notwithstanding anything to the contrary contained elsewhere, the 'Interim Period' will commence with effect from the latest of the following dates (Commencement Date):

4.1 the date of RBCT signing a Cession of Claims Agreement (Cession of Claims Agreement') in terms of which RBCT cedes to Liberty Energy Pty Ltd ... its rights to recover amounts of up to only R 95 557 477.00 in aggregate that are due and payable by OCT to RBCT as of 26 October 2021 ... against payments to RBCT in aggregate of R 95 557 477.00 ...

4.2 the date of RBCT signing a Security Deposit Agreement ... in terms of which Liberty Energy deposits R 10 000 00.00 ... with RBCT as security for the obligations of OCT to RBCT arising after 26 October 2021 under the RBCT Shareholders' Agreement ...'

[179] On 26 November 2021, OCT (through its business rescue practitioners) agreed in writing, to the terms of the RBCT Interim Period Agreement:

'The OCT BRPs hereby confirm in writing:

- (a) their agreement and acceptance of the terms and conditions to the conditional and temporary lifting of the suspension of OCT and its Entitlement set out in this letter and *the irrevocable and unconditional undertaking not to contend otherwise*; and
- (b) their irrevocable and unconditional undertaking that they will not hold RBCT or any of its shareholders bound by or to any purported valuation of OCT's Entitlement contained in any OCT Business Rescue Plan or any (amended or) Revised Business Rescue Plan as being or purporting to be a "Fair Market Value" of OCT's Shareholder's Interest in RBCT as contemplated by and defined in the RBCT Shareholders' Agreement; on terms and conditions approved by RBCT." (My emphasis.)

[180] It was submitted by Mr *Subel SC*, for the first respondent, that this acceptance was unequivocal, that the applicants have unequivocally agreed to be bound by the 'terms and conditions of the conditional and temporary lifting of the suspension of OCT'. These terms and conditions include the duration of the Interim Period, and this acceptance amounts to a waiver of any right to contest the continued suspension, so it was contended.

[181] The court was referred to *Road Accident Fund v Mothupi*,<sup>17</sup> where the Supreme Court of Appeal stated as follows:

'[15] INFERRED WAIVER:

Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it...'

The court went on to state:

'[16] The test to determine intention to waive has been said to be objective...That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations; secondly, that mental reservations, not communicated, are of no legal consequence); and thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional *alter ego*, the reasonable person standing in his shoes.'

[182] The applicants contend that the issue of waiver does not arise, and that in any event, in terms of clause 26.2, 'any waiver had to be in writing and signed by or on behalf of RBCT and each of the shareholders for the time being'. OCT's alleged waiver is not signed as required. Alternatively, the alleged waiver is void or against public policy.

[183] Clause 26.2 of the Shareholders' Agreement states as follows:

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<sup>17</sup> *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA); [2000] 3 All SA 181 (A).

'26.2 Amendments and waivers

No contract varying, adding to or deleting from or cancelling this Shareholders' Agreement, and no waiver of any right under this Shareholders' Agreement, shall be effective unless reduced to writing and signed by or on behalf of RBCT and each of its Shareholders for the time being. The consent or approval of any person who or which is not a Shareholder for the time being is not required to effect any variation, addition or deletion from, or cancellation of, this Shareholders' Agreement.'

[184] The Interim Period Agreement did not constitute a variation, addition or deletion from, or cancellation of the Shareholders' Agreement. Insofar as the issue of a waiver of 'any right under the Shareholders' Agreement' is concerned, clause 23.1.2 of the Shareholders' Agreement provides as follows with regard to a Defaulting Shareholder's rights:

**'suspension and period of suspension**

With effect from the date of RBCT giving a Default Notice to the Defaulting Shareholder ("Suspension Date"), all the rights of the Defaulting Shareholder, including its Entitlement (save for any linked entitlement ...), arising under the Shareholders' Agreement and any applicable Associated Agreements, or consequent upon any resolution of the Board in terms of or contemplated by this Shareholders' Agreement, shall be temporarily suspended forthwith. The Defaulting Shareholder shall with effect from the suspension date cease to export or be entitled to export coal through the Terminal other than coal already then at the terminal or then in transit...Such suspension shall endure with effect from the Suspension Date until RBCT by notice in writing to the Defaulting Shareholder confirms that the Event of Default in relation to the Defaulting Shareholder has been resolved ... to the satisfaction of RBCT and that no Event of Default in relation to the Defaulting Shareholder applies ... or failing such resolution and cessation of the Event of Default RBCT confirms the date of Transfer and that the entire Shareholders Interest in RBCT of the Defaulting Shareholder has been permanently transferred to all or any of the other Non-Defaulting Shareholders or other third party purchasers in terms of 18.' (My underlining.)

[185] The Interim Period Agreement was concluded during the period of suspension of OCT. OCT was a Defaulting Shareholder at the time whose rights were prescribed in clause 23.1.2 of the Shareholders' Agreement.

However, it was also in the position of a Proposing Transferor *vis-a-vis* Liberty Coal.

[186] In *De Villiers and Another NNO v BOE Bank Ltd*,<sup>18</sup> in circumstances where waiver was not exercised in writing as set out in the loan agreements, but orally, the court held as to the failure of the respondent bank to waive compliance with suspensive conditions in writing, that it was trite law that contractual clauses providing that amendments to the agreement had to comply with specified formalities were valid and binding, and had to be given effect to. The court stated further as follows:

'[78] It may appear odd that agreements which were ostensibly executed should now be held to have lapsed. The proper approach, however, is to consider the terms of the agreement and to hold the parties to such obligations and formalities as agreed to... It is precisely to avoid the kind of disputes and uncertainties referred to in the highlighted parts of the *dicta* of the *Brisley* judgment referred to in para [76] above that the validity and binding nature of clauses 2.2, 9.7 and 11.7 of the loan agreements should be observed and enforced. The dispute in the present case arose because waiver was not exercised as set out in the loan agreements.'

[187] Having regard to the above and to the provisions of clause 26.2, I find that OCT's undertaking does not constitute a waiver of its rights to contest the Interim Period Agreement. The question remains, however, whether OCT will be successful in its challenges raised against the Interim Period Agreement. These will be dealt with later.

#### *Whether OCM is a Coal Exporter*

[188] This issue arose during, what appears to me to be, a vetting process in the course of achieving the 'End Game'.

[189] Clause 1.1.14 of the Shareholders' Agreement provides a definition of Coal Exporter as follows:

"Coal Exporter" means

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<sup>18</sup> *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 1 (SCA).

- 1.1.14.1 any company which mines and produces coal in the Republic of South Africa and is lawfully entitled to export coal from the Republic of South Africa; or
- 1.1.14.2 a company which has been approved in writing by RBCT and which Controls and continues to Control a Coal Exporter contemplated by 1.1.14.1 on the basis disclosed in writing to and approved by. RBCT; or
- 1.1.14.3 a company which has been approved in writing by RBCT and which is Controlled by and continues to be Controlled by a Coal Exporter contemplated in 1.1.14.1, on the basis disclosed in writing to, and approved by, RBCT; or
- 1.1.14.4 a company which has been approved in writing by RBCT and which is involved in a joint venture (to mine and produce coal for export) with a Coal Exporter contemplated by 1.1.14.1, on the basis disclosed in writing to, and approved by, RBCT,

provided that if a company approved by RBCT as contemplated by 1.1.14.2; 1.1.14.3 or 1.1.14.4 ceases to be a Controlling or Controlled company or involved in the joint venture, on the same basis as was disclosed to and approved in writing by RBCT as contemplated by 1.1.14.2; 1.1.14.3 or 1.1.14.4, then such company shall cease to be a Coal Exporter for purposes of this Shareholders' Agreement;'

[190] According to RBCT, OCM/OCT is no longer a Coal Exporter because it does not mine and produce coal. The mining and production of coal is carried out by mini-pit contractors for their sole benefit and profit with only a minimal royalty for use of the mine being paid to OCM.

[191] The applicants do not dispute that OCM is currently not mining and producing coal on its own but contend that it remains a Coal Exporter on account of the mini-pit contractors doing so *on behalf of OCM*. According to the applicants, OCM does not itself, through its own directly employed workforce, or using its own plant, equipment, and machinery, perform the actual physical mining operations. They submit that the Shareholders' Agreement does not say that the company must itself mine and produce coal



or that it cannot do so through contractors. They contend that OCM may contract with a third party to perform some or even all of the functions and obligations arising from 'mining and production' of coal. OCM contracts with several independent mining contracting companies to perform the coal mining and production activities. It is a well-established practice across the South African mining sector, so it is asserted, for mining companies to contract with third party service providers to carry out some, or all, of the physical mining operations for and on behalf of the mining company. According to the applicants, RBCT is aware that some, if not all, the other shareholders also employ third party mining contractors.

[192] The applicants assert that the business rescue practitioners elected to utilize the risk averse rather than the risk aggressive approach (where a mining company could choose to dispose of its entire production on the spot market, which means its product would be sold at a price directly derived from the actual price offered for its particular type of product on the international markets on a particular day) to ensure that the position of OCM's creditors would be stabilized and would not worsen. The easiest and simplest way for the business rescue practitioners to have ensured that OCM ran no risk at all, and would under any circumstances, generate cash flow surpluses, was to, in effect, shift the risk and reward position to the mining contractors. This was achieved by the business rescue practitioners agreeing with the operators that they would conduct the mining operations on behalf of OCM but entirely at their own cost and *would thereafter purchase* the coal from OCM at a fixed margin. This entailed that there was absolutely no cost to OCM: it did not have to obtain specially trained employees or any yellow equipment; it did not have to pay the mining contractor for services; and it would be paid a fixed royalty for the coal so mined and produced which would enable it to properly manage its cash flow of income and expenditure without having to make any payment or to commit to any capital or cost outflows.

[193] The only drawback in this regard, according to the applicants, was that OCM would not benefit from any unexpected increase in the price on the international markets for its commodity. The BRP's concluded arrangements

with several mini-pit contractors to operate the mini-pit areas on behalf of OCM, conduct mining on behalf of OCM, and produce coal for OCM as its property, the ROM thereafter being sold to the operator at a fixed margin per ton no matter what the total operating cost or sales prices were. It was unexpected that Russia invaded Ukraine, and the direct result of the commencement of those hostilities was that the price of coal on the international markets escalated dramatically and immediately.

[194] In their letter to RBCT dated 21 June 2022, the applicants informed RBCT that the Curator was aware of the contractual arrangements with the mini-pit contractors and that copies of the agreements were provided to him.

[195] According to RBCT, analysis of information provided to it up to October and November 2022, showed that OCM was conducting a 'leasing business' where it was 'leasing' its mining rights to the mini-pit contractors to mine and produce coal for export for themselves using OCM's mining license and OCT's Entitlement, where the real economic benefit of doing so was not accruing to either OCM or OCT. OCT was made aware of these concerns which were that OCM was no longer a Coal Exporter in terms of the Shareholders' Agreement, and secondly, it appeared that OCT's Export Entitlement was not being used to further the aims of the Business Rescue Plan which was to bring back into operation OCM's coal mining business which was a critical component of the 'End Game'.

[196] Having regard to the specific, clear wording of clause 1.1.14.1, I am of the view that the concept of 'use of contractors' to do the work of mining coal, as suggested above, is vastly different from 'leasing' of the mining rights to another company for that company's benefit.

[197] According to the Curator,<sup>19</sup> to whom the applicants had given copies of the contracts, the mini-pit contracts are not service contracts where OCM mines and produces coal for its own benefit through the services of contractors as suggested by the applicants. Notably, where the applicants

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<sup>19</sup> In his abiding affidavit dated 23 September 2022- *Kurt Robert Knoop N.O. and Others v National Director of Public Prosecutions and Others*; High Court, Gauteng Division, Pretoria; Case No 2022-016480; page 1558 of the indexed papers.

suggest that the only drawback with regard to the fixed royalty was that OCM would not benefit from any unexpected increase in the price of coal on the international markets for its commodity, the Curator confirms this but notes that the contracts only provide for a change in the royalty payable as a result of decrease in the coal price in which case the royalty will be reduced. Notably further, it does not appear that OCM retains ownership of the mined coal until it is purchased by the mini-pit contractors as suggested by the applicants. These conclusions are evidenced in the extract below from the affidavit of the Curator:

'21.7 I highlight below the following general observations in regard to the mini-pit contracts:

21.7.1 in all but one contract which provides for a profit share, OCM is paid a fixed royalty fee. The royalty fee is reduced by an agreed amount where the contract miner has made a prepayment of the royalties to OCM. The royalty fee does not take account the prevailing and changing market conditions and save in one instance where provision is made for escalation, albeit based on CPI, there is no escalation on an annual basis;

21.7.2 the mini-pit contracts do not, save as set out hereafter, ordinarily contemplate the adjustment of the royalty payable to OCM. The contracts do provide for a change in the royalty payable, as a result of decrease in the coal price (in which the royalty will be reduced). There is, however, no similar provision allowing for an increase of the royalty payable to OCM in the event of an increase of the coal price;

21.7.3 it would have been more beneficial for OCM had the mini-pit contractors been engaged on a basis that had included a determined or determinable fee (incorporating, for instance, adjustments to provide for changes to key elements) to be paid to such contract miner for the mining of OCM's coal resource, as opposed to the current royalty structure. In such a scenario, the contract miner would charge for its services rendered and OCM would retain ownership of the extracted coal, enabling it to sell the coal at a profit to an off taker (as opposed to OCM being made party, as is currently the case, to complex transactional arrangements in which OCM is effectively used as a conduit for other contracting parties to not only extract OCM's coal resource for an insignificant royalty payment, but also, for them to utilise and

benefit from OCT's RBCT Entitlement, without any benefit accruing to either OCM or OCT for it; ...' (My underlining.)

[198] The applicants contend further that RBCT never had a problem with third party contractors; that on 9 February 2021, OCT informed it that four contractors were mining at OCM under interim mining arrangements with the coal to be exported through RBCT, and that RBCT responded with approval on 16 February 2021.

(a) This is what OCT's letter stated: 'Mining at OCM - the mine is operational, four contractors currently mining at OCM, much of which coal is export quality'.

(b) RBCT's response was:

'3. We are pleased that progress is being made in relation to the business rescue of OCM and OCT and that OCM is operational and again producing some coal.

...

5.2 Please confirm OCM's monthly tonnage of coal mined and produced for sale over the past 12 months. Evidence that OCM, and the OCM Business, is operational and producing coal of an export quality and, subject to the lifting of OCT's suspension, capable of getting coal from OCM's mine to the Terminal and exporting coal through the Terminal, will be helpful to establish that OCM is a Coal Exporter as defined in clause 1.1.14.1 of the RBCT Shareholders' Agreement. This is key for the reasons set out below. ...

...

5.7 ... The Events of Default are set out in clause 21. In this regard, it would be helpful if OCT could motivate and provide RBCT with information and supporting documents that show (and put RBCT in a position to confirm as required by clause 23.1.2, at the proposed time of the lifting of OCT's suspension) that no Event of Default in relation to OCT applies, including:

...

5.7.3 that OCM is (since it started mining coal again) a "Coal Exporter" (as contemplated by clause 1.1.14.1, and see clause 21.1.2) ...'

I do not agree with the applicants' contention that RBCT in the above correspondence approved of OCM's *actual* relationship with the mini-pit contractors.

[199] The applicants also contend that RBCT later acknowledged, in its letter dated 20 June 2022, that OCM is 'a Coal Exporter able through the current mini-pit operations to mine and produce coal, as defined in the Shareholders' Agreement'. I do not agree, read in the context of the letter and the version of RBCT, that RBCT acknowledged the actual contractual relationship between OCM and the mini-pit contractors. This much is evidenced by RBCT's assertion that it learnt from correspondence from the Curator on 23 June 2022, and importantly, later from the First Report of the Curator dated 6 July 2022, that notwithstanding what OCT had informed it, OCM was not generating any revenue from the export of coal through the terminal.

[200] I find that OCM is not currently a Coal Exporter by virtue of it not itself mining and producing coal for sale or export, or by it contracting the work of mining coal for its own benefit to contractors.

*Whether the imposition of the conditions and periods of the upliftment of the suspension constitute oppressive and unfairly prejudicial conduct*

[201] In argument, Mr *Wickins* SC, submitted that the imposition of the conditions and periods of the upliftment of the suspension in the Interim Period Agreement constitute oppressive and unfairly prejudicial conduct on the part of RBCT.

[202] The facts leading up to the conclusion of the Interim Period Agreement have been detailed earlier. More importantly, when OCT's Export Entitlement was suspended in November/ December 2018, the suspension was active for a period of three years before it was lifted again. OCT had been in Business Rescue for four years at the time. OCT's outstanding dues payable to RBCT by October 2021 was in the region of R 95 557 477. OCT was clearly in actual insolvent circumstances at the time. Payment to RBCT did not come as a simple payment but via complex and elaborate transactions that would place

Liberty Coal in ownership of OCM and OCT's shares. It was an essential requirement, when the provisions of the Shareholders' Agreement are considered, that this transaction be vetted before it was approved. RBCT approved a number of extensions to accommodate OCT to advance the aims of the Business Rescue Plan and to achieve the 'End Game'.

[203] The fact that the question whether OCM was still a Coal Exporter became an important factor was clearly not foreseen by RBCT at the outset. This is a fact which is severable from the issue of the NPA's preservation orders because it is a requirement in terms of the Shareholders' Agreement.

[204] The fact that RBCT later paid heed to the preservation orders obtained against the shares of OCT and OCM cannot seriously be criticized when the judgment of the Pretoria High Court is taken into account.

[205] Having regard to the extensive correspondence between the parties, copies of which were filed in these proceedings in relation to this issue by both the applicants and the first respondent, the Interim Period Agreement was distinctly the product of months of engagements, negotiations and clarifications. The applicants can hardly now claim that the terms of the Interim Period Agreement were oppressive, that they were in an unfair bargaining position and that they agreed to the terms and conditions of the Interim Period Agreement on account of the deleterious consequences of not doing so. The applicants had an opportunity at each stage, from the time that the Interim Period Agreement was negotiated and concluded, and through the many applications for extension to challenge the legality or the fairness of the Interim Period Agreement but did not do so. OCT was represented by its business rescue practitioners in accepting the terms and conditions of the Interim Period Agreement. If at any stage they felt that it was unfair or oppressive, it was open to them to challenge the continued suspension of OCT. Not only that, the business rescue practitioners actively, of their own accord, put forward an *'irrevocable and unconditional undertaking not to contend otherwise'* which they now recant. The lack of bona fides cannot be ignored.

[206] Having regard to my findings earlier with regard to the purpose of the Interim Period Agreement, I find that the imposition of the conditions and periods of upliftment of the suspension do not constitute oppressive and unfairly prejudicial conduct on the part of RBCT. On the contrary, the Interim Period Agreement was concluded to assist OCT in its endeavours.

[207]

*Was OCT deprived of its rights to the Export Entitlement on arbitrary grounds in contravention of s 25(1) of the Constitution*

[208] Placing reliance on s 25(1) of the Constitution, it was submitted by the applicants that RBCT cannot indefinitely deprive OCT of its rights, that OCT is performing its obligations (primarily to pay RBCT) yet is simultaneously deprived of its rights on arbitrary grounds arising from the NDPP's unproven allegations in relation to which RBCT has no contractual right.

[209] Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property.

[210] The court was referred by Mr *Wickins* to *National Credit Regulator v Opperman and Others*<sup>20</sup> where the following was stated:

'[61] This Court has not specifically found that personal rights emanating from contract, delict, or enrichment are indeed property under section. Our constitutional jurisprudence accepts that deprivation of ownership of corporeal property constitutes deprivation for purposes of s 25. Without discussing the specific point, this Court has also accepted a trade-mark to be property, albeit incorporeal, deserving protection under s 25. Intellectual property, even though incorporeal, is of course different from an enrichment claim. The right to claim restitution on the basis of enrichment is a personal right. It can only be enforced against a specific party or parties, in this case the consumer who received the money. It is not a real right in property like, for example, ownership or a usufruct, enforceable against all. Section 25 deals with property and not with ownership. But reliance has been placed on the link to

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<sup>20</sup> *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 61.

ownership in evaluating whether there is a deprivation or whether s 25 comes into play.'

[211] I have no doubt having regard to the above that OCT's right to its Export Entitlement constitutes property as envisaged in s 25(1).

[212] As stated earlier, however, the End Game involved a vetting process for compliance with the Shareholders' Agreement. RBCT was aware of the mini-pit contractors but was not initially aware of any issues in this regard based on representations made to it by OCT. The facts relating to the mining operations at OCM only emerged later.

[213] Although the applicants contend that RBCT's actions were based on unproven allegations of the NPA, the correspondences show that OCT was in fact given the opportunity to present information to show that OCM was mining coal.

[214] As I see it, OCT failed to produce information to the satisfaction of RBCT that OCM was producing coal and was a Coal Exporter as required in terms of clause 1.1.14 of the Shareholders' Agreement by the dates of the various extensions, and the final deadline for the RBCT board meeting. OCT was therefor afforded its rights in terms of the Shareholders' Agreement both procedurally and substantively.

[215] Mr *Wickins* was critical of the fact that the Shareholders' Agreement requires compliance by OCT 'to the satisfaction of RBCT'. This requirement is, however, in terms of a negotiated agreement between all the parties thereto and a challenge to the document itself is a separate issue altogether. In any event, compliance with clause 1.1.14 of the Shareholders' Agreement is measurable by the fact of the structure of the Shareholders Group proposed—it is either met or it is not met. RBCT's letter dated 30 November 2022 makes this clear:

'THIRD GROUND: OCT'S failure to satisfy RBCT that it has met the requirements of the Resolutive Conditions in the Interim Period Agreement:



21. The First Resolutive Condition agreed to in the RBCT/ OCT Interim Period Agreement, and such resolutive condition not becoming applicable, is fundamental to maintain the historical “link” between OCM and OCT, to the existence and continuation of the RBCT/ OCT relationship, to the continuation of the Interim Period and to the achievement by OCT and Liberty Coal of the “end game” and an approved Vertical Control Structure envisaged by clause 1.1.14.3 of the RBCT Shareholders' Agreement.

22. For the First Resolutive Condition to not become applicable, it requires OCM to currently meet and continue to meet the requirements of a Coal Exporter in terms of clause 1.1.14.1 of the RBCT Shareholders' Agreement.

22.1 In terms of the RBCT Shareholders' Agreement, in order for OCT to be and remain an RBCT Shareholder, it must be a Coal Exporter as defined in the RBCT Shareholders' Agreement. OCT is not such a Coal Exporter.

22.2 Currently, sister companies OCT (an RBCT Shareholder) OCM (not an RBCT Shareholder) are in a horizontal company structure that is not compliant with the definition of Coal Exporter in the RBCT Shareholders' Agreement. ...'

[216] The main issue has clearly always been compliance with clause 1.1.14. Notably, RBCT continued with its engagements with OCT on facilitating the 'End Game' notwithstanding the NDPP's preservation orders and interventions. The NPA and its preservation orders has been a secondary issue but understandably equally important. RBCT is entitled, in my view, to satisfy itself that it does not become complicit in crime of the kind alleged by the NPA.

[217] RBCT's letter dated 30 November 2022 records the following:

'11. While there was cooperation in relation to certain of the issues raised, including an OCM site visit, this still remains outstanding as at today's date significant and material information.

12. In particular, and critically, RBCT requested copies of:

- 12.1 all affidavits and filings in the NDPP applications,
- 12.2 all contracts between Liberty Coal and OCM and others, and
- 12.3. The identity of the direct and indirect shareholders of the Mining Contractors/ Sub-contractors).

13. The information was requested so that RBCT would be in a position to assess Daniel McGowan's and Liberty Coal's and other respondents' responses to the NDPP allegations, and consider its own views regarding the information that has come and is coming to light regarding Liberty Coal, the "mini-pit contractors" and operators, and the current and envisaged future profit stripping possibly out of South Africa, viewed in the context of the "end game" approved by RBCT.

14. To date, and despite request, significantly, this information has not been provided.

15. The withholding of among other things the identity of the direct and indirect shareholders of the Mining Contractors/ Sub-contractors, of the Liberty Coal and other Mining Contractors' Contractor Agreement/s and Liberty Coal/ Salaria (Pty) Ltd and other Subcontractor Agreement/s and the Asset Forfeiture papers, amounts to *insufficient cooperation* for purposes of paragraph 4 of the September Extension Letter.

16. On this basis, and as a result of OCT's failure to place all relevant requested information before RBCT, RBCT is unable to determine who is currently actually and beneficially owning the companies using the Terminal, and whether or not OCM derives any true benefit (apart from increased royalty income) from such use by such companies of the Terminal that can be applied by OCM towards bringing OCM back into full production.

17. Paragraph 4.2 of the 29 September 2022 letter makes it clear that, without full compliance with paragraph 5, no further extensions would be considered.

18. There are good reasons that RBCT requested the information at issue. RBCT faces significant reputational risk if the current or future use of OCT's Entitlement by OCM/ Liberty Coal and others ("permitted by RBCT) is subsequently found to be a part of a current grander scheme to (continue to) launder money and/ or to strip money out of South Africa for purposes (other than to restore the OCM coal mining

operations to full operations and indirectly support the employees and communities involved who should be benefiting from a fully operational OCM).

19. With South Africa's pending "grey listing" by FATF, and global attention on South Africa's efforts to avoid a "grey listing" and the steps currently being taken by the NDPP to prosecute individuals and companies they believe to be involved in money laundering criminal activities, the involvement of the Guptas and now Daniel McGowan in the use of the Terminal is bringing unwanted local and global attention on the use of the Terminal and RBCT. RBCT required the information requested in order to satisfy itself of the *bona fides* of the operation, and that the money was being utilized for the purposes envisaged in the End Game.'

[218] In the circumstances, I find that OCT was not deprived of its rights to the Export Entitlement on arbitrary grounds arising from unproven allegations of the NDPP.

*Whether the Interim Period Agreement is inconsistent with chapter 6 of the Companies Act*

[219] The court was referred by the applicants to s 15(7) of the Companies Act together with clause 3.3 of the Shareholders' Agreement: Section 15(7) provides as follows:

'(7) The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency.'

Clause 3.3 of the Shareholders' Agreement provides as follows:

'In terms of section 15(7) of the Companies Act, the provisions of this Shareholders' Agreement must be consistent with the provisions of the Companies Act and with the provisions of the Revised MOI, and any provisions of this Shareholders' Agreement that is inconsistent with any provision of the Companies Act (as amended) or the Revised MOI (as amended), is void to the extent of that inconsistency.'

[220] I find that the Interim Period Agreement was not inconsistent with chapter 6 of the Companies Act. The Interim Period Agreement was concluded in pursuance of the aims of the Business Rescue Plans with a view to facilitating an 'End Game' which was part of the Business Rescue Plans. That time limits were imposed was consistent with representations made by the business rescue practitioners as to the time required. Furthermore, it was not incumbent on RBCT to wait indefinitely for compliance with the Shareholders' Agreement. As at 26 November 2021, OCT had been in Business Rescue for four years, and in default for three years. Furthermore, if the Interim Period Agreement was going to scupper OCT and OCM's Business Rescue Plans, it was open to the business rescue practitioners, as the representatives, to challenge it as they have now done a year later. Finally, it does not say much for the business rescue practitioners that this issue is being raised now when they themselves actively volunteered their 'agreement and acceptance of the terms and conditions to the conditional and temporary lifting of the suspension of OCT and its Entitlement set out in [this] letter and their *irrevocable and unconditional undertaking not to contend otherwise*'. (My emphasis.)

#### *Termination of the Interim Period Agreement*

[221] Having regard to the findings on the issues dealt with in this judgment, it is clear that the Interim Period Agreement lapsed on account of effluxion of time as well as the applicability of the resolute conditions referred to in RBCT's letter dated 30 November 2022.

[222] It was accepted in argument by Mr *Wickins* that the Interim Period Agreement had lapsed. Reliance was placed, however, in furtherance of the applicants' contentions, on OCT's rights to upliftment of the suspension based on the Shareholders' Agreement (as opposed to the Interim Period Agreement) where he contended that OCT was entitled to upliftment of the suspension since it was no longer a defaulting shareholder insofar as payment of dues was concerned.

[223] I find that this argument loses sight of the fact that although payment has been made in terms of the Second and Third Remedy Notices, OCT is no longer in a compliant Shareholders Group nor in a compliant Vertical Control Structure in terms of clause 1.1.14 of the Shareholders' Agreement.

*Whether RBCT has not acted arbitrio bon viri and in good faith*

[224] It is contended by the applicants that RBCT adopted the position on 20 January 2023 that the impasse between the parties was remediable through a restructure of the mini-pit contracts but that it has not furnished the applicants with a notice telling them exactly what they should do to restructure the binding contracts. When the Business Rescue Practitioners subsequently furnished it with a proposal, its curt response was 'too little too late', and there was no counter proposal. As such, the applicants are impermissibly left in the dark and at the mercy of RBCT who, at its unfettered discretion and without first having to say what it requires as a remedy, can decide whether whatever restructuring may occur is satisfactory to it such that it will then lift the suspension, so it is asserted. According to the applicants, even if RBCT had such power, it would have to exercise it *arbitrio bon viri* and in good faith. Mr Wickins referred the court to the judgment in *NBS Boland Bank Ltd v One Berg River Drive CC*<sup>21</sup> which is considered below.

[225] It is submitted further by the applicants that RBCT's letter dated 20 January 2023 illustrates that, despite all its prior protestations about the applicants so-called defaults, RBCT's only remaining complaints, and the only reason why it ultimately suspended OCT's Export Entitlement, was because OCM was not making enough money from the mini-pit contractors; that RBCT has no rights to act in this manner and is acting in bad faith.

[226] RBCT's letter dated 20 January 2023 records the following:

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<sup>21</sup> *NBS Boland Bank Ltd v One Berg River Drive CC*; *Deeb v Absa Bank Ltd*; *Friedman v Standard Bank of SA Ltd 1999 (4) SA 928 SCA*

'4. All information provided to date by OCT to RBCT regarding the OCM mini-pit operations, including the information provided by OCT to RBCT and its legal advisors on 13 December 2022, confirms the following facts:

4.1 OCM is not itself physically mining and producing coal in its mining areas;

4.2 third parties (not OCM) are mining and producing coal for themselves on OCM's mining areas in terms of royalty agreements under which OCM has unusually gifted the third parties with its coal resources on its mini-pit mining areas and the rights to sell such coal resources extracted therefrom by such third parties at their own risk and expense;

4.3 following a series of unusual transactions, third parties (not OCM) are exporting third parties' coal from stockpiles at the RBCT Terminal, using and under cover of OCT's Export Entitlement;

4.4 the effect of the OCM mini-pit scheme is that none of the billions of rands revenues from export sales and exporting of coal using OCT's Export Entitlement accrue to or are received by OCM and OCT in South Africa, and the lost billions are not available to OCM and OCT in South Africa for any of OCM's or OCT's purposes (including the long term sustainable restoration of OCM for the benefit of its creditors including its former employees and for the benefits of the Middleburg region where OCM is situated)

This OCM mini-pit scheme as more fully revealed belatedly to RBCT on 12/13 December 2022 confirms that OCT is not in compliance with material terms and conditions of the RBCT/OCT 26/25 November 2021 Interim Period Agreement; and this agreement in relation to the interim period has lapsed in accordance with its own terms and conditions. Nor does the OCM mini-pit scheme as now revealed constitute a new compliant and lawful proposal upon which RBCT could consider a fresh upliftment of OCT's suspension.'

[227] The letter continues as follows:

'5. We stress and repeat again that the OCM mini-pit operations and affairs could have been structured, and could still possibly be restructured, by mutual agreement of OCM and the relevant parties involved in a manner that could comply with the

terms and conditions of the now lapsed RBCT/ 26/25 November 2021 Interim Period Agreement. To date no such attempt to do so has been communicated by OCT to RBCT, and any such communication if it had been volunteered would have been well received and considered by RBCT.

6. RBCT's position, after careful consideration of the information provided to it on 13 December 2022, therefore remains as set out in its letter to you of 30 November 2022.

7. Furthermore, in the circumstances, RBCT does not in the absence of any compliant and lawful new proposal agree to any new upliftment of the suspension and/or any new extension to OCT beyond 31 January 2023.'

[228] The following was stated by the Supreme Court of Appeal in *NBS Boland Bank Ltd*, which deals with the discretion of mortgagees to vary interest rates in mortgage bonds;

'25. ... It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri*. ... In his commentary on the Digest

Windscheid, *Lehrbuch des Pandektenrechts*, 7<sup>th</sup> ed, vol 2 p 407, maintains that such a rule existed in Roman Law. He relies inter alia on D 50.17.22 which certainly appears to provide analogous support for his view. It reads (the same translation):

"One must in general approve of the principle that wherever in actions of good faith the condition of someone is placed in the power of his master or of his procurator, then this power is to be regarded as equivalent to the power of the decision of a good man".

[26] Reference may also be made to D.17.2.77 where it is said that where one party has to do work to the satisfaction of the other party, the latter must exercise his discretion *arbitrium bono vire*.'

[229] Having regard to the above, and to what has been stated earlier in paragraph 209, I find that OCT remains in a non-compliant vertical control

structure as required by the Shareholders' Agreement. The fact that RBCT cites in its letter the two reasons for not uplifting the suspension does not detract from the fact that the requirement in terms of clause 1.1.14 of the Shareholders' Agreement has not been met. As stated earlier, it has clearly always been a requirement in the vetting process of the End Game.

[230] Finally, RBCT is entitled to be circumspect in its dealings with its shareholders. The contentions of the NPA together with the findings of the Pretoria High Court have been made known to RBCT. The allegations, if they are true, have far reaching consequences for South Africa. I would be surprised if any right-thinking company did not pause to consider whether it was advancing an unlawful cause.

[231] Having said that, RBCT has, despite the preservation orders, continued to engage with the applicants with a view to achieving the End Game.

[232] I find that RBCT has not acted contrary to the principle *arbitrio non viri* or in good faith.

[233] In the circumstances, if not for all the reasons stated in this judgment, but for the reason that OCT is no longer in a compliant Shareholders Group nor in a compliant Vertical Control Structure, I find that OCT does not have a *prima facie* right to the relief which it seeks, and neither does OCM.

*A well-grounded apprehension of irreparable harm*

[234] According to OCT, it will be irreparably harmed if RBCT is permitted to unlawfully breach its contractual obligations towards it. That is, according to OCT, a present and continuing harm. In addition, OCT asserts that:

- (a) the failure of both OCT and OCM's adopted Business Rescue Plans will cause consequential harm to thousands of affected persons;
- (b) if OCM's Business Rescue Plan fails, it will likely be liquidated. If it is liquidated, it will lose its mining right, both OCT and OCM will be



rendered virtually valueless. OCT will incur significant liabilities to RBCT (of approximately R12 million a month) with no corresponding income;

- (c) OCM's rail contract with Transnet will be jeopardized and may not be reinstated, which will severely prejudice both OCM and OCT if they are ultimately successful in the arbitration; and
- (d) there will be a loss of approximately 2000 jobs and accompanying consequences for the families and surrounding communities. In fact, some of the retrenchments have already commenced.

[235] According to RBCT, the applicants' contentions with regard to irreparable harm assumes the permanent closure of OCM on account of the loss of access to OCT's Export Entitlement, and there is no basis for this assumption as RBCT is by no means the only outlet available to the third party mini-pit contractors to sell the coal that they mine at OCM. RBCT asserts that firstly, they could sell their coal domestically to entities such as Eskom, Sasol or the residual market made-up of cement and ferro-alloy usage and agriculture, and secondly, they could pursue other export avenues such as Durban and Maputo.

[236] Quite apart from the above arguments of the parties, it is a fact that whilst OCT's Export Entitlement remained suspended for three years, OCM did not go into liquidation. According to the business rescue practitioners, the mini-pit contracts provided a much-needed lifeline to OCM which was clearly acceptable to them for OCM to remain in business. Notably, this was while OCT's Export Entitlement was suspended. Furthermore, according to RBCT, some two thirds of the operations of the mini-pit contractors is unaffected by the relationship between RBCT and OCT. Even if this is an exaggerated figure, as contended by the applicants, it evidences alternatives available to the mini-pit contractors insofar as OCT and its Export Entitlement is concerned.

[237] Insofar as the erstwhile employees of OCM are concerned, NUM asserts that they were retrenched by OCM when OCM's dragline operations

came to an end and 'thanks to OCM's ability to continue to generate revenue by exporting coal via OCT's Export Entitlement through the terminal', the NUM affiliated employees of OCM have been paid their retrenchment tranches at the rate of approximately R10 000 per month.

[238] Firstly, it is noted that their rights and claims lie against OCM whose troubles began long before OCT's suspension of its Export Entitlement. Quite apart from Tegeta, OCT and OCM becoming unbanked in South Africa, according to the applicants, OCM had 'no capital, no cash flow, and a mine and equipment in a state of neglect and disrepair requiring extensive repair, replacement and refurbishment...The underground mining contractors did not pay their personnel and underground operations ceased. The opencast mining came to a halt with the funds running out for maintenance, diesel, explosives and drilling contractors. The employees were frequently on strike because they were not being paid' and so went the assertions of the applicants in their founding affidavit. Further, whereas OCT's existence depended on OCM being a Coal Exporter as defined in the Shareholders' Agreement, OCM's existence did not depend solely on OCT's Export Entitlement. On the facts presented, OCM continued to earn the revenue it required from the mini-pit contracts even whilst OCT's Export Entitlement was suspended for three years. The current continued suspension of OCT's Export Entitlement poses no change to those circumstances.

[239] Insofar as the employees of the mini-pit contractors are concerned, it is noted that the mini-pit contracts were in operation since 2018 and long before the suspension of OCT's Export Entitlement was temporarily lifted in January 2022. Again, the current continued suspension of OCT's Export Entitlement poses no change to those circumstances. Furthermore, the employment relationship between the mini-pit contractors and their employees is far removed from the contractual dispute between the applicants and RBCT.

[240] Insofar as Templar Capital and Liberty Coal are concerned, understandably there are consequences as between OCM and Liberty Coal resulting from OCT's current position. However, RBCT cannot be compelled

to enter into a further Interim Period Agreement to facilitate compliance with the Shareholders' Agreement, nor can it be compelled to lift the suspension of OCT's Export Entitlement in the present circumstances.

[241] I find that there is no irreparable harm to be suffered by OCT, OCM and the members of NUM. Whilst I sympathise with the members of NUM for the uncertainties which they face, the outcome of the imminent arbitration proceedings should provide a permanent resolution of the dispute.

*No suitable alternate remedy*

[242] The launching of this application on an urgent basis was not the applicants' only option and certainly not the better option. On account of the various interests concerned and the number of disputed issues, the urgent application morphed into a protracted process that was only heard on 24 March 2023. It should be stated further that none of the preliminary disputed issues was heard or resolved prior to the matter being heard on 24 March 2023.

[243] The applicants first port of call was a referral of the dispute to arbitration. Having regard to the numerous issues and disputed facts, it was the correct course of action. The facts before me show that the dispute was referred to arbitration in December 2022. Mr *Subel* submitted that nothing more was done by the applicants thereafter; there was not even a statement of claim filed, and that it was only in the week of this matter being heard (24 March 2023) that a pre-arbitration meeting was called for or held. According to Mr *Wickins*, a panel of arbitrators comprising eminent retired judges was already appointed and it was not possible to do more until a pre-arbitration hearing was held. I beg to differ on this point. A concise statement of the applicants' case was an essential requirement to set the process in motion. None was available when this matter was heard, and it remains to be seen what the pending case is for which the applicants seek the interim relief.

[244] As stated earlier, if these proceedings are expedited, as suggested by Mr *Wickins* who submitted that the calibre of panelists appointed as arbitrators

will not allow unnecessary protraction of the proceedings, the applicants should find the relief they seek soon if they are entitled to it.

[245] Mr *Subel* submits correctly that if the interim relief sought is granted at this point, there will be a lack of motivation to expedite the arbitration proceedings.

[246] In the meantime, the prospects of the applicants and the mini-pit contractors are no different to those which prevailed for three years prior to the temporary lifting of OCT's suspension when neither of the applicants was placed in liquidation.

*The balance of convenience*

[247] According to the applicants, there is no prejudice to be suffered by RBCT if the interim relief is granted:

- (a) its commercial interests are protected because OCT has paid all its debts to RBCT and there is no suggestion that it will not do so in the interim;
- (b) RBCT's contention that it stands to suffer reputational harm is misguided because there is no evidence of any wrongdoing by OCT/OCM; and
- (c) RBCT did not adopt the same position in relation to Glencore, a shareholder that has been found guilty of corruption.

[248] It was submitted on behalf of RBCT that the applicant's failure to establish any irreparable harm should be balanced against the harm that would occur if the relief were to be granted. Such harm, asserts RBCT, includes:

- (a) Harm to RBCT who would be forced to 'make a contract' with a party who has no entitlement to export through its Terminal and is permitting Bermuda registered Templar Capital to do so, and in circumstances where RBCT's Shareholders' Agreement precludes it from doing so.

- (b) Harm to the public interest and the broader South African economy, succinctly set out in the NDPP affidavit, given that the Curator's Fourth Interim Report finds that more than R6 billion may already have been dissipated in this manner over the seven months between March and September 2022. This, according to RBCT, means that some R850 million may be removed from South Africa every month, possibly unlawfully, in contravention of the preservation order, and contrary to the undertakings that had been given to RBCT under the lapsed Interim Period Agreement.

[249] That RBCT's commercial interests might be protected in the interim because OCT has paid all its debts to RBCT and that there is no suggestion that OCT will not do so in the future, has not been the only consideration in this application. The applicants' contractual and constitutional rights have also been considered.

[250] However, there have also been other weighty considerations such as the interests of the employees (members of NUM), the greater public interest and the South African economy.

[251] I have addressed the employees' rights which depend on what OCM does. OCM has the option in the meantime to continue with the mini-pit contracts at better royalty rates (according to the applicants, most of these mini-pit contracts were expiring during 2022 and 2023 anyway), or as suggested by RBCT, to contract *the work of mining coal* to external contractors where a greater benefit accrues to OCM.

[252] Something must be said, despite the applicants' contentions to the contrary, for the public interest which is a weighty factor in the context of corruption in South Africa and its economy.

[253] This court has been reminded that the Curator has not filed an affidavit in these proceedings and that the Curator's Reports do not comply with prevailing authority that requires them to be part of an affidavit before they are accepted.

[254] I have had regard to s 3(1) of the Law of Evidence Amendment Act, 45 of 1988 which reads as follows:

‘(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to –
  - (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) any prejudice to a party which the admission of such evidence might entail; and
  - (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interest of justice.’

[255] I have seen fit to admit the Curator’s Abiding Affidavit<sup>22</sup> dated 23 September 2022 as well as his reports (all of which are annexures to the founding affidavit of the NPA) having regard to *inter alia* the following:

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<sup>22</sup> In Case No 2022-016480; Page 1558 of the indexed papers

- (a) The nature of the proceedings: This is an urgent application for an interdict in which the evidence of the respective parties is presented by way of affidavit. The main issue to be determined is based on a contractual dispute.
- (b) The nature of the evidence: The nature of the evidence is documentary evidence in the form of an abiding affidavit (filed under case number 2022-016480 in the Pretoria High Court in an application by the Business Rescue Practitioners for a declaratory order on the status of the preservation order), as well as reports, of the Curator appointed by the court to *inter alia* assume control, custody, care and administration (with the Business Rescue Practitioners), with power of attorney to deal with the property relating to the dispute between the parties as if he himself were its owner or holder, for the purpose of protecting said property and reporting to the court thereon, whose powers, duties and authority are further defined in the court order (case number 62604/21 of the Pretoria High Court dated 23 March 2021).
- (c) The purpose for which the evidence is tendered: the purpose is to show the nature of the mining operations conducted on the property.
- (d) The probative value of the evidence: The documents in question are relevant and reliable. They form part of extensive reports to the court relating to the nature of the business operations on the property and are compiled by an independent party appointed by the court. It is common cause that the mini-pit contractors mine coal on the property and that they pay OCM a royalty for this. The royalty rates and the fact that the mini-pit contractors benefit from the value of the exported coal are not in dispute.
- (e) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends: It

appears that the curator resigned from his appointment during December 2022 on account of death threats from unnamed sources.

- (f) Any prejudice to a party to which the admission of such evidence might entail: There is no prejudice to be suffered by the any of the parties in this case. The applicants in particular have filed extensive affidavits opposing the intervention application by the NPA, and have placed their version on the relevant issues before the court.
- (g) Any other factor which should in the opinion of the court be taken into account: The evidence in question is consistent with proven facts.

It is in the interests of justice that the documents in question are admitted in evidence. They are so admitted.

[256] Notably, the applicants have themselves relied on aspects of the Curator's reports. According to the applicants, the Curator acknowledged in his first report that the mini-pit contracts are valid, binding and enforceable, and he accepted that they were concluded at market related prices at the time.

[257] The figures provided by the Curator are staggering, but even if they are exaggerated, if it is the case that money is being dissipated in the way contended, this fact favours an approach where it is prudent to await the outcome of the arbitration proceedings.

[258] Having regard to all of the arguments presented by the parties, I find that the balance of convenience does not favour the applicants or the granting of the interim relief.



[259] In all the circumstances, the application for an interim interdict must be dismissed.

### **Costs**

[260] I find that this is a matter in which costs should follow the result. The applicants, OCT and OCM, have not been successful in obtaining the relief which they seek. They are ordered to pay the costs of the first respondent, RBCT. I do not see the need to order that the costs be payable by the business rescue practitioners.

[261] NUM decided that it will abide the decision of the court by the time that the matter was heard on 24 March 2023. There is already a costs order against it in respect of its *interim interim application*. There is no further costs order against NUM.

[262] Insofar as the NPA is concerned, the applicants should be ordered to pay its costs. The applicants saw fit to join the second and third respondents, who have only a commercial interest in the case, and did not oppose NUM's application to intervene, yet they opposed the intervention application of the NPA who have a justified interest in the case.

[263] As between RBCT and the second and third respondents, I find that each party should pay its own costs. The reasons are evident from my findings.

### **Order**

[264] In the circumstances, the following order is granted:

- 1 The application for an interim interdict is dismissed.
- 2 The costs of the first and fourth respondents to be paid by the first and second applicants, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel where so employed.

3 As between the first respondent and the second and third respondents, they are each to pay their own costs.



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**HIRALALL AJ**

#### CASE INFORMATION

**This judgment has been handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 11h00 on 31 May 2023.**

DATE OF HEARING : 24 March 2023  
DATE OF JUDGMENT : 31 May 2023

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