Companies and Intellectual Property Commission

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FINAL INSPECTOR REPORT ON

NOVA PROPGROW GROUP HOLDINGS LTD 2011/003964/06

FILE: CCDR 150/2019

INSPECTOR:

CUMA ZWANE

25 July 2022

Contents

1. BACKGROUND

1.1. **Unsatisfactory Response to CoR 19.1**:

On 25 October 2021, due to the non-satisfactory response received from the Nova PropGrow Group Holdings Ltd ('the company') board of directors ('the Board') in terms of a Notice to Show Cause Regarding Reckless Trading or trading under insolvent circumstances in Form CoR 19.1 (issued to the Board on 4 February 2021); the Commission, in terms of Section 176 of the Companies Act 71 of 2008 (as amended) ("the Act"), issued the Board with a Compliance Notice on a Form CoR139.1, requiring the Board to:

i. Submit to the Commission a signed resolution of the Board's intention to 'exit the Debentures' in order to substantiate the statement made in the Communique to the public, titled Communique – Nova Group Update and dated 9 April 2021

ii. Submit a copy of the approved audited annual financial statements for the financial year ended 28 February 2021 for the Commission to make an evaluation of the company's current liabilities for the 12 months ending 28 February 2022 so as to negate the allegation of potential insolvency or financial distress

iii. Submit to the Commission, written and signed approval from the Debenture Trustee or his\her proxy (or equivalent), that the Nova Board of Directors may postpone the payment of Debentures, beyond the projected 10-year Scheme of Arrangement period; subject to the board still maintaining the view that it has the discretion to postpone the payment of Debentures beyond the projected 10-year Schemes of Arrangement period

iv. Subject to the inability to fulfil point (iii) above, substantive proof that the company has and will have sufficient liquid assets that can and or have been realised into cash and cash equivalents to allow the company to meet its current liabilities for and before the end of the financial year ending 28 February 2022

The Compliance Notice was issued to the Board in order to afford it an opportunity to adequately comply with Section 22 of the Act by proving beyond reasonable doubt that the company has and would have adequate/sufficient liquidity to meet its current financial obligations; including the outstanding debentures which, according to the Commission, as informed by the International Financial Reporting Standards framework used in preparing the audited annual financial

statements of the company; were due and payable within the twelve months ended 28 February 2022.

A response was received from the Board on 15 December 2021 via email, through their legal representative, per Diaan Ellis of Faber Goertz Ellis Austen Inc; to which I acknowledged receipt. The response (Annexure A) included a copy of the audited annual financial statements for the financial year ended 28 February 2021, a copy of minutes of a meeting held on 25 February 2021 (the date as reflected in the minutes) and a cashflow budget titled *Summary Statement Of Financial Performance Nova Propgrow Group Holdings Limited And Its Subsidiaries Including Headoffice Costs For The Period Ended 31 October 2021 Including The Total Operating Cash Budget To 28 February 2022.*

1.2. Required Enforcement Post CoR. 139.1 Response

Subsequent to evaluating the response received by the Board on 15 December 2021, a determination is required to be made as to whether the merits presented by the Board warrant the issuance of a CoR 19.2 to allow the company to continue trading, and if not, a final compliance notice in terms of Regulation 19 (2) of the Companies Regulations, 2011 ("the Regulations"), instructing the company to cease carrying on its business or trading, would need to be issued.

2. MANDATE

In terms of Section 22 (3) of the Act, if a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.
In terms of Section 171 (2) the Act, a compliance notice may require the person to whom it is addressed to:
(a) cease, correct or reverse any action in contravention of this Act;
(b) take any action required by this Act;
(c) restore assets or their value to a company or any other person;
(d) provide a community service, in the case of a notice issued by the Commission; or
(e) take any other steps reasonably related to the contravention and designed to rectify its effect.

3. LEGISLATIVE FRAMEWORK

Section 22 of the Act and Regulation 19of the Regulations ; read as follows:

Section 22: Reckless Trading Prohibited

(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.

(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

(3) If a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.

Regulation 19: Reckless Trading or Trading Under Insolvent Circumstances

(1) The Commission may issue a notice to show cause contemplated in section 22 (2) in Form CoR 19.1, which must clearly set out the grounds upon which the Commission has formed the requisite belief that the notice is justified.

(2) If a person who has received a notice in Form CoR 19.1 provides information to the Commission within 20 business days after receiving the notice, the Commission, after considering that information, must issue either-

(a) a notice in Form CoR 19.2 accepting the information, and confirming the company's right to continue carrying on its business activities; or

(b) a compliance notice, as contemplated in section 22 (3).

4. CONSIDERATION

4.1. Assessment of the Board’s response dated 15 December 2021

In the Compliance Notice issued to the company on 25 October 2021, the Board was required, within forty (40) business days, to:

i. *Submit to the Commission a signed resolution of the Board's intention to 'exit the Debentures' in order to substantiate the statement made in the Communique to the public, titled* ***Communique – Nova Group Update and dated 9 April 2021***

The Board submitted a signed copy of its minutes of a meeting it held on 25 February 2021. The minutes do not expressly indicate that a resolution was passed to begin a repayment process of debentures. In its defence for not passing such a resolution, the Board argued, "*We reiterate that an act of redemption requires a specific resolution by the board of directors of Investments to redeem all or a portion of debentures which resolution is then approved by the Trustee. Until such a specific resolution has been adopted followed by an approval of such resolution by the Trustee, no act of redemption can be said to have taken place*". It further stated that "*the decision (as taken on 25 February 2021) was not a resolution by the board of directors of Investments to redeem either all or a portion of the debentures, there is no Trustee's approval of the decision and the decision did not constitute an act of redemption*".

While it may be understood that a specific resolution would need to be taken by the Board of Nova Property Investments (Pty) Ltd and be approved by the Trustee, it should be highlighted that the approval of such a resolution would not have been possible due to the absence of a Trustee, seeing that Mr. Cohen (the former Trustee) resigned during the course of the 2019 financial year (Annexure B) and no new trustee was nominated for approval by Debenture Holders within 90 (ninety) business days of Mr. Cohen's resignation, per Clause 15.3 of the Debenture Trust Deed. As such, the Board has, through its own inaction, out itself in a n position of breach. The absence of a resolution to exit the Debentures, therefore, puts the company in breach of the Schemes of Arrangement, as further alluded to in Section 4.6 of this report.

ii. *Submit a copy of the approved audited annual financial statements for the financial year ended 28 February 2021 for the Commission to make an evaluation of the company's current liabilities for the 12 months ending 28 February 2022 so as to negate the allegation of potential insolvency or financial distress*

A copy of the approved audited annual financial statements for the financial year ended 28 February 2021 were submitted to the Commission. The Debentures were still classified as a non-current liability, with no portion thereof reclassified as a short-term liability to indicate that a payment would be made to the Debenture Holders within the twelve months ended 28 February 2022.

In Note 15 of the annual financial statements, the Board stated that "*The debentures are redeemable by Nova Investments in terms of the Schemes of Arrangement read with the Debenture Trust Deed, on any date within a projected period of 10 years from the date of the sanctioning of the Schemes of arrangement on 20 January 2012, or on any date after such projected 10 year period, when the board of directors of Nova Investments, in its discretion, elects to redeem some or all of the Debentures as contemplated in the Schemes of Arrangement read with the Debenture Trust Deed. Any such decision to redeem, either before or after the projected 10-year period requires, in addition, the written approval of the Receivers and the Trustee."* This position is consistent with what the Board claimed in its previous response, only that now it acknowledges that any postponement of the redemption beyond the 10-year period requires the approval of the Receivers and the Trustee, per clause 6.3.1 of the Debenture Trust Deed.

As at 15 December 2021, the date on which the Board delivered its response to the Commission, clauses 6.1 and 6.3.1 of the Debenture Trust Deed had not been set in motion or exercised. The company had neither elected to redeem all or some of the debentures nor had it elected a redemption date beyond the 10 year-period for approval by the receiver and trustee.

Note 15 further stated that "*Resolutions to redeem Debentures will be taken in due course by the board of directors of Nova Investments, when circumstances permit."* It's quite alarming that despite Clause 6.3 and 6.3.1 of the Debenture Trust Deed in terms of the redemption period, the Board of directors of Nova Investments would have to wait for circumstances to permit them to resolve to redeem the Debentures.

This assertion provokes the necessity for an inter-regulator deliberation between the Commission and the South African Reserve Bank (SARB), seeing that Nova was tasked with repaying investors according to the Schemes of Arrangements, stemming from SARB Directives which were withdrawn in terms of the Fact Sheet (Annexure C) published by the SARB on the basis of the sanctioning of the Schemes of Arrangements. There is no evidence available suggesting that Nova Propgrow Group Holdings Ltd (incl. Nova Property Group Investments (Pty) Ltd) has the latitude to wait for favourable circumstances or other conditions before executing its legal obligations outlined in the Schemes of Arrangements and Debenture Trust Deed. The submitted annual financial statements, therefore, are not a fair representation of the company's financial position and state of affairs.

iii. *Submit to the Commission, written and signed approval from the Debenture Trustee or his\her proxy (or equivalent), that the Nova Board of Directors may postpone the payment of Debentures, beyond the projected 10-year Scheme of Arrangement period; subject to the board still maintaining the view that it has the discretion to postpone the payment of Debentures beyond the projected 10-year Schemes of Arrangement period*

As at 15 December 2021, the date on which the board delivered its response to the Commission, no written and signed approval had been received from the Debenture Trustee or his\her proxy (or equivalent) affirming that the Nova Board of Directors may postpone the payment of Debentures beyond the projected 10-year Scheme of Arrangement period. .

In its response (points 18 – 20), the Board argued that the concepts "extension" or "postponement" of the 10-year period were a misnomer and that there was no provision in the Debenture Trust Deed for "*a postponement of the repayment date*". Citing Clause 6.3.1 and 6.3.1.2 of the Trust Deed, the Board emphasized that *unless and until* the Trustee had approved of an election by Nova Investments to redeem any or all of the debentures, whether before or after the expiry of the 10-year period, there was no act of redemption and because of this no current obligation was created to pay any or all Debenture Holders.

The Board continued to argue that given the central role of a Trustee, no debentures could be redeemed without the approval of the Trustee. As already alluded to in point (i) above, Mr. Cohen (the former Trustee) resigned during the course of the 2019 financial year and no new trustee was nominated for approval by Debenture Holders, per Clause 15.3 of the Debenture Trust Deed. The board claims to have refused the resignation and only later accepted in 2021. It's refusal of the resignation was disputed by Mr. Cohen, who sought legal counsel and was advised that his resignation was lawful and valid. The Nova Board chose to ignore Mr. Cohen's counter legal counsel (Annexure D) and maintained that his resignation was unlawful. This dispute ought to have been submitted to and determined by arbitration in terms of clause 28 of the Debenture Trust Deed. There is no evidence that such a process was followed.

In point 29 of its response, the Board stated that "*Investments will canvass with the Trustee (on the assumption that the CIPC is correct in its interpretation, aforesaid) what the Trustee's attitude is to "postponement" of the redemption of debentures outside of the 10-year period and whether he will be prepared to provide the approval…"*. It is alarmingly shocking and grievously concerning that the Board's view on this matter was relegated to a mere "attitude" on the part on the Trustee,

when the required approval ought to have been informed by a resolution or equivalent consent by the Debenture Holders (on behalf of whom the Trustee should be acting) empowering the Trustee to postpone the redemption of debentures outside of the 10-year period.

In pursuit of appointing a new Trustee, the Board then arranged meetings that were held in January 2022. Without pronouncing on the validity and lawfulness of the process and outcomes of the meetings, it's worth mentioning that the Commission was furnished with a letter (Annexure E) from the new Trustee, per Mr. J. Tromp; dated 19 January 2022. In point 9 of the letter, Mr. Tromp states, "*I have nevertheless on the assumption that your view is correct, considered the issue and having done so, I confirm that I have decided to approve the postponement of the redemption of debentures and the payment of Debenture Holders beyond the 10-year period and this letter, which I have sent to the directors of PropGrow and Investments, constitutes my approval in this respect.*"

The letter was delivered only a day after the meeting to appoint Mr. J. Tromp was concluded. He was allegedly appointed on 18 January 2022 and on 19 January 2022, already made a decision that affects potentially thousands of investors, without having convened a Debenture Holders meeting to pass a resolution for the postponement of the redemption of debentures and the payment of Debenture Holders beyond the 10-year period. This raises grave concerns as to whether Mr. Tromp represents Debenture Holders or himself, or some other stakeholder(s). If the Trustee has absolute discretion to make decisions that affect Debenture Holders without their approval, then the Debenture Holders are still without representation in terms of exercising their rights per the Trust Deed.

It should be noted that the meetings held to appoint a new Trustee and the delivery of the letter from the Trustee were outside of the 40 (forty) business days afforded by the Compliance Notice. The Commission does not have the latitude nor the legal right to grant an extension to a Compliance Notice. The company had the right within 15 business days of receiving the Compliance Notice, to apply to the Companies Tribunal in Form CTR 142; in terms of section 172, for an order confirming, modifying or setting aside all or part of the Notice. The Board, however, did not exercise this right. As such, requirement (iii) of the Compliance Notice was not satisfied.

iv. *Subject to the inability to fulfil point (iii) above, substantive proof that the company has and will have sufficient liquid assets that can and or have been realised into cash and cash*

equivalents to allow the company to meet its current liabilities for and before the end of the financial year ending 28 February 2022.

Since point (iii) was not fulfilled, the company had to provide proof of liquidity to meet its current liabilities for and before the end of the financial year ending 28 February 2022, which included the repayment of Debentures. In its response, the company provided an operating cash budget for the remainder of the financial year up to and including 28 February 2022. The Current liabilities excluded Debentures. On this matter, the board argued that the *end of the coming financial year* was the financial year ending 28 February 2023 and not 28 February 2022. A count of 10 (ten) years from January 2012 ended in January 2022. While the Commission's opinion of the liabilities due and payable for the financial year ended 28 February 2022 differs from the company's, the position that the Debentures were due and payable within the outgoing financial year (28 February 2022) is maintained. As such, the response provided on this matter is considered inadequate. No further discussion is required on this matter, until otherwise established post the outcome of the inter-regulator deliberations.

4.2. Qualitative Assessment of Nova's Audited Annual Financial Statements

As at 28 February 2022, which is Nova's financial year end, the Debentures line-item in the Statement of Financial Position was still classified as a non-current liability, as it has been since the incorporation of Nova Propgrow Group Holdings Ltd as a legal entity. Portions of the Debentures were classified as current liabilities, preceding the financial year in which Debentures would be paid, in line with financial reporting standards. Nova's financial statements have consistently classified the Debentures as a liability for the past ten (10) financial years.

For the purposes of establishing the accounting parameters that inform Nova's legal obligations in terms of the Debentures, it is necessary to state the accounting definition of a liability. According to the *Conceptual Framework for Financial Reporting*, published by the IASB[1], a liability is *a present obligation of the entity to transfer an economic resource as a result of past events.*

[1] IFRS. 2018. *Conceptual Framework for Financial Reporting 2018*. [online] Available at: https://www.ifrs.org/content/dam/ifrs/publications/pdf-standards/english/2021/issued/part-a/conceptual-framework-for-financial-reporting.pdf

To contextualize Nova's financial obligations in as far as the Debentures are concerned, so as to outline the accounting parameters within which the liabilities ought to be disclosed, the following key features from the definition of a liability must be made plain:

- *present obligation*: Does Nova Propgrow Group Holdings Ltd, through its control over Nova Property Group Investments (Pty) Ltd, have an obligation towards certain parties or persons who have a Debenture claim against it in terms of the Scheme of Arrangements? Emphatically yes.
- *past events*: What led to Nova's obligation to pay Debenture Holders various sums of money over a predetermined period of time? This is of vital importance, as it provides the legal framework that governs the Board's obligations towards Debenture Holders and informs the material aspects that ought to be disclosed in the annual financial statements.

It has already common knowledge that Nova was tasked with repaying investors who invested in various property syndication companies which were managed by the former Sharemax companies. In terms of the Schemes of Arrangements alluded to in Note 15 of the company's audited annual financial statements for the financial year ended 28 February 2022, Nova's assertions and opinions regarding the postponement of the redemption of debentures and the payment of Debenture Holders beyond the 10-year period seem to imply that the Schemes of Arrangements empowered the Board to do as it pleases, without any consequences for its deviation from the prescripts of the Schemes of Arrangements and Debenture Trust Deed, which are legally binding. The Board stated in Note 15 of the financial statements for the financial year ended 28 February 2021, as alluded to in Section 4.1 above, that "*Resolutions to redeem Debentures will be taken in due course by the board of directors of Nova Investments, when circumstances permit*". The gravity and implications of such a statement render the financial statements materially defective, in that they do not faithfully represent what they purport to represent.

In order for financial statements to be a faithful representation of a reporting entity's financial position, performance and cashflows, the *Conceptual Framework for Financial Reporting* published by the IASB states that "*information is material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial reports make on the basis of those reports, which provide financial information about a specific reporting entity" .*

In Nova's case, cash payments were due and payable to Debenture Holders within a period of ten (10) years, unless extended beyond this period in accordance with the provisions of the Trust Deed, per clauses 6.1, 6.3.1 and 6.3.1.2. It has already been established that no election for extension was presented by the company for approval by the Receiver and Trustee before the effluxion of the 10-year period. As such, the full value of the Debentures became due and payable in the financial year ended 28 February 2022. The repayments made to Debenture Holders as at the writing of this report are presented in Section 4.3. of this report. In light of the above, Nova's annual financial statements for the financial year ended 28 February 2021 are neither neutral nor free from error.

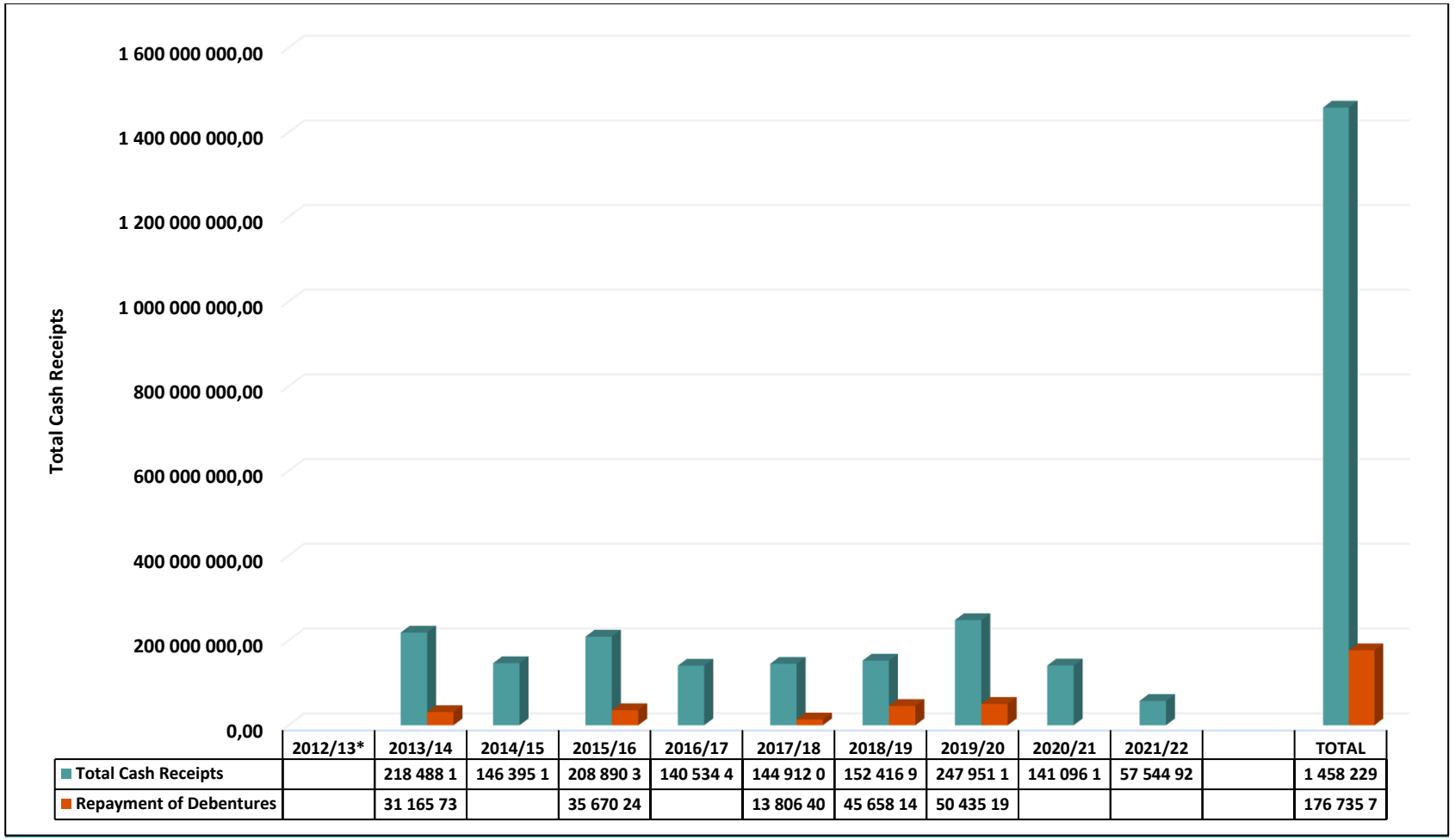
At this juncture, it is necessary to provide an analysis of the extent to which the Schemes of Arrangements was implemented in order to provide a clearer picture of what transpired over the past ten years, with special attention to whether the Board implemented the SCHEMES OF ARRANGEMENTS in good faith, acted in the best interests of investors or not and the level of the Board's stewardship of the assets over which they were entrusted. This will put further context to the Commission's concerns about the prejudice and damage suffered by investors and shed more light on the rationale for the regulatory intervention required, not only to determine the integrity (or lack thereof) of Nova's annual financial statements, but also to bring the Board to proper accountability, in the interest of the affected parties.

4.3. Implementation Appraisal of the Scheme of Arrangements

NOVA was afforded ten (10) years to implement the Scheme of Arrangements. Over the ten-year period, it only managed to repay an aggregate of R 176 735 736.00, which constitutes a meagre 12,12% of the sum of cash receipts sourced from customers, borrowings and the sale of immovable property; as reflected and depicted in Table 4.1. and Figure 4.1. below.

	Revenue	Cash Receipts from Customers	Finance Costs	Portion of Finance Costs being Interest paid to Debenture Holders	Proceeds from Sale of Investment Property	Proceeds from Borrowings	Repayment of Borrowings	Repayment of Debentures
2012/13	10 674 339	-	4 967 875	3 557 033	-	-	-	-
2013/14	103 953 190	99 460 450	58 068 998	39 738 278	119 027 659	-	-	31 165 739
2014/15	107 362 956	104 792 468	41 585 446	18 712 788	41 602 679	-	-	-
2015/16	79 244 210	83 663 776	28 123 950	10 496 891	125 226 588	-	58 618 933	35 670 247
2016/17	98 452 936	86 568 329	31 415 487	14 107 744	-	53 966 162	-	-
2017/18	83 888 205	92 508 191	31 875 615	9 378 100	-	52 403 867	27 247 369	13 806 408
2018/19	81 887 350	74 660 769	26 712 181	-	36 409 679	41 346 492	11 517 531	45 658 146
2019/20	68 827 582	73 478 212	33 796 054	-	174 472 897	-	85 002 210	50 435 196
2020/21	63 849 322	61 562 526	14 413 610	-	79 533 637	-	61 123 169	-
2021/22	51 357 022	42 777 497	13 750 003	-	13 973 807	793 621	2 088 673	-
TOTAL	**749 497 112**	**719 472 218**	**284 709 219**	**95 990 834**	**590 246 946**	**148 510 142**	**245 597 885**	**176 735 736**

Table 4.1.: Abridged Cashflow Analysis: Aggregate Receipts vs Debenture Repayments Comparison

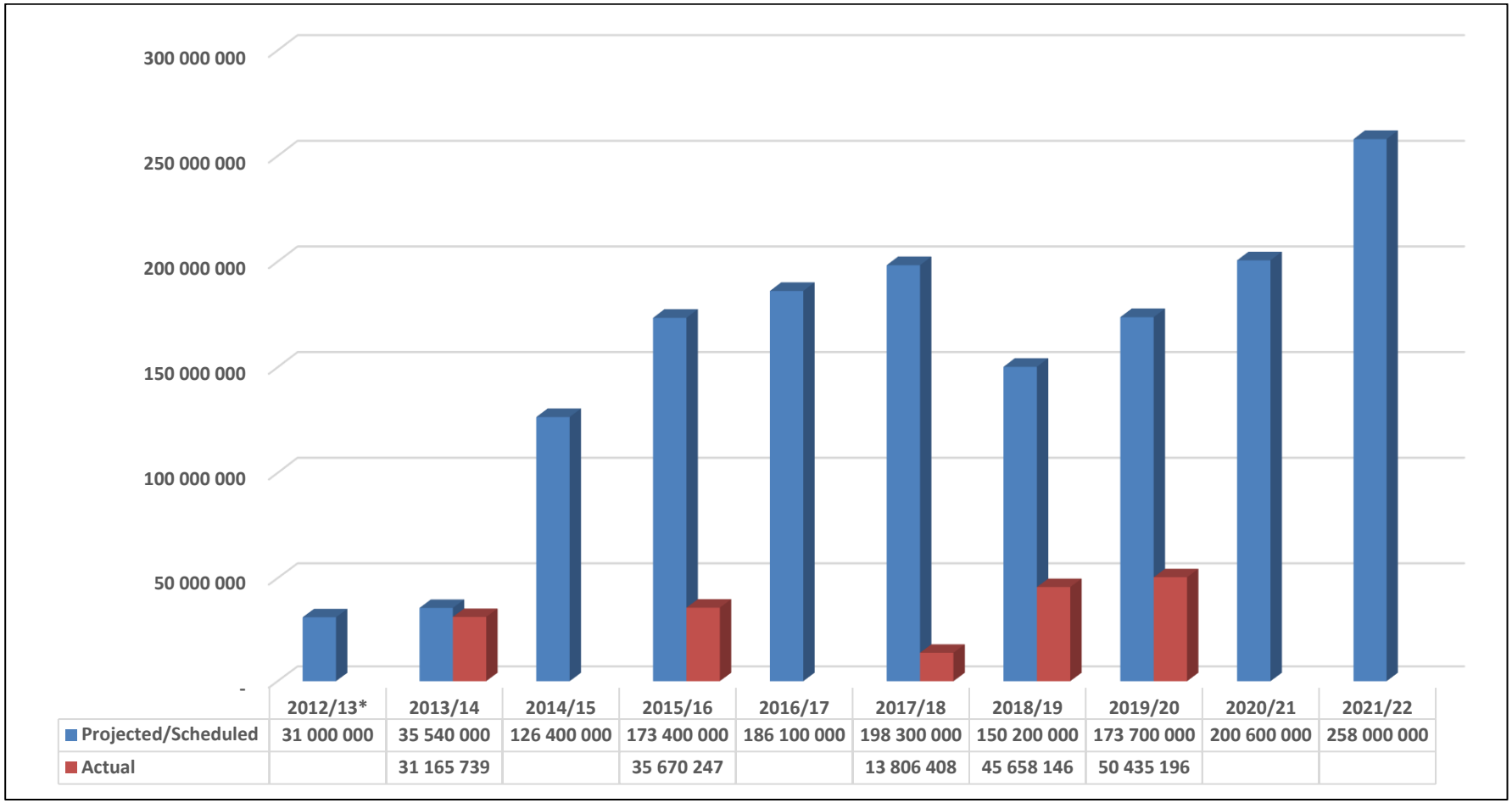


	2012/13*	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22		TOTAL
Total Cash Receipts		218 488 1	146 395 1	208 890 3	140 534 4	144 912 0	152 416 9	247 951 1	141 096 1	57 544 92		1 458 229
Repayment of Debentures		31 165 73		35 670 24		13 806 40	45 658 14	50 435 19				176 735 7

**One-month period*

Figure 4.1: Abridged Cashflow Comparison of Receipts versus Debenture Repayments

In terms of Figure 4.2. below, Debentures repaid annually relative to the projected/scheduled repayment plan per Annexure ARR7 of the Schemes of Arrangements did not even come close to what ought to have been paid, save for the disbursement made in the 2013/14 financial year.



	2012/13*	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
Projected/Scheduled	31 000 000	35 540 000	126 400 000	173 400 000	186 100 000	198 300 000	150 200 000	173 700 000	200 600 000	258 000 000
Actual		31 165 739		35 670 247		13 806 408	45 658 146	50 435 196		

**One-month period*

Figure 4.2.: Debentures Repaid Annually Relative to Projected/Scheduled Repayment Plan

A better picture of the aggregate actual number of Debentures repaid, weighed against the total projected/scheduled repayments, is illustrated by Figure 4.3 below, together with Figure 4.4, which contrasts the total actual cash receipts from the past 10 years against the aggregate debentures repaid and the portion of finance costs that constituted interest paid to Debenture holders.

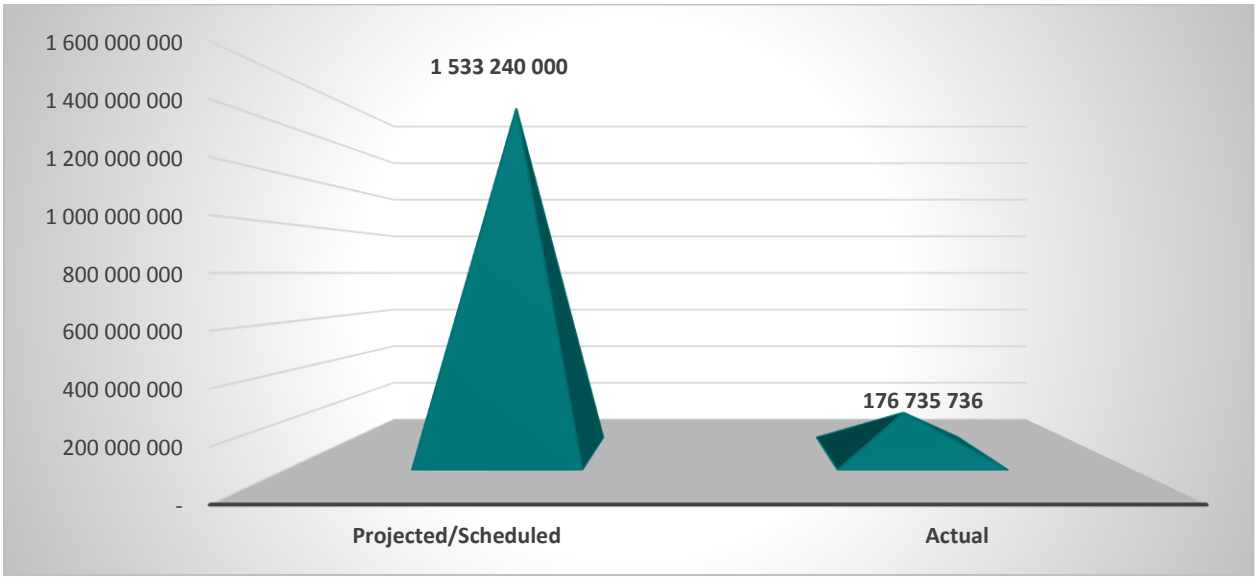


Figure 4.3.: Aggregate Debentures Repaid Relative to Projected/Scheduled Repayment Plan

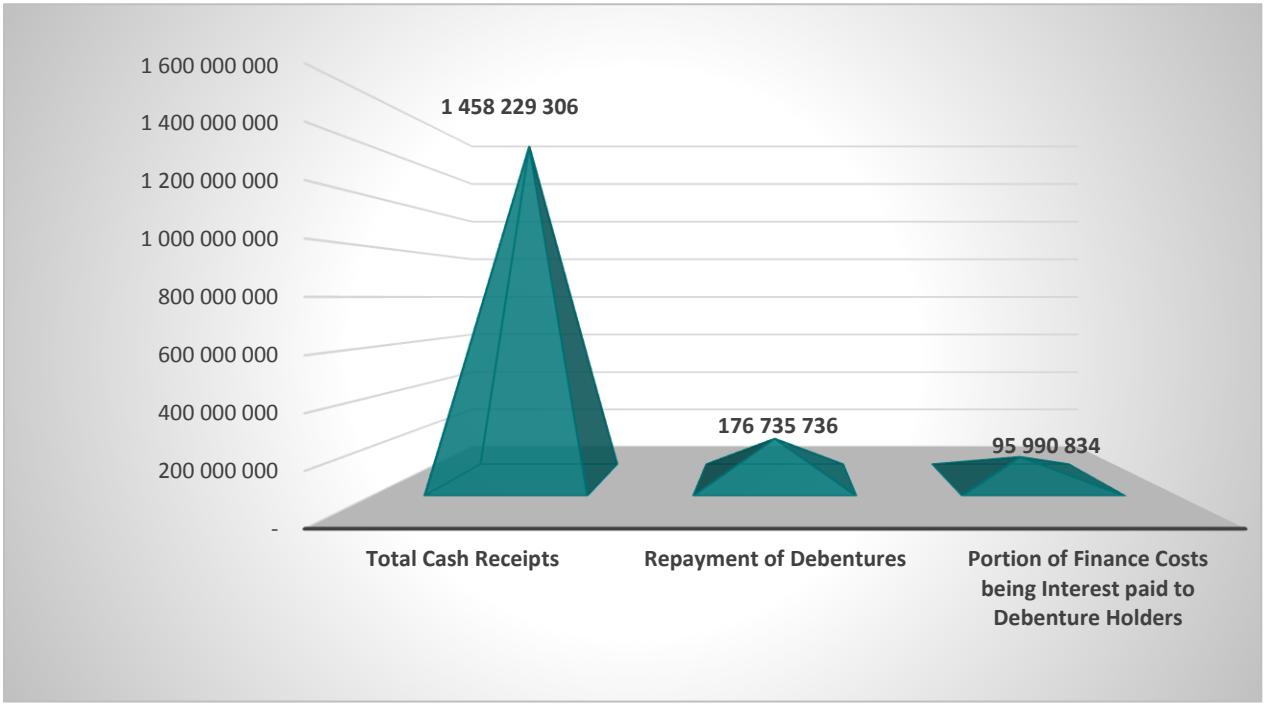


Figure 4.4.: Total Cash Receipts Relative to Debentures Capital & Interest Repaid

To put things in a more holistic perspective, Appendix B7 below (extracted from the Schemes of Arrangements) of the Explanatory Statement of the Circular to the Scheme of Arrangements posited that liquidating Sharemax, in the event of the Schemes of Arrangements not being sanctioned, investors would lose as much as 70% of the value of their investments. It is clear from Figure 4.5 below that such a scenario, in comparison to the implementation of the Schemes of Arrangements, is far removed from what has been achieved. Ten years later, investors are in a far worse position that what was presented to them the SARB and the High Court as a possible alternative outcome in justification of sanctioning the Schemes of Arrangements.

"APPENDIX B7"

Liquidation Scenario Comparison

	R
Best estimate forced sale value Income Plan properties	500 000 000
Less: Liquidation fees	-50 000 000
	450 000 000
Less: Auctioneers fees and expenses at 15%	-75 000 000
	375 000 000
Less: Estimated legal and related fees and expenses	-25 000 000
	350 000 000

The nett R350 million realisation will stand to be distributed to the investors with investments aggregating R1,533,240,000, providing an estimated liquidation dividend of some 22 cents in the Rand, before taking into account the time it would take to finalise liquidation and related proceedings, which is estimated to take at least 3 (three) years.

Source: Scheme of Arrangements

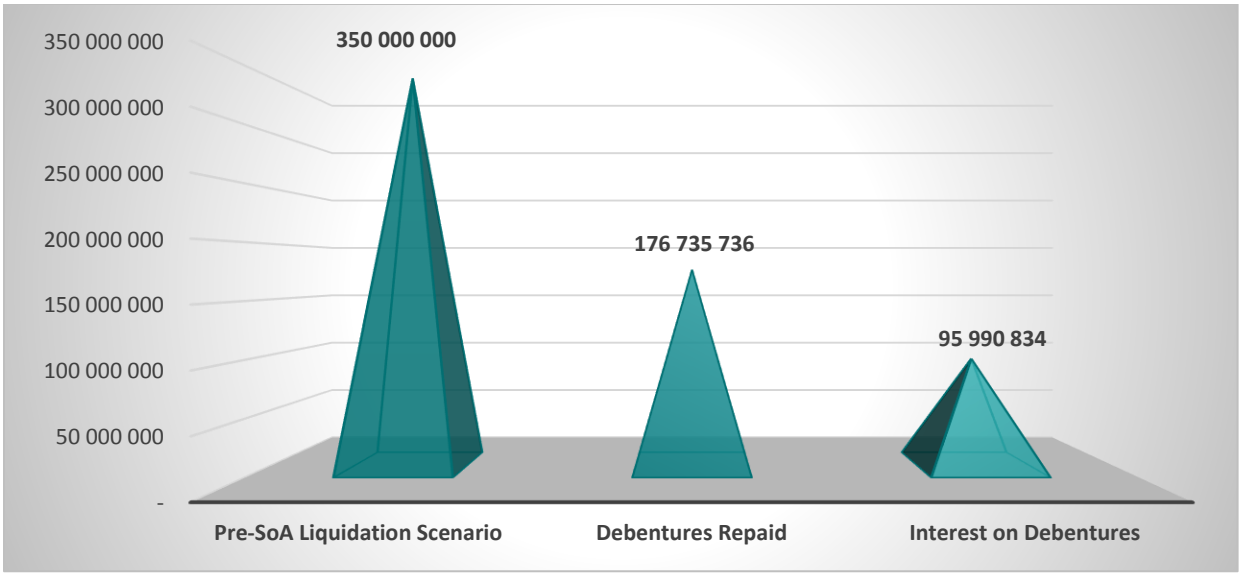


Figure 4.5.: Aggregate Debentures Repaid Relative to Projected/Scheduled Repayment Plan

Another grossly concerning factor which casts doubt on the company's ability to continue as going concern or meet its financial obligations tied to outstanding Debentures, is its disposal of investment property and the use of proceeds therefrom to fund other expenditure and liabilities in lieu of debentures.

As depicted in Figure 4.6 below, only 29,94% of cash received from the sale of immovable property over the past ten year (excluding sales from the financial year ended 28 February 2022) was used to pay outstanding debentures.

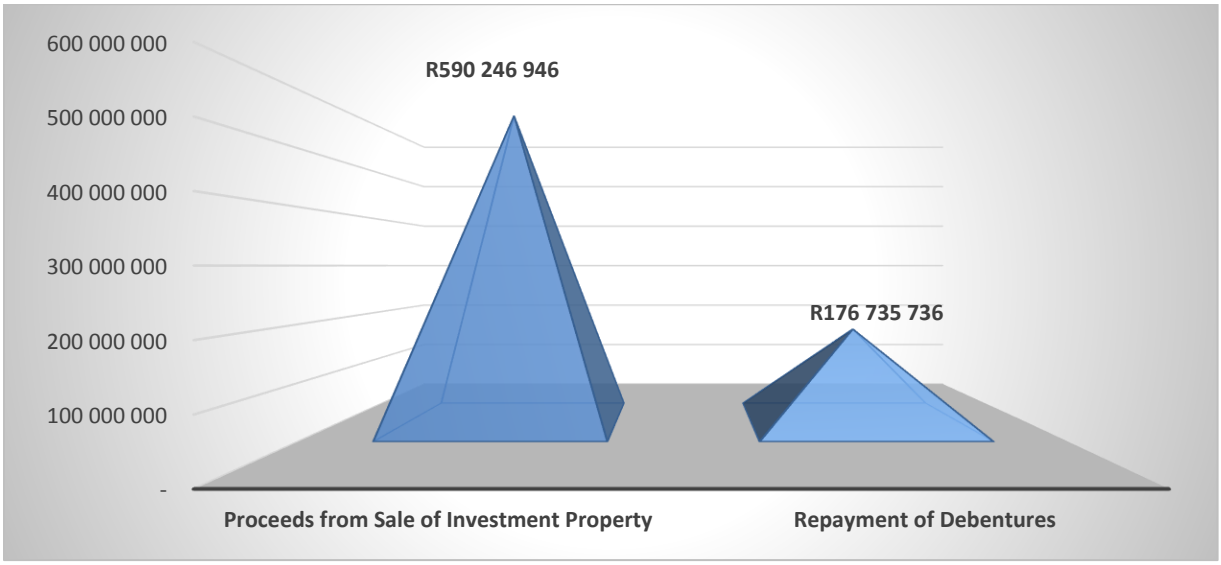


Figure 4.6: Repayment of Debentures relative to Proceeds from Sale of Investment Property

Furthermore, Figure 4.7 below depicts rapidly dwindling revenue caused by the disposal of investment properties. Not only has Nova not been able to meet its obligations per the Schemes of Arrangements, it has relied heavily on the disposal of immovable property to meet its financial obligations and supplement its operational expenses; which has eroded a significant part of its capital structure.

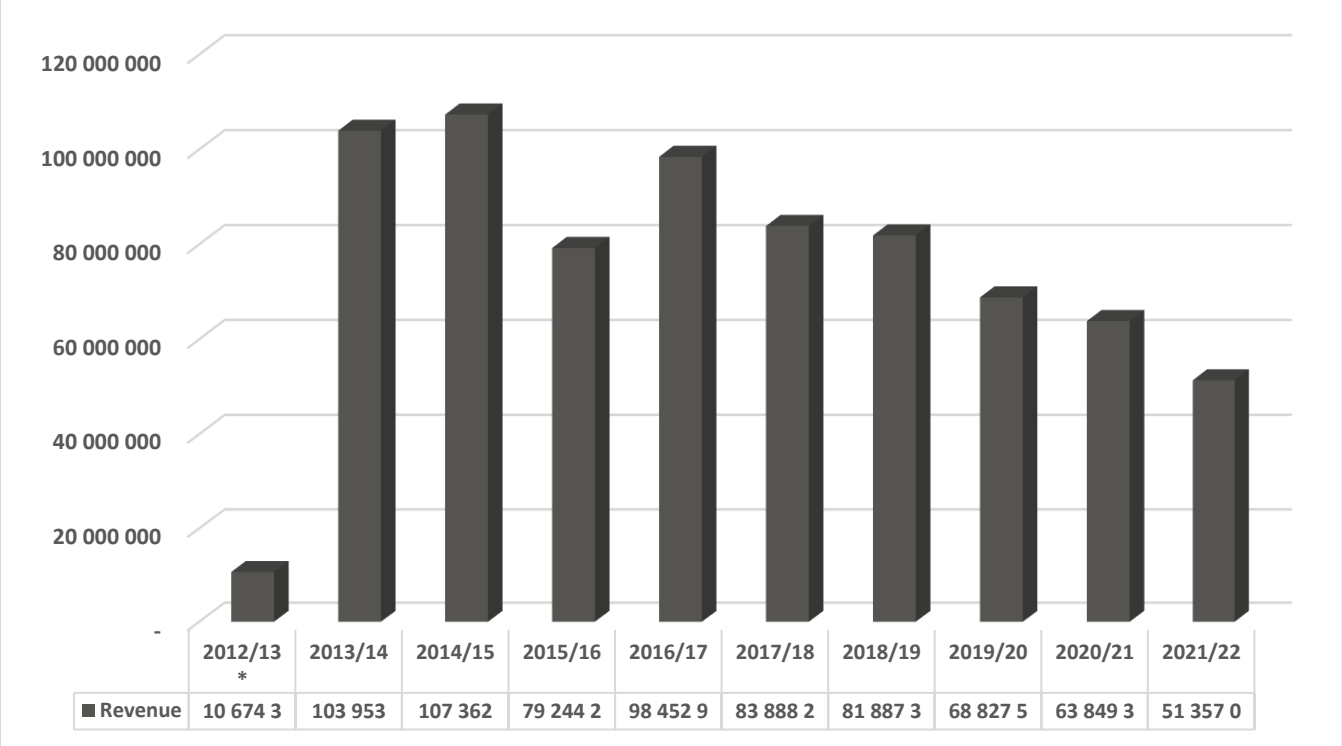


Figure 4.7: Revenue Generated Over the Last 10 Years

4.4. Breaches to the Scheme of Arrangements

4.4.1. Appointment of a Debenture Trustee

As already alluded to in section 4.1 above, Nova did not nominate a new Trustee for approval by Debenture holders within 90 (ninety) business days of Mr. Cohen's resignation, per Clause 15.3 of the Debenture Trust Deed. The Nova Board chose to ignore Mr. Cohen's counter legal counsel and maintained that his resignation was unlawful. This dispute ought to have been submitted to and determined by arbitration in terms of clause 28 of the Debenture Trust Deed. There is no evidence that such a process was followed. Nova's inaction on this matter constitutes a breach to the Debenture Trust Deed.

4.4.2. Non-alienation of business

In terms of the obligations of and restrictions on the company, the company undertook in favour of the trustee that it would conduct its affairs in a proper and business-like manner and would not, without the prior sanction of a debenture special resolution, alienate the business of the company or the whole or greater part of the assets of the company, per Clause 9.6.4 of the Debenture Trust Deed. It is understood that the business of the company is *investing in commercial and residential property, the letting thereof and development of residential property*, as stated in its annual financial statements. It follows then, that the company derives income from properties it owns and/or develops. The continued sale of properties without an equal or higher rate of acquisitions or developments would ultimately result in the company not being able to generate any income, putting it out of business. Nova's actions, as already alluded to in section 4.3 above, are equivalent to the alienation of its business under this premise:

- While the company has not sold the entirety or greater part of its business in terms of accounting fair value, it has sold the greater part of the income-generating assets (immovable properties) under its control, which majorly impedes on and erodes its ability to repay investors in terms of the salient objectives of the Schemes of Arrangements.
- The continued disposal of its immovable properties constitutes an indirect winding-up of the company, without the Nova board formally pronouncing it as such or classifying its actions as a voluntary liquidation or winding-up in terms of sections 79 and 80 of the Act.

4.5. Contraventions of the Companies Act

Section 29

The Act states that *if a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must satisfy the financial reporting standards as to form and content, if any such standards are prescribed; and present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company*. Furthermore, *financial statements prepared by a company,*

including any annual financial statements of a company as contemplated in section 30, must not be false or misleading in any material respect.

In terms of this report and until otherwise proven from the recommended inter-regulator deliberations per Annexure F (for internal use only), the company has provided annual financial statements which are misleading in certain material aspects. As such, the annual financial statements are neither a fair representation of the company's state of affairs nor neutral or free from error in keeping with the requirements of prescribed financial reporting standards for public companies.

Section 30

As depicted in Table 4.2. below, the Nova's directors have consistently approved its AFS late for the past four (4) consecutive financial years, from 2018 up to and including 2021. Over the last ten (10) years, it has approved its AFS late for seven (7) years on aggregate. This is a continued contravention of the Act, which requires that annual financial statements be prepared within six months after the end of a company's financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting.

Financial year-end	**Approval Date**	**Publication Date**	**Extent of Delay** (Later than 6 months after financial year-end)
28/02/2021	19/11/2021	19/11/2021	3 months
29/02/2020	26/02/2021	26/02/2021	6 months
28/02/2019	20/02/2020	20/02/2020	6 months
28/02/2018	30/11/2018	30/11/2018	3 months
28/02/2017	31/08/2017	08/09/2017	n/a
29/02/2016	31/08/2016	31/08/2016	n/a
28/02/2015	31/08/2015	31/08/2015	n/a
28/02/2014	01/10/2014	01/10/2014	1 month
28/02/2013	01/10/2013	01/10/2013	1 month
29/02/2012	31/01/2013	31/01/2013	5 months

Table 4.2.: Approval of Nova's AFSs over a 10-year Period

Not only is the late approval of AFSs a contravention of the Act, the timeliness of the reported information renders the usefulness thereof significantly futile, as users of Nova's AFSs would not be in a position to make timely and accurate decisions based on the information provided. By the

time the AFS are approved and or published, material changes to the financial position and or performance of the company would have transpired.

4.6. Other Salient Considerations

While the investigation stemmed primarily from the Corporate Compliance and Disclosure Regulation Unit due to financial reporting contentions, the intradepartmental regulatory triangulation of Nova's footprint within the Commission revealed certain administrative and regulatory issues, covering findings from the Business Rescue unit, the Corporate Legal Services unit and the Corporate Governance, Surveillance and Enforcement Unit; the substance of which necessitates the urgent recommended inter-regulator deliberations, per Annexure F.

In order not to encroach on other legislation, it necessitates the Commission to verify with SARB if there were no suspensive conditions or other conditions to the withdrawal of the Directives. While it is acknowledged that there may not have been reasonable foreseeability of loss of the part of SARB when the decision was made to withdraw the Directives, the poor and inadequate implementation of the Schemes of Arrangements has caused damage to investors and subjected them to significant prejudice, taking into account the time of value of money, opportunity costs and inflation; inter alia.

With the Board arguing that it has the discretion to postpone the repayment of debentures beyond the clearly articulated debenture repayment/redemption period stipulated in the Schemes of Arrangements (Clause 4.3.5.22 of Appendix D) and the Trust Deed (Clause 6.1), its argument implies that the Board was given autonomy to do as it pleases without accountability to neither the Debenture holders nor the SARB, or even the Commission (to whom a copy of the sanctioning of the Schemes of Arrangements was delivered for regulatory purposes). If autonomy is the case, then the Schemes of Arrangements has proven to be a vain and ineffective instrument in governing and administering the repayment plan and rendered the withdrawal of the SARB Directives futile, potentially making the alleged illegality of the former Sharemax companies business prevalent in the form of Nova. All that would have happened is a transfer of Sharemax's assets into another entity, a change of the management's composition and undue alteration of ownership and equity; the legal implications of which are astronomic, not only for SARB and the Commission, but for every regulator, juristic person and natural person that was party to the actions taken which led to the restructuring of the Sharemax companies.

4.7. Enforcement Recourse

4.7.1. Escalation to Relevant Regulator/Enforcement Agency

In order to adequately and comprehensively expedite the investigation and reach a final verdict, in the interest of maintaining regulatory integrity and investor confidence, certain fundamental issues implicating other regulators and stakeholders need to be ironed out.

Parts of the functions of the Commission, per Section 187 (3) of the Act, are to promote the reliability of financial statements by, among other things, monitoring patterns of compliance with, and contraventions of, financial reporting standards. The Act, per Section 188(3) further provides for the Commission to liaise with any regulatory authority on matters of common interest and exchange information with, and receive information from any such regulatory authority pertaining to matters of common interest or a specific complaint or investigation.

In light of the implementation appraisal of the Schemes, as well as the Board's insistence that it will make a resolution to redeem debentures 'when circumstances permit', determinations of regulatory oversight need to be made in order to produce a State-wide accurate and proper account of what Nova has done (as reported in its audited annual financial statements); weighed against what it ought to have done, within the context of the Schemes of Arrangements and legal obligations explicit thereto, inclusive of the SARB Directives and findings that led to the issuance of those Directives; so as to adequately determine the scope within which to assess the Board's stewardship of Nova's resources and weigh its accountability against that inter-regulator scope. This will inform the Commission's final view on whether that which Nova's annual financial statements purport to represent is of a faithful and fair representation of its financial position and guide the final enforcements actions where applicable.

Therefore, to accurately and satisfactorily conclude on this case, the various regulators need to collate the different pieces of legislation and interrogate the findings of this report, including the historical documentation that led hitherto, to enable them to address the various pertinent issues expounded in Annexure F; which affect and will inform the outcome of this case.

5. CONCLUSION

Of the salient features stemming from the Scheme of Arrangements, together with the argument articulated in section 4 of this report, this is the sum:

- Nova came into effect primarily as a vehicle to facilitate the repayment of monies invested into Sharemax by the public. The process of capital raising to fund the Sharemax business model and operations was facilitated through prospectuses vetted by and registered with the Commission.
- Sharemax was found to have conducted the business of a bank by the SARB and consequently labelled as an illegal structure
- SARB issued Directives to Sharemax instructing it to repay investors so as to address the contravention of the Banks Act.
- The Directives were then withdrawn on the basis of a supposed equivalent remedial course of action aimed at achieving the Directives' objectives, which was to *repay investors.*
- As per Section 4.4 above, the analysis of cashflows over the past ten (10) years indicates that the Board has not prioritized the repayment of Debentures.

After careful consideration of the company's obligation to Debenture Holders per the Schemes of Arrangements (including the Debenture Trust Deed), the sum of disbursements made to Debenture holders since the effective date of the Schemes of Arrangements, weighed against the initial value of the Debentures, taking into account the fair market value of the investment properties against which Debentures would be paid and the time horizon that was afforded the Board to implement the Schemes of Arrangements; it would be unjustified to allow the company to carry on with business in the manner in which it has conducted itself over the past ten years.

On the basis of the above merits and demerits, reasonable doubt exists on the Board's intention and capacity to fully implement the Schemes of Arrangements. Furthermore, the objective of the withdrawn SARB Directives has not been achieved. As such, the company should not be permitted to continue trading under the current Board's control and should therefore be subjected to some form of supervision or administration, pending the outcome of the recommended inter-regulator deliberations. Due to the time-sensitive nature of the investigation in light of ongoing disposals of immovable assets by the company, the various regulators implicit to this case ought to urgently act on the provisions afforded by Section 188 (3) of the Act to expedite the realisation of a legally accurate and equitable outcome and arrive at a satisfactorily conclusion of the case.

The company failed to prove beyond reasonable doubt that it has and will have adequate/sufficient liquidity to meet its current financial obligations; including the outstanding debentures which, according to the Commission, as informed by the International Financial

Reporting Standards framework used in preparing the audited annual financial statements of Nova Propgrow Group Holdings Ltd; were due and payable within the twelve months ended 28 February 2022.

Based on the substance of the response received by the Nova Propgrow Group Holdings Ltd board of directors, dated 3 March 2021, reasonable grounds still exist that the company is in contravention of Section 22 (1) and Section 29 of the Act. As things stand, Nova's actions have been grossly inconsistent with what was stipulated in the scheme of arrangements. Moreover, that which the AFS purport to represent and the import of the arguments submitted by the Board cast reasonable doubt on the company's ability to fulfil the repayment plan in the "best interests of the debenture holders".

In keeping with the requirement prescribed in Section 22(3) of the Companies Act, 71 of 2008 (as amended), a compliance notice for your consideration is attached as Annexure G to cause the company to cease carrying on its business, with conditions.

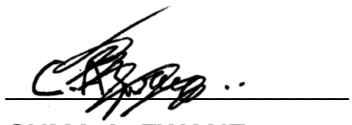
As at the date of this report, our records shows or indicate that the enterprise status of Nova PropGrow Group Holdings Ltd is "*in business*" and thus in order for the company to comply with the requirements of the Act.

6. RECOMMENDATION

It is recommended that the Commissioner approve and sign the Compliance Notice attached as Annexure G in terms of which the company is required to **cease carrying on its business**, with the condition that it **may continue discharging its operational and contractual obligations**, but **is prohibited from disposing of any immovable property**. Furthermore, the company is required to, within 40 business days from the date of the Notice; submit to the Commission:

i. **a copy of its asset register, per Regulation 25(3)(a) and (b) of the Companies Regulations, 2011**
ii. **a copy of its Shareholders' register, per Section 50 of the Act**
iii. **a copy of the list of Debentures referred to (but not included) as Annexure ARR5 in the Scheme of Arrangements.**

It is also recommended that the directors of the entity be given a copy of this report as per the requirement in Section 170(2)(b) of the Act.



CUMA A. ZWANE
Appointed Inspector
Date: 25 July 2022