REPORT TO THE MASTER OF THE HIGH COURT

(GAUTENG JOHANNESBURG DIVISION)

CONCERNING THE INSOLVENCY ENQUIRY INTO THE AFFAIRS OF

HARRISON AND WHITE INVESTMENTS (PTY) LTD

(in liquidation)

Master's Reference No G 1274/2016

INTRODUCTION

1. The undersigned was appointed on 6 November 2017 by the Master of the above Honourable Court as Commissioner to preside over the enquiry into the affairs of the insolvent company Harrison and White Investments (Pty) Ltd ("the Company"). The Commissioner was instructed to report to the Master concerning the witnesses who were called to testify, the impact of their evidence, whether any money or assets could be recovered for the benefit of the Company, its creditors or members and what steps of a civil, regulatory or criminal nature should be taken in the interests of justice and of the creditors on the basis of the facts established during the enquiry.

2. This report deals with these issues. The enquiry was conducted over a number of days during 2018. Many witnesses were called and interrogated and numerous documents were presented to the Commission. During the proceedings permission was obtained from the Master to admit the transcript the earlier enquiry

into the affairs of AJP Investments (Pty) Ltd (in liquidation) ("AJP") as evidence in this enquiry. The transcript was handed in as an exhibit and reference was made thereto when appropriate.

3. I have the privilege to present my report herewith.

THE COMPANY

4. The company was part of a group of companies controlled by one Gavin Lyonel Zietsman (“Zietsman") and one Michael Trevor Ralston ("Ralston"). It was founded by Zietsman and his father, Johnny Zietsman. The group included the following corporate entities in which the company held shares indicated by the relevant percentage: AJP investments (Pty) Ltd (in liquidation), [UNREADABLE] Holdings (Pty) Ltd (percentage unknown); Superlift (Pty) Ltd (100%), Glenwood Property (Pty) Ltd (100%); CLL Manufacturing (Pty) Ltd (100%), Poweralt (Pty) Ltd (30%); Moya Eco Power (Pty) Ltd (100%); JCL Investments (Pty) Ltd (percentage unknown) and Imbambala Logistics Management (Pty) Ltd (percentage unknown). The Company itself was divided into 3 divisions: Head Office, Superlift Crane Hire and Falcon Crane Service, according to the information provided in the Business Rescue Questionnaire that was completed for and on behalf of the Company.

5. The Company's directing minds were Zietsman, Ralston, Mr Johannes du Plessis ("Du Plessis") and later on Mr Kevin Kemp ("Kemp"). Zietsman was chairperson

until the Company was liquidated. He is living in the United States. He was also chairperson of AJP, an associated company. The chief executive officer was Ralston, a chartered accountant, who was in control of the Company's day to day affairs and of its subsidiaries and divisions. Kemp was originally appointed as workshop manager of the Falcon division and was promoted to deputy CEO in August 2014. He and Du Plessis, as financial manager, were members of Exco. Du Plessis testified that his position as financial manager was taken over — if not usurped — by Kemp, leaving Du Plessis in an administrative position. Mr Fareed was in control of fleet management and arranged a number of sales of cranes in the last months before the Company was liquidated.

6. The Company's legal advisers were Mr Connie Myburgh ("Myburgh"), who was on retainer for the Company and for the entire group at all relevant times, and Mr Diaan Ellis ("Ellis") of the firm Faber Goertz Ellis Austen Inc.

7. The Company's shares were held, according to Ralston, by Circle Way Trading 71 (Pty) Ltd (69%); Harrison & White Imbizo (Pty) Ltd (26%) and the Falcon Trust, Ralston's family trust (5%).

8. The group of companies conducted business as electrical and mechanical engineers and contractors. The Company itself did business as a crane hire and repair and service provider.

9. The Company and its associated companies were indebted to FirstRand Bank, acting through its various divisions, (hereinafter referred to as "the Bank" or "RMB") to a not insignificant extent in respect of loan agreements and instalment sale agreements. When these entities defaulted on their obligations a debt reduction agreement was entered into by the Company, Circle Way Trading 71 (Pty) Ltd, Josade Trust and Zietsman. It was signed on 17 September 2012.

10. In terms of the debt reduction agreement, the joint debtors identified in the preceding paragraph admitted indebtedness to FirstRand Bank in a total amount of almost R150 million. The associated company Circle Way Trading 71 (Pty) Ltd was indebted to the Bank, and admitted to being so indebted, to the tune of almost R27,500,000.00. The debtors undertook to maintain the normal scheduled repayments agreed to in the various loan and other agreements, and in addition to reduce the outstanding balance by the payment of R18 million on 15 November 2012, R18 million on 7 January 2013, and R16 million on 30 April 2013, with the balance of the indebtedness to be repaid on 30 June 2013.

11. The conclusion of the debt reduction agreement followed upon early indications of the Company's inability to meet its commitments which inability was conveyed to the Bank in November 2011 already. (From time to time money was obtained from

Sectional Poles (Pty) Ltd, a subsidiary company, to meet the Company's commitments before Sectional Poles was sold). On 14 December 2011, Mr Misheck Chingaya, acting on behalf of the Bank confirmed in an email to Ralston that he had been advised by the latter that the Company would miss an instalment on 15 December 2011. The payment was in fact not made and subsequent instalments were defaulted upon until the debt reduction agreement was concluded. On 1 July 2013, the lawyers acting for the Bank, directed a letter of demand to the debtors who had bound themselves in the debt reduction agreement, demanding payment of the full outstanding amount, which had obviously also attracted further interest in the light of the fact that the debtors failed to make a single payment that had undertaken to effect in terms of the contract. The resolution for business rescue of the Company and its major shareholder, Circle Way Trading 71 (Pty) Ltd was launched on 4 July 2013.

12. The Company's financial situation deteriorated from 2011. It sold one of its divisions, Sectional Poles, to a company in the RMB stable during the first half of 2013 and agreed that the full proceeds of the sale could be devoted to a permanent reduction of the Company's indebtedness to the Bank. The sum of R82 million was insufficient to lower the debt owing to the Bank to enable the Company to keep up its monthly payments. (Ralston was later to claim in his affidavit opposing the Bank's application to liquidate the Company that the latter had been forced to sell Sectional Poles at half its true value to the RMB subsidiary, while another offer for more than R200 million was on the table. No evidence of any offer other than that

of the RMB subsidiary was provided either in the papers opposing the Company's liquidation or during the evidence given at the subsequent enquiry. There appears to be no substance to this allegation. It does appear highly unlikely, in any event, that a commercial bank seeking to recover millions owed to it would manipulate the sale of an asset in a fashion that would cause it to lose millions.)

13. The debtors failed to honour their commitments in terms of the debt reduction agreement (Ralston admitted in his evidence during the insolvency inquiry that the Company was already insolvent in 2012, even before the debt restructuring agreement was entered into. The Company's auditor, Mr Brown, confirmed that the Company was at that stage already in dire straits and that a note relating to its ability to continue doing business as a going concern was included in the annual financial statements for year end March 2013. The financials for March 2014 were never completed and signed off because the auditors were not satisfied that the Company was still operating profitably. When they raised this issue with Zietsman, he became furious and aggressive. The auditors resigned as a consequence of his attitude - and because they were not paid. As stated above, letters of demand were sent to each of the signatories to the debt reduction agreement on 1 July 2013. On 4 July 2013 the Company's board of directors resolved to place it under business rescue. It must be underlined that the affidavit sworn to by the CEO failed to disclose the existence of the debt restructuring agreement and the Company's failure to comply with any term thereof. Bearing in mind that he asserted in the

affidavit that the Company enjoyed a positive cash flow, the affidavit must unfortunately be categorized as perjured and a fraud.

14. The Company's indebtedness to its bankers was secured by *inter alia* a notarial bond in terms of which all the Company's movable assets, especially its cranes, were covered. These assets could consequently not be further encumbered or disposed of without the Bank's express permission first being had and obtained.

15. During 2014, while under business rescue, Messrs Ralston and Kemp revalued the cranes at more than double their actual value, to reflect an asset worth R108 million — which was totally unrealistic, according to the evidence of Du Plessis, the financial manager. This revaluation "massaged" the balance sheet to mask the insolvent estate's insolvency, according to Du Plessis. The cranes were eventually sold for a fraction of this valuation.

THE LESOTHO WINDFARM

16. One of the principal reasons causing the Company to encounter financial headwinds was Zietsman's interest in creating various renewable energy projects in sub-Saharan Africa, especially in Lesotho. The plan to erect a large wind farm in the neighbouring state was to be executed through a subsidiary of the Company, Moya Eco-Power (Pty) Ltd ("Maya"). In his affidavit opposing the liquidation application that will be referred to later herein, Ralston stated that since 2012

efforts had been made by Zietsman to source international funding for this project. He alleged that this funding, while it had not been received yet, was imminent. (He did so again and again at various stages during the following years and finally in the affidavit deposed to by him in the application by various allegedly interested parties to intervene in the application to liquidate the Company. Zietsman was allegedly *"... in constant contact with the funders who a/so originate from the United States of America."*). No particulars of such funding were ever supplied by any of the individuals involved in the sourcing of the funds, Zietsman, Mr Klopper, Ralston and Kemp, a member of the Company's executive committee. Various agreements or term sheets were drawn up with allegedly powerful international risk venture entities represented by individuals that allegedly communicated by telephone with the company directors and the Business Rescue Practitioner, Mr Klopper ("the BRP" or "Mr Klopper"). None of these documents granted any rights to the Company and at least one of the alleged funders, paraded by the proponents of the funding exercise as a bank, was a dormant company registered in a Caribbean attorney's office.

17. Ralston added, significantly, that the Company's capital had been devoted to the funding of the Lesotho windfarm electricity generating company, Moya, to the tune of not less than R72 million. The salaries of two of its Lesotho directors were also paid until the Company started to retrench its own staff in 2016.

18. No explanation was provided, either in this affidavit or at any stage during the business rescue process or the subsequent liquidation and enquiry on what basis a Company that was already struggling to meet its commitments to its bankers was obliged to spend R72 million on a project unrelated to its own business from which project it would apparently receive no benefit at all. It must also be underlined at this stage that the granting of these facilities to Moya was a breach of an express undertaking not to make loans to any entity contained in the loan agreement concluded with the Bank on 23 August 2010 (Clause 9.2.4). It might be argued that, as Moya was a 100% subsidiary of the Company, which was indebted to its holding Company to the tune of R72 million at that stage, which debt was later to balloon to R100 million, that any funding obtained by the subsidiary company could be devoted to the repayment of the loan account. The fallacy of this argument is obvious: Once the funds were received, they must in terms of the funding agreements be devoted to the renewable energy project. There could hardly be any motivation on the part of the funders to see their investment diverted to the payment of old liabilities of a holding company in liquidation. The probabilities are overwhelming that if the pipedream of overseas funding were ever to be realized, it would be provided through a new vehicle while both the Company and Moya would be jettisoned. The Company had no hold over the participants in the funding venture, nor any legally enforceable document or resource to force overseas funders to repay the monies that it made available to its subsidiary company.

19. Given the parlous state of the Company's own finances already during 2012, it is inexplicable why the directors were prepared to expose the Company to financial ruin in this fashion. Moya did no more, according to a PwC report, than conduct research. Du Plessis added that as part of this research five wind towers were erected in Lesotho which were not properly maintained. One of them fell over and the others simply disappeared. Moya was de facto dormant with no assets to its name and debt to its name of R100 million when its holding Company was liquidated.

20. The alleged foreign funding that would save the company was to be supplied through the channel of another company, Global Renewable Energy Ltd ("GRE"). This company is a public company registered in the Isle of Man and was incorporated in 2012, the year in which the Company's search for international funding began in earnest while trading in insolvent circumstances — which may or may not be coincidence. No particulars have ever been provided of the basis upon which Moya or any of the parties involved in any funding venture would be obliged to repay the millions the Company spent on the windfarm — of the existence of which no tangible evidence was ever produced, other than the allegation that land had been made available for the future project upon which test towers were erected without success. No explanation has been provided regarding the benefit that would accrue to GRE or the alleged financier from recapitalizing the Company,

and no detail has ever been disclosed what quid pro quo the company would have to provide as security or return for the funding of millions.

21. At an early stage of the funding saga it was alleged that GRE would supply US$1 million in exchange for 1 000 shares in the Company, but no calculation of the value of the Company's shares was supplied to justify such an investment. The absence of any such information remained a striking feature of all subsequent assertions that funding by a nebulous foreign fairy godmother was imminent.

22. During the 9 December 2013 meeting of creditors of the business rescue, the BRP stated that funding was on the verge of being supplied by UK funders, but again no particulars of these funders and the purported contracts to be entered into with them were supplied — allegedly on the grounds of confidentiality.

23. What appears to have been overlooked in the quest for the goose that would lay unlimited millions worth of golden eggs is that the mere statement that funding from whatever quarter was required to save the Company amounted to an admission that the Company could not achieve liquidity from its own allegedly positive cash flow. (As is set out later in this report, the BRP was fully aware of this situation, even though he stated at one stage of his evidence that in the earlier stages of business rescue the Company could still have been saved by employment of its

own resources — a statement that is flatly contradicted by Ralston's admission that the Company was trading in insolvent circumstances in 2012 already). It should have been a red light to management and the BRP alike to take a long, hard look at its viability. By the same token it must have been obvious from the start of business rescue that any undue delay in this process must affect the Company's assets negatively.

24. The mere telling of this tale, without discussing the evidence led at the enquiry in the later chapters of this report, discloses reckless conduct on the part of all those individuals who were involved in the management and business rescue of the Company.

25. No contracts, no security, no agreements and no tangible plans to ensure that monies spent on dreams that were "blowing in the wind" were put in place to protect the Company against the consequences of diverting funds to a pipedream on the basis of vague promises that financial support would be provided by shadowy entities beyond the borders of South Africa.[1]

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[1] Mr Klopper's evidence on this point is illustrative. Asked by the Commissioner why a reputable overseas investment organisation focusing on renewable energy worldwide would be interested in saving an entity like the company that owed millions and did not appear to be an attractive investment, he replied:

"... The way that it was explained was that Mr Gavin Zietsman, the Director of the company and the representative of the trust that holds the shares from the USA was putting this deal together in order to take the Moyo project into the GRE stable, and Moyo would then be able to pay its loan to Harrison and White. It wasn't thot they were interested in Harrison and White per se as a company. Harrison and White, and the other companies in the group, would obviously render services in the construction of the renewable energy project and building their infrastructure, and so forth. It wasn't that there were interested in Harrison and

26. During the litigation it emerged that GRE did not own any movable or immovable assets in the Republic. Apart from being involved in litigation with Evraz Highveld Steel and Vanadium Ltd, about which more will be said later, there is no evidence of any business activity within the borders of the Republic by this company other than an alleged offer to buy a windfarm in South Africa which evidently did not come to fruition.

27. It alleged in papers in the Highveld litigation that it had obtained a guarantee of funding to purchase the Highveld business to be provided by an entity referred to as PLG Capital Bank, which, according to investigations carried out by the firm of attorneys Edward Nathan Sonnenberg, was shown to be a dormant company, not registered as a bank, and having its registered address in the offices of a law firm on Saint Lucia Island. Yet the Company and its directors relied on funding to be provided by this entity — and some undisclosed other "funders" — for more than four years. In all its engagements with its creditors and in the Business Rescue Plan funding that was allegedly arranged through GRE or others was at every stage of the process said to be imminent but remained Fata Morgana hat elusively moved into the distance whenever the time for its concretization arrived.

White per se, they were interested in Moyo, that held the licence in Lesotho, and if it materialised the loon would have been paid back. That is how it was explained to me." (Vol VI pp 1507/8.)

28. A further worrisome feature of the request for funding is the fact that the finance that was sought to be obtained was intended not for the Company itself, but clearly for the pursuit of the windfarm project. This emerged clearly from the BRP's evidence quoted above and the evidence of a Mr Eugene Rossouw, the only local representative of GRE, in the AJP enquiry.[2] The Company itself, on its own, could never provide sufficient security through its assets or income to a foreign funder who would invest millions. The suggestion that foreign funds would be invested in a crane hire business is far-fetched.

29. The unavoidable conclusion that must be drawn against the background of these facts is that the refinancing of the Company, or the payment of its creditors, was merely incidental to the greater project of creating a renewable energy structure in a neighbouring country. The moment the funding for the greater project arrived, the Company itself would lose its usefulness to the project, which consisted solely in acting as a conduit for money devoted to the project or to the needs of Zietsman and his American projects.

30. There is no shred of evidence provided by the directors or the BRP that the Company's assets and income were presented to a foreign funder to justify the investment of millions of US dollars. This may explain why the BRP did not regard it as necessary to keep a careful eye on the Company's assets or cash flow which

[2] Vol 9 p 1452

would all be rectified once funding for the renewable energy project had been obtained.

31. The corollary to this fact is of course the absence of any guarantee the Company possessed that a sufficient slice of the overseas funds would eventually be distributed to it. As has been pointed out already there was no contract, enforceable undertaking or other obligation resting upon the overseas funders or any of the companies in the group to restore the Company to solvency, and no safeguard against it being abandoned by its controlling minds once funding for the grand project had been obtained other than a loan to a Company that itself was insolvent.

32. This may explain the somewhat cursory fashion in which the BRP attended to his functions vis-à-vis the Company.

33. The failure to appreciate, or to accept, or to admit that the so-called funding was no more than a mirage or a pipedream, and the irrational clinging to this excuse for failing to take action and to terminate the ailing existence of the Company that was sinking deeper into the morass of insolvency with every day that passed amounts to, at the very least, recklessness on the part of those managing its affairs and those involved in its business rescue.

34. The BRP was personally involved with GRE's efforts to obtain finance. Mr Klopper should have been aware, at the very least after the litigation against Highveld, that the so-called bank that was at one stage to provide the so-called funding did not exist. Yet he did not raise the alarm, did not terminate the business rescue proceedings and did not inform the creditors that there was no likelihood of funding ever becoming available. There were apparently several, if not many other institutions that were approached to fund the project. At every turn funding was said to be "imminent", but it never materialized.

35. In his evidence in the AJP enquiry, Mr Klopper denied any knowledge of the fact that GRE's litigation against Evraz Highveld Steel and Vanadium Ltd was funded by the Company. It may well be argued that as BRP he ought to have known if he had kept his eye on the ball.

INSIDER TRADING

36. Reference ought to be made at this stage also to a conviction of insider trading which was imposed upon the Company, Zietsman and Ralston by the Directorate of Market Abuse during 2014, which attracted a R1 million fine. The appeal against the Directorate's finding was unsuccessful.[3] The fine was apparently never paid.

[3] Zietsman and Another v Directorate of Market Abuse and Another 2016 (1) SA 218 (GP)

(It is recorded in the judgment on appeal that the shares purchased in the insider deal were acquired by the Company for its associated company AJP Investments (Pty) Ltd.)

37. The failure to pay the fine is but another indicator of the Company's inability to meet its commitments.

38. More worrisome, however, is the fact that the Company paid the legal expenses incurred by Zietsman in the unsuccessful attempt to have the Directorate's findings setaside on appeal,and the costs expended upon the subsequent attempts to obtain leave to appeal from the Supreme Court of Appeal and the Constitutional Court, after business rescue had supervened. The attorney of record, Ellis, of the firm Faber Goetz, Ellis Austen inc., will have to refund the liquidators for this expense that was unauthorized by the BRP and was in any event a disposition without value.

BUSINESS RESCUE

39. The Company was placed in business rescue on 4 July 2013 by a company resolution signed by its director, Ralston. He also swore to an affidavit as required by section 129 (3) (a) of the Companies Act 71 of 2008. In this affidavit he stated that the Company had insufficient cash resources to pay its creditors as and when

its liabilities fell due, but that its assets exceeded its liabilities by a considerable margin. He added that the positive cash flow the Company experienced would enable it to regain solvency within the foreseeable future.

40. The allegation that the Company experienced a positive cash flow was false,' as the Company and all its associated companies were already trading in insolvent circumstances at that stage, (with the possible exception of ISC Matla, which was in business rescue and remained so when the enquiry was concluded), as Ralston was forced to admit during his evidence at the enquiry.[4] The Company was therefore ineligible for business rescue, as it failed the test of financial distress as set out in section 128 (1) (f) of the Companies Act.[5]

41. Ralston further stated in this affidavit that the major shareholder of the insolvent Company was engaged in obtaining funding from an offshore source which, once it had been received, would settle all the Company's liabilities. Circle Way Trading 71 (Pty) Ltd was this major shareholder. It was placed in business rescue on the

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[4] See pp 736 to 750 of the Record of the Insolvency Enquiry.

[5] See Levenstein, South African Business Rescue Practice: "the elegability of entry into rescue is a fundamental international core theme. Only specific companies, which are bordering on insolvency or financially distressed, should be allowed to file for a formal rescue process and receive the benefit of the moratorium and the restructuring of its business affairs.... If the company was already in a position where it could not pay all of its debts, then clearly it was insolvent and therefore not a candidate for business rescue but rather for liquidation." (Page 7 — 19)

same day as the Company. Mr Klopper was appointed as business rescue practitioner in this company as well. No particulars of the source and nature of the proposed funding were provided.

42. Mr Johannes Frederick Klopper was appointed as Business Rescue Practitioner, as confirmed by Ralston in this affidavit.

43. Ralston's affidavit was signed and sworn to before an attorney, Ellis, who had been involved with the insolvent Company's affairs and those of its associated companies and some of its staff and directors for a considerable period before the resolution for business rescue. The said attorney was therefore, as was Ralston as director, fully appraised of the precarious state of the Company's finances at all relevant times. Both Ralston and Ellis should have known — and Ralston certainly did know — as will emerge from the narrative below, that the Company was at the date upon which the resolution to place it in business rescue was taken already hopelessly insolvent.[6] Both Ralston and Ellis knew that the Company had failed to honour its commitment to the bank undertaken in the debt reduction agreement. Both knew that this fact was suppressed in Ralston's affidavit and both knew that the statement that the company enjoyed a positive cash flow was an perjurious, falsehood.

[6] One indicator of significant distress is contained in the Business Rescue Questionnaire, namely the fact that the PAYE tax deducted from the employees' salary had not been paid to the revenue authorities. See also footnote 2 above.

44. After Mr Klopper had been appointed as BRP, he required Ralston to answer a Business Rescue Questionnaire, which answers had to be confirmed under oath. In this document, Ralston alleged that the cranes owned by the Company exceeded R108 million in value. This statement was a gross exaggeration of the true state of affairs. The cranes were largely of appreciable age and not properly maintained even at that stage. Their value was less than half of the figure advanced by Ralston. They had been revalued to ensure that the Company's last balance sheet reflected a solvent state of an excess of assets over liabilities. This was a deliberate misrepresentation to create the impression that the Company was solvent, which it was not.

45. It hardly requires emphasis that business rescue is a process that is intended to establish within a short period of time whether a company that experiences financial distress can indeed be returned to solvency under the guidance of the Business Rescue Practitioner; or, alternatively, be wound up in a fashion that promises to render a better return for the distressed company's creditors.[7]

[7] *'(54) The purpose of business rescue is to assist a financially distressed company with paying its debts, avoiding insolvency, and maximising the benefit of stakeholders upon liquidation (if inevitable). It is slated expressly in section 7(k) of the Companies Acl that one of the purposes of the Act is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. " It must be emphasised that this must be done while balancing the rights of all affected persons, including creditors, employees and stakeholders. The primary goal of business rescue is to avoid liquidation and its attendant negative consequences on stakeholders. In addition, a secondary purpose is to achieve a better outcome on liquidation or disinvestment whereby [t]he underlying principle behind restructuring or reorganisation proceedings is that a business may be worth more if preserved, or even sold, as a going concern than if parts are sold off piecemeal". AT the same time, where it is not viable to rescue a company it should be liquidated, and its business sold. Business*

46. The emphasis on the need to finalize the business rescue process as speedily as possible is evident from the provisions of section 132 (3) of the Companies Act 71 of 2008, which sets the norm for the completion of the process at 3 months after the start of the proceedings[8].

47. The courts have repeatedly emphasized that business rescue proceedings should not continue indefinitely, as was underlined in *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aéronautique et Technologies*

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rescue can only begin where there is s reasonable prospect of saving the company. This was highlighted in KJ Foods, where the Supreme Court of Appeal quoted with approval the High Court in DH Brothers Industries, which stated that—

> *"Chapter [6] as a whole reflects 'a legislative preference for proceedings aimed t the restoration of viable companies rather than their destruction' but only of viable companies, not all companies placed under business rescue."*

This is in line with the ultimate aim of balancing the rights and interests of all relevant stakeholders.' Per Khampepe J on behalf of the unanimous Court in Diener N.O. v Minister of Justice and Constitutional Development and Others 2019 (2) BCLR 214 (CC).

[8] '(28) Business rescue is not an open-ended process. Its very rationale is that it must end, either when its aim has been attained or when the realisation arises that rescue is not attainable. To this end, s 132(3) provides that if business rescue proceedings have not ended within three months of commencement or a longer period sanctioned by a court, the BRP miust prepare a progress report which he or she must update monthly until the end of the business rescue proceedings, and deliver the report and each update to each affected person and to either the court(if the proceedings were the subjet of a court order) or the Commission …..per Plasket, AJA in Diener N.O. v Minister of Justice and Constitutional Development and Others 2018 (1) All SA 317 (SCA); 2018 (2) SA 399 (SCA), confirmed on appeal by the Constitutional Court referred to in footnote 1.

[40] …. The starting point is the context and purpose of chapter 6. It is apparent when regard is had to the central provisions of chapter 6, as I have done above, that it is intended to create an efficient, regulated and effective mechanism to regulate the rescue of companies in financial distress – as long as they are capable of rescue – in a way that balances the rights and interests of stakeholders'. Ibid.

Embarquees SA and Others[9] *and Absa Bank Ltd v Caine NO, In re: Absa Bank Ltd v Caine NO and Another*.[10]

48. The leading textbook on Business Rescue, Levenstein's South African Business Rescue Procedure, states at p 8-67: *"Attempting to delay the inevitable liquidation of the company when there is no realistic hope or prospect of recovery is a dangerous practice and one which should be discouraged. It is submitted that a long business rescue process can result in diminished liquidation dividends which will seriously affect the creditor's ability to recover. Business rescue practitioners who delay the process do so at substantial risk to themselves, especially when disgruntled creditors go looking for the proverbial 'scapegoat' once the company goes into liquidation."* [11]

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[9] *"It is from the relevant sections contained in. Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings. The prupose of section 129((5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out and there is no question of any condonation or argument relating to "substantial compliance". The requirements "It is from the relevant sections contained in. Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings. The prupose of section 129((5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out and there is no question of any condonation or argument relating to "substantial compliance". The requirements contained in the relevant subsections were either complied with or they were not. In this case they were not for the reasons stated herein above."* Per Fabricius J at para [27].

[10] [2014] ZAFSHC 45 at para 48: *"This was definitely not the idea of the legislature that creditors could be held ransom and be prevented from exercising their normal contractual rights for such an extraordinary period of time."* Per Daffue J.

[11] See also *ibid* at 9-36.

49. Although WesBank had cancelled the petrol cards facilities consequent upon the insolvent Company's failure to honour its instalment commitments, the Bank allowed the further use of these cards as a result of a request by the BRP to do so against the security of a cession of cash in the Company's or BRP's possession.

50. In terms of section 147 (1) of the Companies Act, the first meeting of creditors must be convened by the practitioner within 10 business days after his appointment. In the present instance the first official meeting — other than informal discussions between affected parties and the BRP — was held on 14 October 2014.

51. At this meeting the BRP presented a business rescue plan. In this plan he opined at paragraph 3.5, that *"The Company became financially distressed by virtue of the First Rand Bank loans being terminated."* This statement echoes the version of the Company directors and is repeated in the BRP's affidavit resisting a claim that he should pay the costs of the liquidation in his personal capacity. It is a surprising allegation. It remains unsubstantiated. At no stage after the BRP's appointment as such did he ever investigate, let alone establish, that the Bank acted incorrectly in enforcing its loan agreements on grounds other than the fact that the Company had defaulted on its obligations towards the financial institution. No effort is made to explain the need for a debt reduction agreement which preceded the application for business rescue. Business rescue was decided upon immediately after the Company had defaulted upon its commitments in terms of this agreement by failing to pay the first instalment. It is also in conflict with

Ralston's explanation under oath that the Company had been called upon to finance the activities of Moya in Lesotho and had thereby denuded itself of its liquidity.

52. In the Business Rescue Plan presented at the said meeting, the BRP states that, without having obtained a formal valuation of the Company's assets, he has in light of his own vast experience and the opinion, informally obtained, of an experienced valuer, come to the conclusion that in liquidation the Company's assets would be sold for not more than 50% than their actual value. This would lead to some creditors not being paid in full. In addition, a liquidation process might take between two and three years. The preferable alternative, according to the BRP, was to obtain international funding through an externalization of the Company's shares. He disclosed that he had had extensive discussions with a range of funders in London through the good offices of GRE and had in fact travelled to London himself to investigate the availability of funding for not only the insolvent Company's benefit, but primarily for the projects pursued by Moya. He was accompanied by Mr Eugene Rossouw, the only South African director of GRE. Funding was said to become available during the last week of October 2013.

53. The meeting was postponed until after the date the transfer of funds was to have taken place. No business rescue plan was adopted at this meeting, nor was it ever. The dictates of the Companies Act 71 of 2008 were never observed in this connection.

54. The BRP left the management of the Company in the hands of the directors that had brought the Company to its knees without apparently considering their aptitude or fitness for the position. His engagement with the affairs of the Company was distant and marked by the absence of any personal engagement.

55. After the meeting on 14 October 2013, further meetings were convened and adjourned on 8 November 2013, 9 December 2013, 28 January 2014, 6 March 2014 and 14 March 2014.

56. At this latest meeting the Bank proposed an amendment to the business rescue plan that had been presented to the creditors by the BRP until then, although no plan was ever positively adopted. The amendment proposed by the Bank envisaged the sale of sufficient assets covered by the Bank's general covering notarial bond to satisfy the Bank's claims as a preferent creditor. As has been discussed elsewhere in this report the intervening parties in the eventual liquidation application, and in particular the Viking Trust and the Rosek Trust, had filed claims as purported creditors against the Company. These claims were of highly questionable validity. Nonetheless the Trusts were allowed to vote on the Bank's proposal, and in concert with the other intervening parties voted the proposal down. If the scale the BRP had to hold between the interests of affected parties such as shareholders, employees, creditors and secured creditors had not already been tilted firmly against the secured creditor by the mere failure to admit that the

Company could not be rescued immediately after Mr Klopper's appointment, it was out of kilter after this decision. It left the way open for the Company's assets to be neglected and to be sold by the directors of the Company after the liquidation application had been filed. The resultant detriment to the secured creditor is self-evident.

57. It must be noted further in this connection that Mr Myburgh, still on retainer to the Company, represented the Trusts at this meeting and voted against the sale of assets. It does not seem to have occurred to him in his capacity as legal adviser to the group, that he might find himself in a situation where he experienced a conflict of interest. He must have known from his extensive knowledge of the group that the Company was insolvent — as was AJP — and that it could not be in any party's interest to support a hopeless business rescue. The Company would clearly have been better advised to seek liquidation. In this connection it must be underlined that creditors, directors and shareholders in business rescue are obliged to vote in the best interests of the estate.[12] In addition, Myburgh acted and voted in his personal capacity as a creditor at the aforesaid meeting. The glaring conflict of interest in which he found himself should have dictated his avoidance in any participation in this meeting.

[12] Collard v Jatara Connect (Pty) Ltd and Others 2018 (5) SA 238 (WCC) at [26].

58. Further meetings were held on 30 May 2014, 27 June 2014, 25 July 2014, 5 September 2014, 23 October 2014, 13 November 2014, 1 December 2014, 9 January 2015 and 27 February 2015. From this date onward no further meetings were held because of the fact that the Bank had instituted liquidation proceedings against the Company on 24 February 2015. At each of the meetings until January 2015, the BRP as well as the directors and management of the Company sought further postponements because the funding that was promised at each and every meeting, and was said to be imminent, about to be provided either by or through GRE or other funders, had inexplicably not been provided as promised at the previous meeting.

59. It must be repeated at this stage, as has been set out above in the discussion of the wind farm project, that there was no binding obligation on any funder, nor any arrangement of a formal nature with any of the other companies in the group to ensure that the Company would be restored to solvency once funding was indeed provided. It was always understood that the funding that was being sought was not sought specifically for the Company, but for the realization of the grand renewable energy project.

60. Throughout this period the BRP had to rely on the Company's annual financial statements for the year 2013. According to his aforesaid affidavit he was unable for the entire period to procure any financial information such as monthly

management accounts or financial statements from the people he had left in control of the Company. Apparently, the Company's financial constraints were such, according to the affidavit, that the auditor's fees could not be raised from the Company's earnings. For this reason the bank's repeated request for financial information of whatever nature fell on deaf ears. The BRP did not, as he might have done, contact the Company's auditors to obtain their view upon the lack of the Company's profitability and the likelihood of its continued survival.

61. Given the failure by the Company's management and directors to provide financial information, it is difficult to understand on what basis the BRP could from month to month for 27 months opine that there was a reasonable prospect of saving the Company, or in the alternative, to procure a better result in business rescue than in liquidation. His sole reason for this opinion could only have been, and indeed was, the elusive prospect of funding to the tune of many millions that would settle all the Company's liabilities. He simply had no basis upon which to venture such an opinion:

> *"(33) The fact that both the resolution to commence business rescue and the business rescue plan were based on financial statements which were more than five years old, presented a fundamental difficulty for a proper assessment of prospects of business rescue. Generally, the factual basis for assessment of the true financial position of a company is its (latest) financial statements (and, where necessary,*

its management accounts). And the business rescue plan must conclude with a certificate by the pracfitioner that the actual information provided appears to be accurate, complete and up to date. Although the business plan had the required certificate, it was clearly not correct. For obvious reasons, the2005 financial statements could not, on their own, in January 2012, form a proper basis for an assessment of reasonable prospects of rescuing Kariba.

(34) The true state of Kariba's affairs as at January 2012 and its anticipated operations could not be established without an update of the books of account, conducted on sound accounting principles, proper valuation of the company assets, and substantiated prospective income and expenditure. Att these were tactiing and no cogent case was made to support an opinion of reasonable prospects of rescue, Consequently, the resolution to commence business rescue was taken without a proper basis and falls to be set aside." [13]

62. In his evidence in the AJP enquiry, Mr Klopper testified that he made concerted efforts repeatedly to obtain management accounts on a monthly basis from the Company. Some accounts were delivered to him, but he never had a complete picture of the Company's actual situation. He never investigated claims against the

[13] Per Dambuza AJA in African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & Others 2015 (5) SA 539 (SCA); 2015 (3) All SA 10 (SCA)

Company and in particular no claims that appear to have arisen post the business rescue regime having commenced.

63. Nor did the BRP pay attention to the preservation of the Company's assets. When he was confronted by the Bank's legal representatives with enquiries relating to the alleged sale of the Company's assets, he consulted Ralston and reported, without apparently investigating the matter himself, that the assets had been sold in the ordinary course of business. He was completely unaware of the fact that cranes to the value of millions — which were covered by a notarial bond as security for the Bank's claims — had been disposed of to obtain finance to cover the Company's running expenses. It must be emphasized, however, that these sales occurred after the liquidation application had been filed and Mr Klopper had decided that his function as BRP was "paralyzed" as a result thereof.

64. According to Kemp's evidence, the Company's Deputy CEO, Mr Klopper visited the Company's premises only once during the entire period while the Company was under business rescue, while the financial manager, Du Plessis, said he saw him two or three times at the Company premises, but contradicted that statement later by stating that he had seen the BRP there only once.

65. Mr Klopper justified his absence from the Company premises on the basis that he was in regular communication with Ralston and other members of the

management team by telephone and by email. He relied on what he was told by the director, and by Zietsman from the USA. His delegation of the company management to the very persons who were in control of the Company when it drifted into financial distress and in fact into insolvency is disconcerting, as there is no suggestion that he investigated their ability to rescue the Company and the role they played in the decline of its financial fortunes. His uncritical stance toward the company management may have been informed by the fact that he did not believe that the Company could be rescued without outside financial support.

66. The only basis upon which he could express any opinion that the Company might recover under business rescue was indeed the promise of external funding. If such were to be obtained, the Company's liabilities might be covered by funds obtained by GRE. After the BRP had personally travelled to London to investigate and canvas potential funders he opined in his report presented to the creditors meeting on 14 October 2013 that funds would be made available via the holding company of GRE subject to due diligence investigations, presumably into the viability of the wind farm project and the value of the Company's assets. Having investigated neither of these two aspects it is difficult to understand on what basis Mr Klopper was able to recommend to the creditors that the quest for foreign funding be continued. If this advice was strange at the first meeting in October 2013, it becomes increasingly questionable, far-fetched and unrealistic to recommend further delays in the business rescue process for another twenty-six months without any progress whatever being made with the sourcing of foreign funding.

67. Mr Klopper's absence from the coalface of the Company's operations is all the more surprising, given the fact that assets of whatever nature excluding money in the bank, tend to deteriorate with the passage of time. There is no evidence that the BRP concerned himself with the decline of the Company's net asset value during the wild goose chase of foreign funding. According to his evidence he was assured by Ralston that the cranes, the Company's most valuable asset apart from its customer base, were safe in a locality at Sasol, with the result that he did not see any need to further investigate their existence and condition.

TRANSGRESSIONS BEFORE AND DURING BUSINESS RESCUE

68. The reality of the Company's fortunes was, of course, one of a steep descent into an ever-increasing state of insolvency. Having traded in insolvent circumstances in 2012 already there can be no doubt that the application for business rescue was launched with the aim of preventing the enforcement of the bank's claim to its security while hoping against hope that the promised foreign funding would somehow materialize. It constituted a *mala fide* abuse of the business rescue process.

69. The cash-strapped situation of the Company led to the following severe problems and transgressions:

69.1. PAYE was deducted from the employees' remuneration but was not paid over to SARS. According to Du Plessis, the BRP was made aware of the fact that PAYE was not paid to the revenue authorities. Other than discussing the matter with the directors it does not appear that he took any further steps to rectify the situation, although he testified that during the business rescue proceedings these deductions were, to the best of his knowledge, paid to SARS, until the liquidation application was launched. He did not follow the matter up, though;

69.2. Premiums for the insurance of assets such as cranes and vehicles were not maintained;

69.3. VAT was raised but was not paid to SARS;

69.4. The employees' pension fund was not kept up to date with grave consequences for some employees;

69.5. Creditors were not paid on time leading to threats of litigation;

69.6. Salaries were not always paid on time;

69.7. Cranes which belonged to and were rented from Slab Rect were removed by the latter because of non-payment of rental;

69.8. Cranes, vehicles and other equipment were no longer properly serviced with the result that breakages and delays in service delivery increased;

69.9. Instalments on instalment purchase agreements relating to three cranes and two motor vehicles that were financed by the Wesbank were no longer paid leading to the eventual cancellation of the agreements;

69.10. Funds that were received by the Company were allegedly paid into a bank account held at Absa, not the Company's usual bankers, under the name of ISC Matla, to avoid the bankers appropriating funds paid into the ordinary company accounts. (There was a measure of uncertainty about this allegation expressed during the enquiry);

69.11. During June and July 2016 staff were retrenched. Not all employees received their full retrenchment package immediately they had to leave, due to a shortage of money on the Company's part. Some were paid in instalments and some were permitted to take a Company vehicle in part settlement of their retrenchment package;

69.12. The Company's accounting records were in a chaotic state in 2013 when Kemp became part of the staff compliment. He made concerted efforts to correct the situation but could not succeed with this task before liquidation supervened;

69.13 Unemployment Insurance Fund contributions were not paid with the result that the Department of Labour threatened action against the Company;

69.14 No audited financial statements were prepared after the 2013 financial year, in spite of the bank and the BRP having repeatedly called for them according to his evidence;

69.15 The group's affairs were conducted with a complete disregard of the separate personalities of each individual company. Evidence of funds having been diverted from one company to pay the liabilities of another

member of the group as a matter of course remained undisputed to the extent that it became common cause.

SPECIFIC INSTANCES OF RECKLESS CONDUCT DURING BUSINESS RESCUE

70. In spite of the Company's precarious financial situation, the Company's money was spent on transactions that bore no relationship to the Company's business but placed severe strains on the company's cash flow:

70.1. While the Company was already unable to meet its commitments to the bank in the latter part of 2011, Ralston acquired a Ferrari on 19 October 2011 at a cost of R1.7 million in the Company's name, but for his personal use. The monthly instalment which the Company had to pay for this vehicle amounted to about R40,000.00.The vehicle was disposed of in January 2013;

70.2 On 1 September 2010, the Company purchased a Porsche Cayenne Turbo for about R900,000.00. This vehicle was financed, and the instalments were paid by the Company to enable Ralston to use this luxury vehicle. The vehicle was sold on 6 February 2012;

70.3 On 15 May 2015, while the liquidation application was pending, Ralston purchased a car for his daughter who was working for the Company, to the tune of R196,850.00 and paid for it with Company funds;

70.4 A further vehicle acquired by the Company was a Lexus that was also used by Ralston. It was purchased under hire purchase for an amount of R892,950.00. The Company defaulted and the car was repossessed on 2 February 2017;

70.5. Regardless of the Company's chairperson, Zietsman, living in America and visiting only once or twice per year, the Company acquired a Mercedes-Benz SLS Gulf Wing for his personal use on the occasional visit. It was purchased on 3 August 2011 for R2,338,950.00, financed through Wesbank and the monthly instalments which were similar to those that had to be paid for the Ferrari had to be borne by the Company. The Company defaulted and the vehicle was repossessed on 2 February 2017. Ralston was instrumental in purchasing this vehicle in the Company's name;

70.6. On 27 March 2012, the Company purchased another Mercedes, anAMG A45, for R685,227.00 for the use of management. It was sold on 27 May 2015;

70.7. Zietsman's father, Mr Johnny Zietsman, received about R120,000.00 per month from the Company, even though he was not employed by it. At some stage he made a loan to the Company when it was in urgent need of finance, but this loan was repaid while the Company was already facing liquidation. The instruction to effect these payments had been given by the chairperson, Zietsman, from America. They were executed by Kemp and Ralston. Mr Zietsman senior paid some of the funds into a family trust; but acquired no other assets with it according to his testimony;

70.8. Financial support was extended to Maya of about R72 million. This loan was unsecured and its repayment depended entirely upon the elusive funding that would be devoted to the renewable energy project. The repayment of the loan by a foreign company to the Company whose assets were diminishing by the day and whose insolvent situation worsened incrementally would be a highly unattractive proposition, even if Moyo could be saved from deregistration following upon its liquidation;

70.9 The Company's financial management was chaotic, as confirmed by Du Plessis. Money was moved between the various companies in the group and devoted to whatever liability that appeared to be the most urgent that had to be settled. ISC Matla (Pty) Ltd, itself a company in business rescue, paid a monthly management fee to the Company of R280,000.00. Mr Bekker, ISC Matla's director, appeared to be unaware of the full extent of

the monthly funding transferred to the Company. The Company itself in turn transferred large sums of not less than R100,000.00 per month to Zietsman in the United States of America. The payment of this sum was continued by ISC Matla after the Company's liquidation, apparently as remuneration for the continued efforts to obtain funding. According to Mr Bekker the payments continued, as did the alleged quest for funding, even at the time of the present insolvency enquiry during July 2018;

70.10 ISC Matla paid the sum of R10 million to AJP while in business rescue, a fate shared by AJP at that time. (It has since been liquidated). This sum was allegedly a repayment of a loan, made without the permission or knowledge of the BRP and while the company was indebted to its creditors faced with a moratorium of payment of their claims. This money was allegedly used to pay the retrenchment packages of AJP's employees;

70.11 As has been referred to above, GRE instituted an application against the business rescue practitioner of Evraz Highveld Steel and Vanadium for the acquisition of its business. It was in this matter that the alleged Caribbean funding bank was exposed as a dormant sham. The fees debited in this litigation by Ellis were paid by the Company, which had no direct interest in the litigation at all, while the liquidation application was pending;

70.12 Ellis struggled to obtain payment from the Company, according to his evidence, and had to exert considerable pressure upon Ralston before his fees were covered in part. Ellis knew, or ought to have known, that Ralston procured the necessary funds by the sale of one of the cranes under threat that the counsel who had acted in the litigation referred to above would blacklist Ellis' firm because of the non-payment of their fees. Eventually the Company paid the counsel involved directly, a practice that is usually frowned upon as being in conflict with the rules governing the conduct of advocates who are members of the referral profession;

70.13 The fees that were paid while the liquidation application was pending must be repaid by Ellis and the counsel concerned;

70.14. In March and September 2016, Kemp wrote to Zietsman and Ralston that the Company was trading in insolvent circumstances and should be liquidated. The first of these letters was written immediately after SARS officials had visited the Company to investigate the failure to pay the PAYE deductions to the fisc. His factual statements were not disputed, but he was told not to worry as the overseas funds would arrive soon;

70.15. Kemp advanced funds to the Company at a time when it was particularly cash-strapped in order to pay salaries, but these monies were repaid while

the Company was doing its best to stave off the liquidation application. He received a "raising fee" of 20% upon the amount he made available;

70.16. **Sale of cranes:**

70.16.1 Because of the dire state of the Company's cash flow, cranes were sold between August 2015 — after the application for liquidation had been launched — until the end of 2016, just before the Company was provisionally liquidated — to obtain funds for salaries and expenses, including legal costs;

70.16.2. It goes without saying that the sale of the cranes to obtain finance constituted a fraud upon the bank, whose permission to deplete its security was not obtained. The relevant statutory provision was ignored.[14]

[14] Section 134 (3) of the Companies Acl 71 of 2008 provides:
"If, during a company's business rescue proceedings a company wishes to dispose of any property over which another person has any security or title interest. the company must-

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(b) promptly—

(i) pay lo that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
(ii) provide security for the amount of those proceeds to the reasonable satisfaction of that other person"

70.16.3. The sales were further unlawful because the seller had no right to transfer title in the cranes to the unsuspecting purchasers. Quite apart from the absence of title the dispositions occurred while the Company was facing a liquidation application resulting in the transactions being subject to challenge once the Company was liquidated. In any event, the BRP had not authorized any sale. The transactions are therefore void and the purchasers were obliged to return the cranes to the liquidators inasmuch as this was possible. Should any of the cranes not have been returned to date, the liquidators are obviously obliged to take the necessary steps to protect the Company's rights. The resultant damages caused to the bona fide purchasers were entirely foreseeable; which means that the purchasers were as much defrauded as was the bank. They are left with the cold comfort that they could file a concurrent and possibly illiquid claim against the Company, which would hardly be advisable given the state of the Company's assets;

70.16.4 The sales were concluded without the permission of the BRP. According to the evidence of Mr Klopper he was alerted prior to February 2015 to the sale of one crane by the bank's legal representative, Mr Van Tonder of Werksmans. He made

enquiries from Ralston who informed him that one crane had been sold in the normal course of business. Surprisingly, Mr Klopper left the matter there and made no further independent enquires at any stage thereafter into the fate of the Company's assets until the final liquidation eventuated;

70.16.5 Mr Fareed was in control of the Company's fleet of cranes and was directly involved in advertising the cranes for sale and the negotiations preceding the sale of each crane. In one instance he sold the crane to a company of which his wife was the principal shareholder and director. He failed to disclose this fact to Ralston and Kemp or any other member of the company management. The crane was sold by that company at ahandsome profit. Mr Fareed was fully aware of the fact that the sale of the cranes was tainted, yet he participated in selling them. The secret profit made by the company in which he had an interest must obviously be repaid with interest. Mr Fareed was also involved in selling some of the Company's motor vehicles, of which one was destined for a lady who had worked for the Company;

70.16.6. The sale of the cranes and vehicles and the application of the proceeds to the payment of running expenses and salaries

diminished the Company's assets and worsened its state of insolvency. These actions are therefore reckless and render the directors and managers involved in the disposal of the cranes personally liable for the resultant damage to the Company and its creditors in terms of section 424 of the Companies Act 61 of 1973;[15]

70.16.7 By the same token the directors and managers involved in these transactions are liable to prosecution in terms of section 424 (3);[16]

70.16.8 These actions were carried on while the Company was opposing the liquidation application launched by the bank. The deponent to the opposing affidavit, Ralston, asserted in that affidavit that the Company was solvent. It has already

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[15] (1) When it appears, whether it be in winding-up, judicial management, or otherwise, that any business of the company was or is being carried on recklessly or with the intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on application of the more the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

[16] "(3) 'Without prejudice to any other criminal liability incurred, where any business of a company's cash rate on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.'

been recorded that he was forced to admit that this statement was false. He failed to disclose the fact that assets were being sold, either at the date the opposing affidavit was filed or at a later stage of the proceedings. He was in duty bound to inform the Court of this relevant fact;

70.16.9. The BRP filed a supporting affidavit opposing the Company's liquidation, even though he stated that he intended to abide by the Court's ruling. As is discussed below he was at that stage aware that the liquidation application was unanswerable, yet he supported the unfounded submission by Ralston that the Bank had failed to make out a case;

70.17 The company's auditors resigned during or about 2013 and no new auditors were appointed;

70.18 Use of company funds for private expenses of directors and management:

There are several instances of significant amounts of company funds having been diverted to the payment of the private expenses of company directors and employees, or having been loaned to the individual concerned:

70.18.1. Ralston:

During the period 1 April 2014 to 31 March 2015, Ralston received the total sum of R1,205,371.40 and a further R1,772,145.95 during the period 1 April 2015 to 31 March 2016. These monies were expended on private security services; his registration fee as professional chartered accountant; the transfer of several hundred thousand Rand on his credit card; his legal fees; presumably incurred in respect of the insider trading case; the purchase of his daughter's motor vehicle and repairs to a private motor vehicle. These amounts were paid to him over and above his salary, did not form part of his remuneration package; were not accounted for to SARS and were made while the Company was trading in insolvent circumstances.

The money has not been repaid and Ralston is clearly liable to repay the funds.

In addition, he spent some R30,000.00 per month on his cell phone contract which the Company paid; and enjoyed a generous life insurance the premiums of which amounted to R27,000.00 per month, according to Du Plessis.

The diversion of these large amounts constitutes another example of reckless conduct of the Company's affairs.

70.18.2. Zietsman:

According to the PwC report, Zietsman received a total sum of R486,829.72 between 1 April 2014 and 30 March 2016, made up of several hundred thousand Rand transferred to his credit card; overseas travel costs; vehicle repairs and legal fees. None of these were recorded or taxed as fringe benefits, did not form part of his salary package and were made while the Company was trading in insolvent circumstances. The actual amount received by Zietsman is, however, much higher. As has been stated elsewhere he was paid at least R100,000.00 per month as director's remuneration, the funds being extracted from the Company and later from ISC Matla and payment still being effected during the enquiry in 2018.

These monies were paid in business rescue and while the insolvency application was pending. In return for these sums he was allegedly arranging funding from overseas funders.

In addition, Zietsman's credit card was funded monthly to the tune of at least R30,000.00.

Given the state the Company was in, these payments cannot be regarded as rational or reasonably reflective of any value Zietsman could add to the Company's fortunes. The company was looted.

The money has not been repaid and should be claimed from Zietsman. These payments constitute further evidence of reckless trading.

70.18.3 Kemp:

According to the evidence of Mr Fareed, Kemp became the owner of a Jeep vehicle which the Company purchased during about 2013 or 2014, and which was registered in his name. This was not part of his remuneration package.

70.18.4 Loans made from employees at a raising fee of 20%:

On several occasions in business rescue and while the liquidation application was pending, the Company's cash flow was under pressure that was so severe that employees like Kemp and Ms Waring advanced funds to it to enable salaries or other pressing commitments to be paid. These loans were repaid together with a 20% "raising fee", in effect paying the employees 20% interest on a short-term loan. These profitscannot be justified and should be recovered — if possible, which may be doubtful.

71. The simulated investment transactions:

71.1 Zietsman required funds for his commercial activities in the USA, which he sourced from the Company to the tune of R20 million. The transfer of thesefunds to the foreign destination was, of course, controlled by the Reserve Bank's Exchange Control Regulations, which did not provide for the direct transfer of such a large sum.

71.2 During the relevant period, 2008 to 2009, the Regulations did, however, allow the transfer of not more than R2 million to foreign destinations provided that the funds were intended for the acquisition of shares in commercial companies across the border.

71.3 Zietsman devised the scheme to transfer the sum of R20 million by simulated investment transactions. Through Ralston and Du Plessis he suborned a number of — presumably unsuspecting — individuals to participate in simulated transactions aimed at circumventing the Regulations. These individuals included Mrs Ralston and his own parents-in-law, who are senior citizens. Mr and Mrs Sproule and Mrs Ralston were approached by either Du Plessis or Ralston and persuaded to take up loans from the company between R1.5 and R2 million, which sums were then paid into their bank accounts. They would then obtain a tax clearance certificate and apply to the Reserve Bank, assisted by the two gentlemen for permission to invest the money they allegedly borrowed from the Company in shares in Zietsman's American company.

71.4 Once the funds had been safely transferred out of the country, neither Mrs Ralston nor the director's parents-in-law received a tax certificate, although Ralston, who did not qualify for a tax clearance certificate, had a tax certificate issued in his name on one occasion when he visited his co-directors company in Texas.

71.5 In this fashion R20 million was smuggled out of the country.

71.6 Although these transactions took place sometime before the Company ran into financial trouble, they are indicative of Zietsman's and Ralston's business ethics.

71.7 These transgressions will obviously have to be reported to the Reserve Bank.

72. The GRE involvement:

72.1. Mr Eugene Rossouw is a trustee of the Rosek Trust and a director of Thos Begbie Ltd, a company involved in the generation and storage of electrical power.

72.2 He was approached by an old acquaintance, Zietsman, whose father was a former colleague.

72.3 He was introduced to the Moyo-project and was enthusiastic about it given his personal involvement in the field.

72.4 He was persuaded to join GRE as its only director in South Africa in 2012.

72.5 Like all other parties that were in some way involved with the company, he was promised by Zietsman that funding was imminent, and that the exciting Lesotho project could be launched soon. He was given to understand that the Company had been granted the license to operate a windfarm in Lesotho, which it had ceded to Moya.

72.6 He accompanied Mr Klopper to London to try to raise funds through the good offices of a firm of attorneys. An interested party came to South Africa to do a due diligence, and apparently lost interest when they inspected the Company's capabilities — although they were interested in Thos Begbie's business.

72.7 Deeds of sale of Thos Begbie's shares owned by his Rosek Trust to the Company were drawn up, as far as he was aware, by Myburgh, the group legal adviser of the Harrison and White stable of companies.

72.8. Having become involved in 2012 he was faced with the continuous delay of the funding promised by Zietsman, who was GRE in the United States, until he eventually abandoned the project in December 2015.

72.9. He was prevailed upon to allow his trust to intervene in the insolvency application on the basis that it was a creditor — an allegation that was unfounded in law as the contracts entered into, and amended from time to time, were subject to conditions precedent that had not been fulfilled. The same applied to the Viking Trust. He was approached by Ellis and signed an affidavit that had been prepared without him having been consulted and without having had an opportunity to read the Bank's founding papers. He never heard another word about the application until he was confronted with a costs order granted against his trust when the Company was liquidated.

72.10. Prior to that event he had been requested by Myburgh to institute action against Evraz Highveld Steel and Vanadium, which was in business rescue at that stage and possessed valuable abilities to construct batteries and other technology that was important to store electricity. He was requested to make a contribution of R200,000.00 toward the initial costs of the litigation, which he did in his personal capacity, but was completely unaware of the fact that the Company paid the balance of all legal costs.

72.11. The Company did indeed pay the legal costs of the GRE litigation to Ellis while it was under no obligation to do so as Ralston, Kemp and Myburgh well knew.

THE OPPOSITION TO THE LIQUIDATION APPLICATION

73. The liquidation application was launched by the Bank in February 2015. Notice of opposition was filed on behalf of the Company represented by Ellis, who also filed a notice on behalf of the business rescue practitioner. As has been stated above, the opposition to the liquidation application was raised in bad faith with the sole ulterior motive to delay the proceedings, if not the inevitable, while Zietsman was allegedly still engaged upon obtaining funding, an exercise he had allegedly been engaged in for some years since 2012. Ralston admitted that the allegations concerning the Company's cash flow and solvency he swore to were false. Mr Ellis must have been aware of this fact as stated above.

74. Apart from dishonestly opposing the liquidation application the directing minds of the Company devised further schemes to delay the process. They filed notices in terms of Rule 35 (12) and (13) for the discovery of documents that they could not genuinely believe they actually required for purposes of opposition. Once these documents had been made available another notice seeking further documentation was filed, similarly in bad faith.

75. In furtherance of the object of delaying the liquidation application, the two trusts,Mr Rossouw's Rosek Trust and the Viking Trust together with AJP Investments (Pty) Ltd, Harrison and White Imbizo (Pty) Ltd and Circleway Trading 71 (Pty) Ltd and the Falcon Share Trust launched an application to intervene in the proceedings, claiming on insupportable grounds that they were creditors of the Company.(The same questionable grounds had been advanced to secure their status as creditors entitled to vote in the business rescue proceedings, whose vote ensured that the amendments to business rescue plan proposed by the bank as creditor to sell sufficient assets of the Company to cover the bank's claim as secured creditor, was shot down. The BRP admitted in his evidence that, had it not been for the two trusts filing claims based on agreements that were subject to unfulfilled conditions precedent, the bank's proposal would have been accepted.[17] He did not investigate these claims further as they were filed under oath without any objection to the claims.)

76. After the intervention application had been granted without opposition by the bank, the intervening parties did not pursue the matter and did not file opposing affidavits. Instead they played possum, as did the Company which did not file any answering affidavit until the matter was placed upon the unopposed roll by the bank's attorneys; when the affidavit was filed at the very last moment, forcing a further postponement.

[17] Vol VI, p 1493

77. The Company was therefore left at the mercy of the unscrupulous business practices of Messrs Zietsman, Ralston and Co to the irreparable harm of creditors.

78. It must be noted that Ellis represented the intervening parties whose principal spokesperson was Ralston. The Company was made to pay Ellis' legal costs incurred in respect of the application to intervene. The decision to launch this application clearly lacked any semblance of bona fides and amounted to collusion to impede justice.

THE BUSINESS RESCUE PRACTITIONER – MR KLOPPER

79. Mr Klopper and his role as Business Rescue Practitioner has been referred to repeatedly in the preceding paragraphs and the comments there made should be read into the following paragraphs.

80. He is an experienced attorney, liquidator and business rescue practitioner who has been in practice for more than three decades. His actions, or the lack thereof, must be judged against this background.

81. There can be no doubt that he was fully aware of the fact that business rescue should be brought to finality as soon as possible. In the present instance the business rescue regime continued for a period of more than three years. He failed

to file a single report with the Commission as required by section 132 (3) of the new Companies Act.

82. During this period the evidence led at the enquiry contains allegations that he visited the premises of the Company once only and that at no stage did he conduct an independent investigation of the Company's assets. During the entire process no balance sheet was produced, complete and regular management accounts were unavailable in spite of numerous requests therefore by inter alia the bank, and he appeared to be oblivious to the fact that the management and directors of the Company, to whom he had entrusted the day-to-day running of the Company's affairs, where disposing of assets to maintain the Company's cash flow to the severe detriment of the secured creditor.

83. As business rescue practitioner he was obliged to assess the viability of the Company's business and its potential to become a profitable entity. Apart from participating in the — as it turned out — wild goose chase after funding, and delaying the finalization of the business rescue process on the strength thereof, there is little evidence of any investigation conducted by him to analyze the Company's business and its prospects of returning to profitability either before or after the provision of the elusive funding.

84. Despite repeated reminders by the bank's attorneys of record he failed to produce or to see to the preparation of the 2014 and 2105 annual financial statements or

management statements and did not react to request to confirm thatthe Company assets had been preserved.

85. According to the evidence of Du Plessis he was made aware in 2014 already that the Company was deducting PAYE tax from its employees but was not paying the same to SARS.

86. According to his evidence in the AJP enquiry he did attend an extensive board meeting during October 2014, at the stage when the Company's financial situation was anything but rosy. The Company had seemingly incurred further liabilities since the commencement of business rescue, particularly towards two trusts and loans from other companies in the group. Mr Klopper was unaware of these developments and did not realize that the Company's financial situation was on a downward curve.

87. Perhaps the most worrying aspect of Mr Klopper's attitude towards his position as business rescue practitioner is his decision to adopt a hands-off approach after the liquidation application was launched. In the AJP enquiry he explained that his reason for doing so was purely commercial. He had been paid, allegedly in excess of R100,000.00 per month, until that point in time. Once the liquidation application had been launched any further payment to him would have to be repaid to the liquidators if the Company was in fact liquidated eventually.[18] The pursuit of

[18] Section 341 (2) of Act 61 of 1973.

financial reward by a BRP at the cost of the creditors, particularly the secured creditors, has been decried by the Constitutional Court.[19] He maintained this stance — and repeated this evidence in the present enquiry — even after the presiding officer at the AJP enquiry pointed out to him that the said subsection of the old Insolvency Act provides that a Court may authorize any such payment.[20] As a vastly experienced business rescue practitioner he must have been fully aware of but was clearly unwilling to go to the trouble of having any further remuneration authorized judicially.

88. As business rescue practitioner he was in duty bound to consider whether the liquidation application was justified, in which event he ought to have informed the parties and the Court that liquidation was unavoidable. His failure to do so in the face of irrefutable evidence that the Company could not be restored to solvency enabled the Company's directors, whom he supported with a supporting affidavit, to delay the finalization of the liquidation application for more than a year. During this period the directors were enabled to sell a large number of cranes to the detriment of the bank as secured creditor. During the entire period that the liquidation application was pending, further losses were incurred that could have

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[19] In Diener N.O. v Minister of Justice and Constitutional Development and Others 2019 (2) BCLR 214 (CC) Khampepe J on behalf of the unanimous Court said at [68] '… practitioners will take appointments having regard to the purpose of business rescue proceedings and will (rightly) avoid taking appointments where there are no prospects of rescue – as should have been the case in this matter where the business was not operating, had no employees and only one secured asset. This interpretation would guard against appointments in circumstances where business rescue proceedings ought not to have been commenced and where practitioners are reliant on payment of their remuneration and expenses at the expense of secured creditors without reference to those creditors…..[70]….. The purpose is to rescue those financially distressed companies that are capable of being rescued. Just because a practitioner risks not being paid in the event of liquidation does not mean business rescue will never happen, or even that viable business rescue will happen less. It means only that practitioners, like all creditors, will have to assess the risk of transacting with what may turn out to be a financially distressed company before agreeing to the transaction. This assessment of risk – especially where there is no residue from which to pay a practitioner – might avert the superfluous "business rescue" of a company that should be liquidated. In that sense, the number or proportion of successful business rescues may even increase.

[20] Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (in liquidation) [2015] 1 All SA 324 (GJ)

been and should have been avoided if the liquidation application had been heard on an unopposed basis.

89. It must be underlined that Mr Klopper was fully aware that the Company was trading in insolvent circumstances and that, bar the realization of the overseas funding, liquidation was unavoidable. This is evident from his reply to the question what his position as BRP would have been if liquidation had been staved off:

> *"Mr Commissioner, in my mind the liquidation application would only have been averted if the funds that they promised came in and the creditors were all paid. That was the only possible scenario that I could have contemplated at the time. No Court would have turned down the liquidation application based on the facls, without the funding".*[21]

90. This statement is in stark contrast to his affidavit filed as his answer to the liquidation application, in which he intimated that he would abide the decision of the Court, but added in paragraph 6 thereof:

> *"I also confirm that I am in agreement with the allegations made in the opposing affidavit to the effect that the Applicants have not made out a cause of action in the founding affidavit for the relief sought in the Notice of Motion."*

[21] Record Vol VI pp 1484/5

91. There can be no doubt whatsoever that as an officer of the Court, Mr Klopper was in duty bound to disclose the fact that he knew that the only - illusionary- obstacle between the Company and liquidation was the fairy funding godmother.

92. Given his unequivocal reply that he knew that liquidation was inevitable the strong impression is created that he must have known from the day of his appointment that there was no reasonable prospect of saving the Company other than via outside funding. He must therefore have known from a very early stage, if not on the day of his appointment, that the Company was insolvent and that business rescue was therefore entirely inappropriate.

93. Yet he stayed on. The only reasonable explanation for his failure to terminate the business rescue proceedings at the earliest possible stage appears to be that he was earning a handsome reward while the process was delayed and that he abandoned ship the moment the certainty of remuneration disappeared. It was never explained why the Company could not have sought outside funding while it was provisionally or even finally liquidated, if there was really a genuine commercial reason to restore it to solvency.

94. It must therefore regrettably be concluded that Mr Klopper failed to fulfil his duties as BRP and may be held liable for the losses incurred by his failure to terminate the business rescue process at the outset[22].

95. To these regrettable failures must be added that he failed to observe the duties of a director imposed upon him by the Company Act 71 of 2008 in sections 75 to 77 thereof.[23] A director was at all stages obliged to act in the best interest of the Company and its creditors, which the Business Rescue Practitioner clearly failed to do.

FINDINGS AND RECOMMENDATIONS

96. There can be no doubt that the Company was the victim of directors and management bent upon personal enrichment in this regard of the rights of creditors. The following individuals must be identified as the principal culprits:

96.1. Gavin Zietsman

96.1.1. As chairman of the Company's board he was allegedly principally involved in finding funding for the renewable

[22] See section 140 (3) (c) (ii) of the Companies Act 71 of 2008

[23] Section 14 (3) (h) of the Companies Act 71 of 2008.

energy project. As has been demonstrated above, he fleeced the Company in the pursuit of this goal by diverting its money and dedicating it to the research that was done by Moya. The transfer of millions to the detriment of the Company, without ensuring that due security for the repayment of any loan was in place, led directly to the demise of this corporate entity. This action alone was indubitably reckless.

96.1.2 But the fleecing of the Company did not stop there. The chairman enjoyed a very liberal salary for efforts that over the years produced not a single tangible advantage or benefit for the Company. His credit card was generously replenished out of the coffers of the ailing Company and its associated entities. His air travel was catered for and for his convenience during the occasional visit to South Africa a very expensive German sports vehicle was kept at company expense.

96.1.3. Similar generosity was to his knowledge expended upon the director, Ralston and his penchant for expensive luxury vehicles.

96.1.4. Zietsman was warned by Kemp that the Company was trading in insolvent circumstances. This was obviously no news to

him. He never disputed the fact that the Company had been run into the ground. He was privy to the fact that the Company funded litigation that was totally unconnected with its own existence and business. He was very aware and approved of the sale of cranes to keep some semblance of a trading company alive knowing full well that these items constituted the bank's security and being fully aware of the fact that the innocent purchasers of the cranes were being defrauded as the Company could not transfer a valid title to them.

96.1.5. He was party to a contrived application for business rescue which was put in place not in pursuit of a restoration of the Company's fortunes, but as a move to keep the conduit for the flow of the eventual funding open, should such funds ever be sourced.

96.1.6. He was aware of and involved in GRE's litigation against Highveld Steel and Vanadium and must have supplied the name of the bogus bank that was registered at the address of a Caribbean lawyer. He was therefore party to a deliberate attempt to mislead the Court.

96.1.7. The same holds good for the opposition to the liquidation application, which was dishonest, designed to delay and calculated to harm the Company.

96.1.8. He caused unsuspecting and vulnerable individuals like his own parents-in-law to be suborned into participating in a fraudulent scheme to evade the provisions of the Exchange Control Regulations and to thereby expose them to potential criminal prosecution.

96.1.9. He arranged a R120,000.00 monthly payment to his father, Mr Johnny Zietsman, by the Company while there was no obligation on the latter to do so.

96.1.10. His actions display a complete disregard for the duties of a company director. His actions were reckless, dishonest and often designed to defraud. Many of his offending acts were committed while the Company was in business rescue and while the liquidation application was pending, which constitute aggravating circumstances.

96.1.11. There can be no doubt that Zietsman is guilty of reckless and fraudulent trading and should be declared liable for all

the Company's debts in terms of section 424 (1) of Act 61 of1973. He should also be obliged to repay all the benefits that he garnered for himself by the abuse of the Company's funds.

96.1.12. He should be prosecuted for fraud and transgression of the Exchange Control Regulations as well as for reckless conduct of the company business in terms of section 424 (3) of Act 61 of 1973. A copy of this report should be sent to the Director of Public Prosecutions for consideration and appropriate action, if so advised, and to the Reserve Bank on the same basis.

96.2 Michael Ralston

96.2.1 What has been said above in respect of Zietsman applies in equal measure to Ralston, the Company's chief executive officer. He, too, enriched himself liberally at the expense of the ailing Company and aided and abetted the chairperson in his reckless and fraudulent actions.

96.2.2 His love for expensive motor vehicles denuded the Company, as did his expensive lifestyle which was largely funded by the

Company over and above his salary, without such additional benefits being taxed.

96.2.3 As CEO of the Company he was responsible for and involved in the failure to pay PAYE and VAT to the fisc, the failure to maintain the employees' pension fund, the failure to pay UIF and he was principally involved in disposing of assets such as cranes while being fully aware of the fact that they were encumbered in favour of the bank.

96.2.4 He swore to the affidavit that placed the Company in business rescue while he knew that the Company could not be saved and that business rescue was inappropriate. His affidavit was perjured. The same holds good in stronger measure for the allegations he made in the affidavits filed on behalf of the Company in opposition to the liquidation application.

96.2.5 He authorized the payments to Zietsman and Mr Johnny Zietsman and funded the abortive GRE litigation as well as paying the costs of the intervention application out of the company's pocket.

96.2.6 While the company was opposing the liquidation application he purchased a new motor vehicle for his daughter who had been employed by the Company.

96.2.7 His actions were reckless, dishonest and fraudulent. He grossly enriched himself to the detriment of the Company and failed to terminate the business rescue at the earliest opportunity to allow the Company to be liquidated. He must repay the monies he unlawfully withdrew from the Company and is liable to be declared responsible for all the debts of the Company in terms of section 424 of Act 61 of 1973. He is liable to be prosecuted in terms of section 424 (3) of the same Act and should in addition face charges for perjury. Further charges should be preferred against him for the aiding and abetting of the transgressions of the Exchange Control Regulations. His actions should also be referred to the Director of Public Prosecutions and the Reserve Bank.

96.3. Kevin Kemp

96.3.1. Kemp fulfilled a role that was slightly less prominent than that of Ralston. He may have tried as best to keep the Company going, even advancing his own money to the Company when

the cash flow dried up. He warned against the fact that the Company was trading in insolvent circumstances.

96.3.2. On the other hand, he was instrumental in the running of the Company and the selling of the cranes in particular. He was alive to the dangers of trading in insolvent circumstances but did nothing other than writing to the chairman and Ralston about his concerns. He was privy to the fact that PAYE, VAT and UIF was deducted but never transferred to the fisc.

96.3.3. He was party to the payment of 20% raising fees to himself and to Mrs Waring when money was advanced to the Company. In addition he allegedly received a Jeep motor vehicle at the Company's expense, which did not form part of his remuneration package.

96.3.4. As a member of the management team he was no innocent bystander to conducting business in the business rescue and while the liquidation application was pending. It follows that as one of the persons responsible for the running of the Company until a final liquidation order was granted he must also be held liable for the Company's debts in terms of section

424 of Act 61 of 1973. By the same token he may face prosecution in terms of section 424 (3).

96.4. Shahed Fareed

96.4.1. As manager of the Company's fleet of cranes and vehicles he was part of the company management. He knowingly participated in the sale of cranes and vehicles which he knew, or ought to have known, were covered by the bank's general material bond.

96.4.2. He certainly knew that the sale of cranes and vehicles rendered the Company inoperative and unable to continue with its business. Nonetheless he not only continued to diminish the asset base, but he also assisted the company Triple S to make a secret profit from the sale of one crane.

96.4.3. He is therefore as guilty of participating in the reckless conduct of the Company's business as the directors and executive officers. Not only must he accept responsibility for the secret profit that the Company was denied, but he is also liable in terms of section 424 (1) of the old Companies Act and may similarly face prosecution under section 424 (3)

96.5. Diaan Ellis

96.5.1. Mr Ellis and his firm, Faber Goertz Ellis Austen Inc, represented the Company and some of its associated entities before business rescue supervened. The firm also acted for the chairperson and Ralston in the insider trading matter. The Company paid for all of these services, as well as for the work done in connection with the GRE litigation. Ellis was also the attorney of record in resisting the liquidation application on behalf of the Company and acted for the intervening parties in the application that was clearly designed as a maneuver to delay the inevitable liquidation of the Company.

96.5.2. Mr Ellis' fees were to a large extent paid while the Company was in business rescue, without the prior approval of the BRP, and during the period in which the Company was facing the liquidation application. As has been set out above, some of the fees were only paid after he exerted considerable pressure on Ralston. He was aware of, or ought to have been

aware of, the fact that one crane was sold in order to obtain finance to meet his claims.

96.5.3. It is clear that all the fees that were paid to Ellis and his firm while the Company was in business rescue without the approval of the BRP, and all the fees that were paid while the liquidation application was pending, must be repaid to the Company. The payments made while the liquidation application was pending are void as dispositions made in insolvency, whereas fees paid during business rescue are reclaimable because they were made without prior authorization by the business rescue practitioner.

96.5.4. Although Ellis was aware of the fact that his company was paid while it was trading insolvent circumstances it cannot be said that he participated in the management of the Company. The provisions of section 424 are therefore not applicable to him or his company. The liquidators are however obliged to claim all of the fees as set out above.

96.6 The direct payments to the advocates

96.6.1. The advocates who had represented GRE in the unsuccessful litigation against Evraz Highveld Steel and Vanadium were paid directly by the Company under the circumstances set out earlier in this report.

96.6.2. The payments were made while the Company was attempting to fend off the liquidation application and are therefore void as dispositions made during insolvency.

96.6.3. The liquidators are therefore obliged to reclaim the fees from the counsel concerned. As members of a referral profession they should not have accepted payment from the client directly, but it is doubtful whether the matter will be pursued at this stage by the Bar Council. Should the counsel concerned refuse to repay the fees they received directly from the client the liquidators will be forced to go to law in order to reclaim the payment. The situation will obviously be quite different in such event and the liquidators will then be obliged to draw the attention of the Bar Council of the Johannesburg Bar to the advocates' apparent failure to observe the profession's ethical rules and their acceptance of payment

from a client facing a liquidation application that must at all times to their knowledge have had a solid chance of success.

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96.7. Connie Myburgh

96.7.1. Mr Myburgh was on retainer for the Company before the business rescue proceedings were launched and remained such until the Company was liquidated.

96.7.2. Any payments made to him in business rescue were made without the prior approval of the BRP and may be reclaimable on that basis. Payments made while the Company was facing the liquidation application must be repaid as dispositions in insolvency.

96.7.3 As has been set out above he acted on behalf of the purported creditors, the Viking Trust and the Rosek Trust when the bank's proposed amendment of the business rescue plan was rejected to sell sufficient assets to meet the secured creditor's claim. In addition, he voted in his own capacity as a creditor. He thus knowingly found himself in a triple conflict of interest.

96.7.4. He must have been conscious of the fact that he wasfacing a conflict of interest between his duties towards the Company and the purported creditors and his own interests. It may therefore be advisable to refer the matter to the new legal practice counsel for an investigation and appropriate action if so advised.

96.7.5. As the legal practitioner who was on retainer to the entire group, including the Company, he must have been aware at a very early stage of the financial woes every company in the group was experiencing. As legal advisor he was obliged to engage the Company directors and management as soon as the red lights of inability to meet financial commitments as and when they occurred began to flicker. He did nothing of the sort. He continued collecting retainers while the sham of business rescue proceedings played itself out over a period of about 3 years. He colluded with the Company directors and management in obstructing the flow of justice by delaying the finalization of the liquidation application through the stratagem of the intervention of the Trusts, who were to his knowledge by no stretch of the imagination bona fide creditors. In his role as legal advisor he indubitably participated in the

management of every one of the companies in the group, including the insolvent company. The actions stipulated above were clearly reckless, if not worse. He is therefore liable to face an application in terms of section 424 (1) and to have its actions referred to the Director of Public Prosecution in terms of section 424(3).

96.8. The payments made to other companies in the group

96.8.1. As has been set out above, the Company made numerous payments to other companies in the group, as and when the other companies cash flow was insufficient to meet urgent commitments. These payments were dispositions without value, as the Company was not obliged to make any of these payments. The various instances in which the Company paid for legal expenses or made advances to other companies have been touched upon in this report above.

96.8.2 All these payments could theoretically be reclaimed from the estates of the other entities, but it must be doubtful whether, with the possible exception of payments made to ISC Matla, there would be any prospect of success in pursuing such a

course. It must be left to the judgement of the liquidators to decide whether the game would be worth the candle.

96.9 The so-called "raising fee" paid to employees who advance money to the Company

96.9.1. There can be no doubt that the payment of the raising fee to employees who advance money to the Company to tide it over some of its repetitive cash flow crises was irregular. Theoretically this fee could be reclaimed. It is difficult to say whether such action would be justified, particularly where in the case of Kemp he already faces, or ought to face, a claim in terms of section 424 (1) of the old Companies Act.

96.9.2. It must be left to the good judgment of the liquidators whether to institute action in this regard or not.

96.10 Johnny Zietsman

96.10.1. The payments made to Johnny Zietsman have been detailed above. These payments were made without any obligation resting upon the Company to provide R120,000.00 per month to a person who was rendering no service to the Company.

His son's instruction as chairperson of the Company to pay the sums to him was but another feature of the recklessness with which the Company's affairs were conducted.

96.10.2. Johnny Zietsman did make a loan to the Company when it was in financial trouble, but that loan was repaid. This payment was in itself irregular, constituting an undue preference under the circumstances in which it was made.

96.10.3 The liquidators are therefore obliged to reclaim the money paid to Johnny Zietsman.

96.11. The Business Rescue Practitioner, Mr Klopper

96.11.1. The actions of the BRP, Mr Klopper, have been repeatedly addressed in the preceding paragraphs and they must be regarded as having been included in this section.

96.11.2 It is unfortunately necessary to record that Mr Klopper has been gravely remiss in the exercise of his functions as a business rescue practitioner. In the first instance he must have been aware that the company was trading in insolvent circumstances from a very early stage of his appointment. His

comments during the evidence he gave at the enquiry are unmistakable in this regard.

96.11.3 He was in duty bound to alert the Court to the incontrovertible fact of the Company's insolvency and to terminate the business rescue proceedings. It is difficult to accept that he entertained a bona fide belief that the elusive funding would be found, especially after the GRE litigation.

96.11.4 He failed to comply with the statutory duties of ensuring the adoption of a business rescue plan and of reporting to the Commission after three months had passed without the business rescue proceedings having been terminated.

96.11.5 At the very latest he must have acted once the bank launched its liquidation application. He failed to take the court into his confidence regarding his own, completely correct view that the company could not avoid being liquidated on the facts that were relied upon in the liquidation application. His failure to do so represents a grave error of judgement that renders him reliable in terms of section 140 (3) (c) (ii) for the losses incurred by the company and its creditors in the period after February 2015, if not before.

96.11.6 His failure to take the court into his confidence in the liquidation application reflects upon his professional status and consequently it is unfortunately necessary that a copy of this report be provided to the legal practice counsel for consideration and action if regarded as appropriate.

96.11.7 It must be an open question whether the business rescue practitioner can be held liable in terms of section 424 of Act 61 of 1973, given the specific provisions regarding the liability of a business rescue practitioner under the new Companies Act, quoted above. The wording of section 140 (3) (c) (ii) appears to suggest, however, that existing legislative provisions, such as the retention of the old Companies Act's Chapter on liquidation proceedings, may well apply to the position in which the BRP finds himself. In either instance the liquidators are obliged to act to recoup the damage caused by Mr Klopper's failure to act timeously, decisively and appropriately to terminate a business rescue process that was an abuse of the proceedings from the start.

96.12. Asset recovery

96.12.1. Repeated reference has been made in this report to assets that were sold unlawfully, such as the cranes and vehicles, apart from unlawful and reckless payments.

96.12.2. The liquidators must recover all these assets that are still traceable and worth to pursue. The cranes must be reclaimed from the individual purchasers that have been detailed in the KPMG report. Their names need not be repeated at this juncture.

97. Conclusion

I have no objection to the use of this report in any intended or consequent proceedings, provided that the Master of the High Court, Johannesburg, grants consent to the disclosure and use thereof.

Signed electronically at Pretoria on this 7TH day of May 2019.

E BERTELSMANN

Commissioner