THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 116/2020

In the matter between:

KURT ROBERT KNOOP NO	**FIRST APPELLANT**
JOHAN LOUIS KLOPPER NO	**SECOND APPLELLANT**
and	
CHETAALI GUPTA	**RESPONDENT**
MAHOMED MAHIER TAYOB	**INTERVENING PARTY**

Neutral citation: *Knoop and Another NNO v Gupta (No 2)* (Case No 116/2020) [2020] ZASCA 163 (9 December 2020)

Coram: WALLIS, MBHA and MOCUMIE JJA and EKSTEEN and MABINDLA-BOQWANA AJJA

Heard: 6 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 9 December 2020

Summary: Removal of business rescue practitioners – s 139(2) of Companies Act 71 of 2008 – grounds – whether grounds for their removal established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ledwaba DJP, Janse van Nieuwenhuizen J and Senyatsi AJ concurring, sitting as court of first instance) reported sub nom *Gupta v Knoop NO and Others* 2020 (4) SA 218 (GP); [2019] ZAGPHC 960:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is set aside and replaced with:

'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

3 The costs occasioned to the appellants by the application to intervene by Mr Tayob, including those consequent upon the employment of two counsel, are to be paid by Mr Tayob in his personal capacity.

JUDGMENT

Wallis JA (Mbha and Mocumie JJA and Eksteen and Mabindla-Boqwana AJJA concurring)

[1] The respondent, Mrs Chetali Gupta, her husband, Mr Atul Gupta, and his brothers Messrs Rajesh and Arti Gupta (collectively 'the Guptas'), are the sole shareholders in equal shares, in two companies, Islandsite Investments One Hundred and Eighty (Pty) Ltd (Islandsite) and Confident Concept (Pty) Ltd (Confident Concept). On 16 February 2018 Islandsite and Confident Concept were both placed under voluntary business rescue in terms of resolutions taken by their respective boards of directors under s 129(1), read with s 129(2), of the Companies Act 71 of

2008 (the Act). Acting on the recommendation of their attorneys, the board of directors of Islandsite appointed the appellants, Messrs Kurt Knoop and Johan Klopper, as business rescue practitioners (BRPs) and the board of Confident Concept appointed Mr Knoop as BRP.

[2] Less than a year later, in November 2018, Mrs Gupta launched an application in the Gauteng Division of the High Court, for the removal of Messrs Knoop and Klopper as BRPs of these two companies. A full court (Ledwaba DJP, Janse van Nieuwenhuizen J and Senyatsi AJ) was specially constituted to hear the application. On 13 December 2019, in a judgment by Ledwaba DJP concurred in by his colleagues, it granted an order for the removal of the BRPs.[1] An application for leave to appeal against that order was lodged and leave to appeal to this court was granted on 7 February 2020.

[3] On the same day that it granted leave to appeal the full court granted an order that the noting of an appeal would not suspend the operation of the removal order ('the execution order'). The execution order was itself the subject of an extremely urgent appeal in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013. Both appeals were set down for hearing in this court on 6 November 2020. The circumstances in which that occurred are set out in the judgment already delivered upholding the urgent appeal.[2] In this appeal Mr Tayob, the intervening party, applied for leave to intervene and submit evidence to the court. That application was abandoned, but we need to deal with the costs it occasioned. The issues it raised were disposed of in the judgment in the urgent appeal.

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[1] *Gupta v Knoop NO and Others* 2020 (4) SA 218 (GP); [2019] ZAGPHC 960 (Full court).
[2] *Knoop and Another NNO v Gupta (No 1)* [2020] ZASCA 149 (*'Gupta 1'*).

[4] That judgment also dealt with and disposed of issues raised in this appeal concerning the purported withdrawal of this appeal, the *locus standi* of Messrs Knoop and Klopper to pursue the appeal and whether it had been rendered moot by the actions of persons purportedly appointed to replace them as BRPs. For the reasons there given the contentions on behalf of Mrs Gupta in regard to these issues in this appeal are rejected. This appeal has not been withdrawn; Messrs Knoop and Klopper have *locus standi* to pursue it; and, it has not been rendered moot. The only issue we now need to deal with is whether the order for their removal as BRPs was correct.

The background

[5] The business affairs of the Guptas have come to public attention through media reports; the 'State of Capture' report by the then Public Protector, Ms Thuli Madonsela; and the activities and daily public hearings of the Commission of Inquiry into Allegations of State Capture, known eponymously as the Zondo Commission after the commissioner, Deputy Chief Justice Raymond Zondo. The Commission was appointed in fulfilment of the remedial action determined by the Public Protector in her report.

[6] In consequence of allegations made about the Guptas, a number of companies in the group through which the Guptas conducted their business activities became 'unbanked', because the major banks in South Africa were not prepared to afford them banking facilities. This precluded them from continuing with their business operations and very probably rendered them commercially insolvent.[3] That was why Islandsite and

[3] *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152; 2020 (2) SA 93 (SCA); [2020] 1 All SA 64 (SCA).

Confident Concept were placed under supervision and went into voluntary business rescue. For the same reason, six other companies in the group were placed under business rescue at the same time, namely: Tegeta Exploration and Resources (Pty) Ltd (Tegeta); Optimum Coal Mine (Pty) Ltd (OCM); Koornfontein Mines (Pty) Ltd (Koornfontein); Optimum Coal Terminal (Pty) Ltd (OCT); Shiva Uranium (Pty) Ltd (Shiva) and VR Laser Services (Pty) Ltd (VR Laser).

[7] All of these companies are controlled by the Guptas. They are directly or indirectly subsidiaries of Islandsite through Oakbay Investments (Pty) Ltd (Oakbay), which controlled the operations of all the other companies in business rescue. Forty percent of the shares in Oakbay are owned by Islandsite and the balance by Mr and Mrs Gupta. It is convenient to refer to these companies generally as the Oakbay Group. Its acting Chief Executive Officer (CEO) is Ms Ronica Ragavan.

[8] The present appellants, Messrs Knoop and Klopper, were not only appointed as the BRPs in respect of Islandsite and Confident Concept, but they also held appointments as BRPs in respect of some of the other companies in the Oakbay Group. Sometimes these were held jointly, sometimes only one of them was appointed, and sometimes they were appointed in conjunction with other BRPs. The relevance of these appointments will become apparent later.

[9] Although appointed at the instance of the directors, Ms Ragavan and Mr Ashu Chawla in the case of Islandsite, and Mr Chawla in the case of Confident Concept, disputes arose between the BRPs, Ms Ragavan and other employees in the Oakbay Group shortly after the business rescue commenced. These will be described in greater detail later, but suffice for

the present to say that they led to Mrs Gupta making this application on 28 November 2018. She did so on the basis of an affidavit deposed to by Ms Ragavan. The latter's authority to institute these proceedings on behalf of Mrs Gupta and the authenticity of the latter's signature on certain affidavits was challenged on the basis of discrepancies between the dates on the affidavits and the dates of attestation shown by the commissioners of oaths in the South African consulate in Dubai before whom they were attested. There is no reason to believe that Mrs Gupta did not appear before these consular officials and depose to the affidavits so the point was not pursued.

[10] Ms Ragavan summarised Mrs Gupta's complaints against the BRPs in the following four paragraphs of her founding affidavit:

'16.1 the staff appointed by the First Respondent (who is the sole business rescue practitioner of Confident Concept and who is the lead business rescue practitioner, in the sense that the Second Respondent hardly seems to be involved at all, in respect of Islandsite) to attend to the affairs of Confident Concept and Islandsite are simply not up to the task;

16.2 the approved business plans (which are binding as a matter of law) are being ignored and undermined by the respective business rescue practitioners in various respects;

16.3 the respective business rescue practitioners are totally ignoring very competitive third party offers which are made in respect of various of the very valuable assets in question and have insisted, across the board, on sales by way of auctions;

16.4 the First Respondent has in writing instructed that quotations are issued instead of VAT invoices in circumstances where I am advised and respectfully submit VAT invoices should properly be issued. This instruction is most disturbing.'

[11] In addition to these specific allegations Ms Ragavan said that the conduct of the BRPs in various unspecified respects was not in good faith; amounted to a failure by them to perform their duties; involved a

failure to exercise a proper degree of care in the performance of their duties; evidenced a conflict of interest or lack of independence and was consistent with neither the conduct of an officer of the court nor the responsibilities of a director of the companies in question. This was merely a recitation of the provisions of the section, with the addition of references to ss 140(3)*(a)* and *(b).* She did not identify any conduct by either Mr Knoop or Mr Klopper that fell short of what was required of an officer of the court. Nor was reference made to any breach of a provision in ss 75 to 77.

[12] The factual allegations against the BRPs quoted above in para 10 needed to be substantiated by evidence. In the light of the requirements of s 139(2) factual findings needed to be made and considered to determine whether a case for their removal had been made out. The general recitation of some of the provisions of the Act added nothing to the factual allegations in para 10. In order for the BRPs to know what it was they were charged with doing, or omitting to do, and in what respects their conduct of the business rescue was said to be deficient, specific facts needed to be set out in the founding affidavit to which they could respond in order to defend their administration. Knowledge of the allegations with which one is confronted and an opportunity to rebut or explain them is central to the fair conduct of legal proceedings.

[13] It is unfortunately necessary to restate these basic propositions because the judgment under appeal contains no analysis of the factual case made by Mrs Gupta and no factual findings in respect of the alleged conduct of the BRPs. There are no findings of fact:

(a) in regard to the competence of their staff;

(b) that they ignored and undermined the approved business rescue plans;

(c) that they ignored very competitive third party offers in respect of various valuable assets or that they insisted across the board on sales by way of auction;

(d) in regard to alleged breaches of the Value-Added Tax Act 89 of 1991 (the VAT Act).

The absence of factual findings on these issues necessitates a fuller treatment of the facts than would ordinarily be necessary. It is not possible to determine from the full court's judgment whether it thought that these factual allegations had been established and justified removal of the BRPs, or whether its judgment rests on a wholly different factual foundation. Both possibilities must therefore be addressed. A court of first instance is obliged to set out clearly in its judgment the factual findings and reasons upon which the judgment rests, in order for the appeal court to perform its functions, which is to examine whether on those facts and for those reasons the claim for relief was correctly determined. Regrettably that was not done in this case.

[14] An application for the removal from office of a BRP requires the facts relied on by the applicant to be measured against the circumstances in which the court is empowered to remove the BRP. It is therefore helpful to deal at the outset with the provisions of s 139(2) of the Act and the circumstances in which a court may order the removal of a practitioner. As the full court laid great stress on the provisions of ss 140(3)*(a)* and *(b)* the proper application of those sections in business rescue and the duties they impose on BRPs will also be addressed.

Section 139(2) of the Act

[15] In a voluntary business rescue the BRPs are appointed by the board of directors of the company,[4] but they can only be removed by a court order under s 130 of the Act, or under the provisions of s 139.[5] The relevant provision for present purposes is s 139(2), which provides:

'Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

(a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;

(b) failure to exercise the proper degree of care in the performance of the practitioner's functions;

(c) engaging in illegal acts or conduct;

(d) if the practitioner no longer satisfies the requirements set out in section 138(1);

(e) conflict of interest or lack of independence; or

(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.'

The full court relied on subsecs *(a)* and *(e)*, although potentially sub-secs (*b*) and (*c*) might be thought to have been engaged. The focus is therefore on these provisions.

[16] Proceedings under s 139(2) may be brought by affected persons. That expression is defined in s 128 as meaning a shareholder or creditor of the company; a registered trade union representing employees of the company; and, if any employees are not so represented, each of those employees or their representatives. Mrs Gupta is a shareholder of both Islandsite and Confident Concept, so she has *locus standi* to bring an application under s 139(2). She did so in her own right. The papers do not indicate the attitude of her co-shareholders to the application, although it seems inevitable that they are aware of it. Not only the familial

[4] Sections 129(1) and (3)*(b)* of the Act.
[5] Section 139(1) of the Act.

relationship, but also the fact that the principal affidavits on behalf of Mrs Gupta were executed by Ms Ragavan, whose position as acting CEO of the Oakbay Group means that she is responsible to the shareholders of Islandsite for her actions in that capcaity, make it apparent that the three Gupta brothers must be aware of this litigation. However, they were not joined and have not sought to intervene or depose to affidavits. Their silence is puzzling, but no inference can be drawn from it. What is before us is an appeal against an order granted at the instance of someone to whom the Act gives *locus standi* to bring this type of application.

[17] The court has a discretion either to grant or to refuse an order for the removal of a BRP. The discretion is exercisable if one or more of the grounds for removal set out in s 139(2) has been established on a balance of probabilities. However, proof of a ground for removal alone does not dictate that an order for removal must follow. The power of removal is not combined with a duty to exercise that power, of the type referred to in *Schwartz v Schwartz*.[6] The range of actions by BRPs that might fall within these sub-sections and the degree of seriousness and varying implications they may have for the business rescue process, is such that it cannot be said that proof of one or more of these grounds will necessitate removal, or even give rise to a presumption or inclination to order removal. Whether they do is a matter for judgment on the facts of the particular case. In that sense it involves what is loosely called a discretion, meaning only that the court must take into account a number of disparate and incommensurable features.[7] However, that does not afford the decision any special immunity on appeal, where the appeal

[6] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473-474.
[7] *Mahomed v Kazi's Agencies (Pty) Ltd and Others* 1949 (1) SA 1162 (N) at 1168; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360F-362E; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 83-88.

court is in as good a position as the high court to determine the case.[8] The question before the court of first instance was whether the BRPs should be removed. It was not choosing among two or more different but permissible options, as a court does on questions of sentence, or costs, procedural issues, or the quantum of general damages. It was providing the correct or incorrect answer to the question of removal. On appeal this court is therefore free to interfere if it concludes that the high court erred.

[18] Before turning to the various grounds upon which the full court ordered the removal of the BRPs, it may be helpful to make some general remarks, as this is not a question that has previously engaged the attention of this court. The power now given to the court is not novel. Under our common law the court has always had and exercised the power to remove trustees and administrators of deceased estates on the ground that their continuation in office would prejudicially affect the proper administration of the estate entrusted to them and prejudice the beneficiaries of that estate.[9] That power extends to the removal of executors,[10] liquidators of companies[11] and trustees in insolvency.[12] Cases dealing with these situations will be instructive in regard to the approach to be adopted to removing BRPs. Two general principles will be that removal is not something to be ordered lightly and that the primary reason justifying removal will be actual or potential prejudice or harm to the interests of the estate, trust or company, and those in whose interests the

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[8] *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 797D-H; *Gaffoor and Another v Vangates Investments (Pty) Ltd and Others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA) para 39; *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC) para 19 fn 17.

[9] *The Master v Edgecombe's Executors and Administrators* 1910 TS 263; *Sackville West v Nourse and Another* 1925 AD 516.

[10] The power is contained in statute. Section 54(1)*(a)* of the Administration of Estates Act 66 of 965.

[11] Under s 379 of the Companies Act 73 of 1963 the court may remove a liquidator for good cause.

[12] *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) and s 59 of the Insolvency Act 24 of 1936 as amended by s 18 of Act 99 of 1965.

administration was established, such as heirs in an estate or creditors in circumstances of insolvency.

[19] The general nature of the grounds for removal is such that they cannot be established directly. They are factual conclusions or inferences drawn from other proven facts. It is necessary for the applicant for removal to specify and establish by evidence the conduct on the part of the BRP that they say justifies an order for removal. Only if there is proper proof of the primary facts can the question of drawing an inference properly arise. The drawing of inferences from the facts must be based on proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*: [13]

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish … But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

[20] The first ground relied on in this case was incompetence or a failure to perform the duties of a BRP of the particular company. Reliance on this ground required evidence of specific instances of incompetence, or failure to perform the BRPs duties, in relation to the company under business rescue. Incompetence suggests that the BRP lacked the necessary skills to perform their duties. It may be established by proof that the BRP is 'of inadequate ability or fitness; lacking the requisite capacity or qualifications'.[14] That is a reasonably high bar.

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[13] [1939] 3 All ER 722 (HL) at 733E-F, cited in *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) at 706B-D; *MV Pasquale della Gatta: MV Filipppo Lembo; Imperial Marine Co v Deiulemar Compagnia di Navigazione Spa* [2011] ZASCA 131; 2012 (1) SA 58 (SCA) para 24. See also *Great River Shipping Inc v Sunnyface Marine Limited* 1994 (1) SA 65 (C) at 75I-76C and particularly the statement that 'evidence does not include contention, submission or conjecture.'

[14] *Shorter Oxford English Dictionary*, 6 ed (2007), Vol 1 at 1355, sv 'incompetent', meaning 2.

Merely moderate ability does not amount to incompetence. Nor does the failure to meet the standards that the affected party would like to see achieved, whether that relates to the time taken to complete the business rescue process, or the prices at which assets are sold, or the manner in which the BRP approaches their task. The alleged incompetence must relate directly to the performance of the task of a BRP. An inability to perform the role of BRP properly in relation to the circumstances of the particular company must be demonstrated.

[21] Where a failure to perform the duties of a BRP is relied on it is essential to identify the duties that the affected party says should have been performed and to show the respects in which they were not performed. A failure to convene meetings as required by the statute and the business rescue plan, or a failure to report to the creditors and other affected parties, come to mind as fairly obvious examples. A general neglect of the duties of a BRP, where the BRP simply fails to deal with matters requiring attention in a regular and timeous fashion, may suffice, but a BRP who is attending to matters in a manner which the affected party does not approve of is not failing to perform their duties.

[22] A failure to exercise a proper degree of care in the performance of their functions will in most instances require proof of negligence. It is difficult to see how that could be shown by way of general allegations without reference to specific instances of negligence. While proof of harm to the company, whether in the implementation of an approved business plan or from the perspective of its future operations after business rescue is terminated, may not be a prerequisite to proof of a failure to exercise a proper degree of care, in the absence of harm it may be difficult for a court to conclude that the BRP has not exercised a

proper degree of care. At the very least the potential for harm to have been caused by the actions of the BRP must be considered even if that harm was averted or did not materialise.

[23] Lastly, a conflict of interest or a lack of independence are also reasons for the removal of a BRP. There is little difficulty with the notion of a conflict of interest, a concept that has over many years received the attention of our courts. The classic statement of the principle is in the judgment of Innes CJ in *Robinson v Randfontein Estates*:[15]

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty.'

Examples of the principle in action are provided by cases such as *Barnett v Estate Beattie*[16] and *Grobbelaar v Grobbelaar*,[17] which involved the removal of executors who had claims against the estate that were disputed. In the latter case Van Blerk JA said:[18]

'It is clear that a substantial conflict arises between the personal interests of the respondent and those of the estate, in consequence of which a situation is created where the respondent's position as executor is rendered intolerable. He finds himself in the impossible position that on the one hand, as a creditor of the estate, he must fight for his claim, and on the other hand, in his capacity as executor of the estate, he must defend against the same claim. In this role he would be compelled to choose sides. He cannot remain neutral or impartial.' (My translation.).

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[15] *Robinson v Randfontein Estates Gold Mining Company Ltd* 1921 AD 168 at 177-178.
[16] *Barnett v Estate Beattie* 1928 CPD 482 at 485.
[17] *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 724F-G. C/f *Webster v Webster en ń Ander* 1968 (3) SA 386 (T) at 388C-D.
[18] At 725G-H. The judgment was in Afrikaans and the original passage read:
'Dit is duidelik dat hier wesenlike botsing bestaan tussen die persoonlike belange van die respondent en die van die boedel waardeur toestand geskep is wat respondent se posisie as eksekuteur vir hom onhoudbaar maak. Hy bevind hom in die onmoontlike posisie dat hy enersyds as skuldeiser van die boedel sal moet veg vir sy eis en andersyds in sy hoedanigheid as eksekuteur die boedel sal moet verdedig teen dieselfde eis. In hierdie rol sal hy genoodsaak wees om kant te kies. Hy kan nie onsydig of onpartydig bly nie.'

In *Van Niekerk v Van Niekerk*[19] the conflict arose because the executrix and sole heir to the estate had a substantial interest in excluding or diminishing the claim by the widow to half the estate or substantial maintenance and acted accordingly.

[24] The requirement that the BRP be independent is likewise well-established in related contexts such as the appointment of liquidators, where the general rule is that the liquidator should be independent of the company in liquidation.[20] That has been held to disqualify from appointment as liquidators shareholders, directors, creditors and the attorney acting for the company. Once appointed they are required to be independent and to carry out their duties without partiality.[21] Independence requires that they do not have a relationship, direct or indirect with the company, its management or any person concerned in its affairs that may place them in a position of conflict of interest,[22] or prevent them from exercising an independent judgment on the affairs under their control. Whilst in a voluntary business rescue the BRP owes their appointment to the directors of the company, they must not allow themselves to be dictated to by the directors or shareholders or any third party. They must at all times exercise an independent judgment taking into account the potentially conflicting interests of different affected parties.

[25] An extreme case of the absence of independence on the part of the BRP came before this court in *African Bank of Botswana v Kariba*

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[19] *Van Niekerk v Van Niekerk and Another* 2011 (2) SA 145 (KZP). See also *Bagnall NO and Others v Acker NO and Others* [2020] ZAWCHC 161 paras 67 to 112.
[20] *In Re Greatrex Footwear (Pty) Ltd (II)* 1936 NPD 536.
[21] *Standard Bank of South Africa v The Master of the High Court (Eastern Cape Division)* [2010] ZASCA 4; 2010 (4) SA 405 (SCA) paras 124 to 128.
[22] *Hudson and Others NNO v Wilkins NO and Others* 2003 (6) SA 234 (T) para 13

Furniture.[23] The board, consisting of its only two shareholders, a husband and wife, appointed an attorney as BRP. The company had not been operational for some five years, yet the BRP presented a business rescue plan without the benefit of any current financial statements. An amount of R5 million that the shareholder had said on oath was available to fund the business rescue was not included or accounted for. The BRP said it had been consumed in the costs of certain litigation, but was unable to furnish details of those costs. The money simply vanished. The bank that was the principal creditor objected to the business rescue, but the BRP ignored their objections. The business rescue plan presented to the creditors fell 'woefully short' of compliance with the requirements of s 150 of the Act and did not provide information from which an assessment of reasonable prospects of the business rescue succeeding could be made. The BRP relied entirely on information furnished to him by the shareholders and his own unsubstantiated assessment. The justified impression gained by the bank was that he was acting as a representative of the company.

[26] Matters came to a head at the meeting where the business rescue plan was rejected by the creditors. An offer was presented on behalf of the shareholders in terms of s 153(1)*(b)*(ii) of the Act and the BRP ruled that it was not open to the bank to respond to the offer because it was binding. In terms of the offer he transferred the bank's voting interest to the shareholders, thereby giving the latter a 95 percent interest. They then voted to approve the rescue plan. The offer did not disclose who was making it, the price, or where, when and how payment was to be made. This court held that it was not an offer at all. In the ensuing litigation the BRP acted as attorney for both the company and himself, and deposed to

[23] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* [2015] ZASCA 169; 2015 (5) SA 192 (SCA).

the principal answering affidavit for himself and the shareholders. At the appeal he sought to represent himself and the company, until the manifest impropriety of this was pointed out.

[27] This court was faced not only with the appeal, in which the bank sought to set aside the BRP's acceptance of the 'binding offer', but also with an appeal against the high court's refusal to set aside the resolution placing the company in business rescue and to set aside the appointment of the BRP. Having upheld the appeal on the merits and set aside the resolution placing the company under business rescue, it held that it was unnecessary to deal with the BRPs appointment, but went on to make certain comments about his conduct preparatory to ordering him to pay the costs jointly and severally with the shareholders. These comments were relied on by the full court in this case to justify the removal of the BRPs, so it is necessary to deal briefly with them.

[28] There are three passages appearing in para 35 and paras 37 and 38 of the judgment of Dambuza JA that are relevant. They read as follows:

'[35] … However, the conduct of the practitioner in this case raises serious concerns. This is because of the responsibility he had, as a business practitioner under the Act, which he does not seem to have appreciated. A business rescue practitioner must be held to a high professional and ethical standard. In addition to the powers and duties specifically conferred on business rescue practitioners by ch 6, they are also officers of the court (s 140(3)*(a)*) and have the responsibilities, duties and liabilities of a director as set out in ss 75 – 77 (s 140(3)*(b)*). It was the duty of the practitioner in this case to conduct a careful assessment of Kariba's affairs and to prepare a plan that adequately reflected the prospects of Kariba's rescue. Against this standard, and the standard expected of the practitioner as an attorney, the attitude displayed by the practitioner, in regard to serious concerns expressed by the bank regarding what it considered to be the shortcomings in Kariba's affairs and the rescue plan, is disturbing.

[37] … He ignored, and was even hostile to, inquiries by the bank's representatives when such inquiries related to aspects which were the core of his function as a business rescue practitioner. The impression gained by the bank's representatives that he acted as a representative of Kariba, rather than as an independent practitioner, was justified. The apparent lack of appreciation, by the practitioner, of the seriousness of the office he held is unacceptable.

[38] In addition the practitioner was expected to act objectively and impartially in the conduct of the business rescue proceedings. So too, when it came to the institution of legal proceedings, was an objective and impartial attitude to be expected. This was lacking in the extreme.' (Footnotes omitted.)

[29] Against the background of the facts of that case it will be apparent that these comments were directed very specifically at the particular conduct of the BRP. They did not state any new principle of law, but criticised the BRP's conduct against the background of established principle. As Leach JA said in his concurrence, it was no surprise that the bank applied for his removal.[24] Whether they have any relevance to the conduct of Messrs Knoop and Klopper depends upon the proven conduct in this case. However, the full court stressed the references to ss 140(3)*(a)* and *(b)* of the Act and much play was made in Ms Ragavan's affidavit of alleged failures to meet the standards of officers of the court and directors of companies, so it is necessary to consider the implications of these provisions for BRPs.

Section 140(3)*(a)* and *(b)* of the Act

[30] Section 140(3)*(a)* of the Act, says that during the business rescue proceedings the practitioner:

'is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court'.

[24] Ibid para 56.

This is a somewhat mystifying provision. In *Gupta 1*[25] it was pointed out that a voluntary business rescue 'is an entirely private process involving the company, the BRP and all affected persons'. Unless the court is approached for some reason, for example, to set aside the resolution to commence business rescue or the appointment of the BRP, or the BRP applies to place the company in provisional liquidation, the process takes place without any engagement at all with the court. In those circumstances it is difficult to ascribe any meaning to a provision that says they are officers of the court.

[31] The obligation to report to the court in accordance with any applicable rules of the court is equally mystifying. There are no rules of court imposing an obligation on BRPs to report to it. Nor are there any orders by a court requiring reports. In a voluntary business rescue the only occasion on which the BRP is required to inform the court of anything is under s 141(2)*(a)* of the Act when they conclude that there is no reasonable prospect that the company can be rescued and apply for its liquidation.[26] The mere fact that they are applying for the company's liquidation is information enough that they do not believe that it is capable of being rescued. If the court disagrees and refuses a liquidation order there are no apparent consequences for the BRP.

[32] Section 141(2)*(b)* says that if the BRP concludes that there are no longer any reasonable grounds for thinking that the company is financially distressed they are obliged to inform the court, the company and all the affected parties in the prescribed manner. With a voluntary business rescue, it is unclear how the court is to be informed or what it is

[25] Op cit, fn 1, para 41.
[26] Section 141(2*(a)* of the Act.

to do with this information. A judge faced with an unopposed, and probably *ex parte*, application in the motion court, in which no relief was asked and no order could be made, would rightly question whether it was properly before the court. The BRP merely has to file a notice of termination of business rescue with the CIPC.[27] This brings the business rescue to an end.[28] Section 141(2)*(b)* seems inapplicable in the case of a voluntary business rescue. There is no other provision of the Act that requires them to report to the court as envisaged in s 140(3)*(a)*. In my view, whatever relevance the description of a BRP as an officer of the court may have in the context of business rescue ordered by the court under s 131 of the Act, it has no application to a voluntary business rescue and these provisions should be construed accordingly.

[33] In any event, I do not think that describing a BRP as an officer of the court adds anything to their duties or responsibilities. The expression 'officer of the court' is most commonly used to refer to advocates or attorneys who are admitted by the courts and ethically owe special duties to the court that may at times conflict with the interests of their clients. Its origins in the present context appear to lie in England where certain processes such as insolvency administration were functions of the Court, but delegated to and performed by specific officers of the court designated as such by statute.[29] The Admiralty Registrar, who had responsibility for the sale of ships arrested in proceedings *in rem* in the Admiralty Court, appears to have been in much the same position. There are no similar officers in our jurisprudence, where these functions are discharged by the Master and trustees or liquidators appointed by the Master, or chosen by creditors and subject to the direction of creditors

[27] Section 141(2)*(b)*(ii) of the Act.
[28] Section 132(2(*(b*) *of the Act.*
[29] *Gilbert v Bekker and Another* 1984 (3) SA 774 (W) at 777E-778A.

and the overriding supervision of the Master. The nearest comparison might be with the Registrar or the Sheriff. To say that someone is an officer of the court conveys little practical meaning. It 'is a vague term without legal content'.[30] At most it conveys that a fairly high standard of personal integrity is called for from the person so described. But that flows in any event from the duty of good faith and as there was no attack on the personal integrity of Messrs Knoop and Klopper this was not a relevant consideration.

[34] I turn then to s 140(3)*(b)* of the Act that provides that BRPs have 'the responsibilities, duties and liabilities' of a director of the company as set out in ss 75 to 77 of the Act. Like the previous provision this is an unfortunate legislative shortcut, given that the directors of the company remain in office and perform their duties subject to the authority of the BRP.[31] The BRP does not become a director of the company for the purposes of the sections in question.[32] Section 75 deals with the personal financial interests of a director and their duties of disclosure in relation to matters coming before the board of directors. It is difficult to see how this is to operate in relation to the BRP. For the reasons dealt with above, they are already precluded from placing themselves in a position where their personal interests conflict with those of the company or persons interested in it. That would generally preclude them from contracting with the company, other than to agree further remuneration in terms of s 143(2) of the Act. Assuming there can be contracts or decisions by the company that actually or potentially affect their financial interests or those of related persons, to whom are they obliged to make disclosure? Who can sanction the arrangement after such disclosure, given that the directors

[30] Ibid at 781D.
[31] Section 137(2)*(a)* of the Act.
[32] See the definitions of 'director' in s 75(1)*(a)* and s 76(1) of the Act.

can only act subject to the authority of the BRP? These and other conundrums arise from any endeavour to make s 75 applicable to BRPs.

[35] Section 76(2) enacts in statutory form the basic principle of our common law that has existed since the seminal decision in *Robinson v Randfontein Estates.*[33] It is already part of the duties of BRP. Similarly, the requirements of s 76(3) that a director must act in good faith for a proper purpose and in the best interests of the company are already implicit in the fact that failing to do so constitutes grounds to remove the BRP. It might be thought that s 76(3)*(c)* is of assistance in setting the standard of care that the BRP must display, but applying it in any particular case is frustrated by the inability of the BRP to invoke the provisions of ss 76(4) and (5) describing the circumstances in which the duty is fulfilled.

[36] Section 77 contains a number of provisions dealing with the potential liability of a director to the company arising out of their conduct as a director. Some of its provisions are manifestly inapplicable to a BRP and others are difficult to apply, but it is unnecessary to discuss these any further. The fact that in certain circumstances the BRP may incur liability to the company for actions performed in the course of the business rescue, says nothing about the scope and extent of the duties of the BRP, nor does the possibility that such liability may arise – including as a result of perfectly honest conduct by the BRP[34] – affect a decision on an application for the BRPs removal.

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[33] Op cit fn 15. See also *Bellairs v Hodnett and another* 1978 (1) SA 1109 (AD); *Gross and Others v Pentz* 1996 (4) SA 617 (A); *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA); *Breetzke and Others NNO v Alexander NO and Others* [2020] ZASCA 97; 2020 (6) SA 360 (SCA).
[34] See ss 77(9) and (10) of the Act.

[37] In the light of these considerations ss 140(3)*(a)* and *(b)* are generally unhelpful in determining whether in a particular case the court should order the removal of a BRP. They should not be invoked by way of a ritual incantation to justify removal, when the reasons advanced by the applicant seeking removal do not rely on the breach of any express provision by the BRP. Only where there is reliance on specific provisions of ss 75 to 77 will it be necessary to consider whether these provisions may be relevant to the decision whether to remove the BRP. There was no such reliance in this case. I turn then to consider the basis upon which the application was brought by reference to the founding affidavit of Ms Ragavan.

The application

[38] Ms Ragavan sought to provide evidence to support her specific allegations. She summarised the provisions of the two business rescue plans and emphasised those on which she placed reliance. She then set out under three headings what she described as 'Detailed aspects pertaining to Islandsite' and under a further three headings 'Detailed aspects of Confident Concept'. She then advanced specific complaints under the headings 'Attempts to obtain reports', 'The attitude of the first and second respondents', 'No compliance with statutory obligation to submit reports and updates' and 'Westdawn Investments'.

[39] Mr Knoop filed a detailed opposing affidavit dealing with these broad allegations and the detail furnished by Ms Ragavan, and Ms Ragavan delivered a reply. She applied to strike out certain portions of the opposing affidavit. A supplementary affidavit was then delivered by Mr Knoop to, as he put it, update the court with events that had transpired since the filing of his opposing affidavit and to inform the court of the

current status of the business rescue. This affidavit was admitted notwithstanding opposition on behalf of Mrs Gupta. It is unclear from the full court's judgment what happened in regard to the application to strike out, which was included in the appeal record but not referred to in argument. It appears to have gone the way of most such applications.

[40] The case was argued on the papers and there was no application for it to be referred to oral evidence. It follows that in considering the evidence the *Plascon-Evans* rule applied and the application fell to be determined on the version of Messrs Knoop and Klopper, together with any undisputed evidence in the affidavits of Ms Ragavan and the supporting affidavits on behalf of Mrs Gupta. There was no suggestion that any of the evidence of Mr Knoop, or the other witnesses on behalf of the BRPs, was so unworthy of credence that it could safely be rejected on the papers. The appeal requires us to consider the evidence on both sides and determine whether on the facts a case was made that the BRPs had in any respect acted in a manner bringing them within the purview of s 139(2). Any question of discretion only arises if that case was established on the papers on a balance of probabilities.

[41] The first complaint that the staff employed by Mr Knoop were not competent can be disregarded. It was not supported by chapter and verse. No-one was identified as not performing adequately. The response by Mr Knoop was that the team supporting the BRPs were all competent administrators having many years of financial experience who had managed or administered many entities. In a fairly characteristic reply Ms Ragavan said that she had no personal knowledge of the team or their experience, but denied that the BRPs had competently administered

Islandsite and Confident Concept. Counsel did not persist with the complaint.

[42] In order to place the remaining matters in context a brief synopsis of the business rescue plans presented to meetings of creditors in respect of both Islandsite and Confident Concept and adopted by the creditors is desirable. The conduct of the BRPs can only be assessed in the light of their duties in terms of those plans.

The business rescue plans

Islandsite

[43] The Islandsite plan was presented at a meeting of creditors and adopted on 17 April 2018. There had been an earlier meeting of creditors on 5 March 2018 at which the BRPs reported that the company had debtors of approximately R48 million and assets substantially exceeding that amount. The principal source of the company's income was rentals and the cause for it being in financial distress was that the company and related entities were unbanked. The plan recorded that there had been numerous unsuccessful approaches to financial institutions to obtain banking facilities. There were said to be two possibilities open to the BRPs in order to rescue the companies and avoid liquidation. The one was the sale of the business as a going concern and the other was to enter into a management contract at arms-length with a third party. Either of those was said to be a course of action that would maintain the continued trading status of Islandsite.

[44] The more immediate proposal was to pay the pre- and post-commencement creditors from trading income, that is, rental receipts and 'arms-length sales by private treaty (as a preference) and/or public

auction'. The shareholders, that is, the Guptas, were given a right of first refusal to match any offer. The creditors voted to mandate estate agents and auctioneers to market the immovable properties that were a major asset and authorised the BRPs to proceed with a sale of the largest property, over which the Bank of India held a mortgage, in terms of a sale agreement tabled at the meeting. This property was occupied by Sahara Computers (Pty) Ltd (Sahara), another business controlled by the Guptas. The intention was to settle post-rescue debts and sums due to the Bank of India in respect of unspecified credit agreements. The secured assets being those held by the Bank of India were to be realised either by private treaty or public auction within 30 days of the sanction of the plan. If this all occurred as planned the Bank of India would be paid in full within six to nine months and the preferent and trade creditors would likewise be paid in full within the same period.

[45] A number of conditions attached to the plan. It contemplated the company trading as a going concern during the period of business rescue. Lease agreements were annexed that reflected that much of the rental income needed to come from related companies. Some of these were occupying premises in the building that was to be sold in terms of the sale agreement. Another lease related to a Cessna Sovereign 680 aeroplane, which was burdened by an unspecified security in favour of Cessna Finance Corporation. Yet another related to the lease of mining equipment to Westdawn Investments (Pty) Ltd (Westdawn), which was not in business rescue, but was a direct subsidiary of Oakbay. SARS imposed four conditions including an undertaking that the company would ensure that all future tax obligations be met until proceedings had been terminated. The condition said that any deviation from this would constitute a material breach of the plan and 'proceedings will in such

instance be deemed to have terminated'. It is unclear what the effect of this provision would be if invoked by SARS for whose benefit it was included in the plan. It cannot have meant that the business rescue would in fact terminate because that can only occur in terms of s 132 of the Act. At most it would give SARS a ground for escaping from the restrictions of the plan. VAT liability was payable in full.

[46] There were several areas where the plan was silent. It did not deal at all with the fact that the company was owed nearly R695 million by other companies in the Oakbay Group, or companies connected to the Oakbay Group. It made no assessment of the likelihood of rentals being paid by these related companies. It did not identify specific properties to be sold to pay the one secured creditor and the preferent and trade creditors. There was no assessment of who the debtors were or the recoverability of these debts. It left two secured creditors unpaid and made no provision for the disposal of any movable property, in particular the aeroplane. Lastly, it did not set out a plan for the sale of the business as a going concern or for the conclusion of a management contract in order to restore access to banking facilities. Nonetheless, it was approved by the creditors.

[47] Ms Ragavan contended that the intention behind this plan was to make use of the moratorium on pursuing claims against Islandsite to realise sufficient funds to pay the Bank of India and the preferent and trade creditors and then to end the business rescue proceedings forthwith. However, she did not say how the company was going to be able to secure banking facilities. Nor did she deal with the inter-company loans, beyond saying that they were not to be repaid in terms of the business rescue. She did not say whether this was the general intention behind the

plan or Islandsite's intention, but in his answering affidavit Mr Knoop did not join issue with her statement. It is safest to accept that in general this may have been the general aim in preparing the plan.

[48] Achieving this general aim was necessarily subject to whether it was practically achievable. The plan aimed for the identified creditors to be paid within six to nine months. At the time of its adoption the BRPs had not yet undertaken a complete investigation of the company's affairs as mandated by s 141(1) of the Act and in any event the BRPs remained under an obligation, if at any time they concluded that there was no longer a reasonable prospect of the company being rescued, to inform the court, and all affected persons, and apply for it to be placed in liquidation. In other words, while the BRPs were obliged to try to implement the plan, whether they could do that, or do it within the contemplated timeframe depended on matters not within their control. One cannot treat a business rescue plan as being writ in stone or having the same status as the Laws of the Medes and Persians.

Confident Concept

[49] An initial plan for Confident Concept was withdrawn and a revised plan presented at a meeting of creditors on 9 May 2018. That meeting was further postponed to 16 May 2018 for further revisions to the plan. The outcome of the meeting was summarised in a letter addressed to all affected parties and creditors on 18 May 2018. The plan was adopted subject to certain further amendments. Islandsite did not vote on the adoption of the plan, which was potentially significant as it was, according to the information then available to Mr Knoop, the largest creditor of Confident Concept, with a claim of R119 million.

[50] An objection to the plan was lodged by a Mr Nath, who claimed to be present as the representative of the shareholders, that is, the Guptas. Ms Ragavan identified him as the Chief Financial Officer of Tegeta. He contended that it was unnecessary to sell any assets, as the debts could be discharged by collecting outstanding debtors. Mr Knoop responded that the majority of the debtors were companies in the same group all of which were in business rescue[35] and, whilst he then thought the prospects of recovery were good, it would not occur in the immediate future. It is significant that only six days earlier Messrs Knoop and Klopper had instructed a forensic auditor to analyse and confirm the money flows between the various companies in business rescue and the position with the inter-company loans.

[51] Mr Nath then suggested that the BRP should have liquidated Shiva, which was shown as owing R54 million, but it was pointed out that it was also under business rescue and subject to a statutory moratorium on legal proceedings. He then indicated that he wished to represent Islandsite at the meeting on the authority of its shareholders, but this was rejected as it was for the BRPs to represent Islandsite.

[52] The approach of the BRP in Confident Concept to resolving the problem of the company being unbanked was slightly different from the approach in Islandsite. It was either to sell the immovable properties and movable assets – the latter consisting largely of mining equipment and fourteen luxury motor vehicles[36] – or to sell the business as a going concern. In regard to the movable mining equipment the intention was to

[35] Islandsite, Shiva, VR Laser and Tegeta.
[36] The list of assets included a Range Rover, a Porsche, two Land Cruisers, a Mercedes Benz SLS, a Lamborghini, a Jeep Grand Cherokee, a Lexus LX, an Audi Q7 TDI Quattro, a Rolls Royce, an S60 D4 Volvo, a Land Rover, an S65 AMG Mercedes Benz and an armoured Nissan QX80 5.6 SUV.

engage with the respective mines using it with a view to their acquiring it at market related values, after having regard to the offers tabled for that equipment. The proposed plan was formulated against a backdrop of seeking authority to continue the trading activities of the business, whilst as a first preference selling all encumbered movables and collecting book debts. Authority would also be sought to accept offers and negotiate the sale of immovable and movable assets, alternatively the sale of the business as a going concern by private treaty or, failing that, by open tender.

[53] The creditors eventually voted for approval on a preliminary basis for the BRP to have authority to:

'2.1 Immediately sell all encumbered movable assets, at the best price, on the basis that every offer received shall be distributed to all registered/affected creditors, allowing them an opportunity of 10 calendar days after the date of distribution to provide a better offer, failing which the business rescue practitioner shall be entitled to accept such offer and dispose of the equipment, subject to the prior consent of the affected secured creditor and the practitioner shall use his best endeavours to complete the process by 30 June 2018.

2.2 Immediately institute action for the collection of debtors;

2.3 Immediately mandate estate agents and/or auctioneers to market and sell the immovable properties (subject to the prior written consent of the secured creditors), with such process to be facilitated (with guarantees) within four (4) months of the adoption of the plan;

2.4 To accept and do all things necessary to give effect to the transfer of such immovable properties.

2.5 To market and sell such mining equipment in the open market, as contemplated in Part B, 2.1 herein above.

2.6 settle post rescue debt as a first charge inclusive of sums due in respect of credit agreements in favour of the secured creditors (pertaining to accruing post rescue interest/debt).

2.7 To, against realisation and registration of assets (as applicable), settle the creditors pursuant to the creditors ranking attributed thereto.'

[54] Unlike the Islandsite plan, the Confident Concept plan provided for all creditors, including related party creditors, to be paid. It is unclear how this was to be achieved, given that the total amount said to be owing to all creditors exceeded the value of the assets. Furthermore, the BRP undertook to sell only those assets that were necessary to pay the secured, preferent and trade creditors. If that could be achieved it would leave the company with the residual assets and claims against it by related parties. At what stage it could be disposed of as a going concern was not clear.

[55] Ms Ragavan's allegation that the BRPs in the case of Islandsite and Mr Knoop in regard to Confident Concept ignored and undermined the approved business rescue plans must be measured against the plans as summarised above. She alleged that the BRPs 'embarked upon and are continuing to carry out very different activities', an allegation that Mr Knoop denied. She relied on a passage from the proposal section of the plan that referred to sales by private treaty being a first option, but the proposal adopted by the creditors, set out above in para 53, contained no such constraint. The same was true of the Islandsite plan.

The areas of complaint

[56] Three areas were identified as giving rise to the allegations of non-compliance with the business rescue plan of Islandsite. The first was the manner in which the BRPs dealt with issues concerning the insurance of the Cessna Sovereign 680 aircraft, an endeavour to re-register it in the Isle of Man and its maintenance. The second related to offers to purchase the Cessna and offers to purchase three properties owned by Islandsite.

The third concerned an instruction given in regard to accounting for VAT.

[57] Three issues were raised in regard to Confident Concept. The first related to the amount realised by the sale of equipment. The complaint was that there was a discrepancy between the amount for which it had been sold and the amount available for distribution to creditors. The second related to Mr Knoop's dealing with Mr Nath, the representative of the shareholders in both companies, that is, the Guptas, and his endeavours to assist the BRPs in identifying properties that could be sold by private treaty. Ms Ragavan said that the BRPs insisted on proceeding by public auction and that this attitude was 'inflexible', contrary to the business rescue plans and not in the best interests of the two companies. The third issue arose from the distribution of the proceeds of the sale that formed the subject of the first complaint. An amount was paid to Sahara and nothing to Islandsite even though it was the largest creditor. It was said both that this was a departure from the business rescue plans and that it demonstrated an irresoluble conflict of interest between Islandsite and Confident Concept.

[58] Only one of Ms Ragavan's general complaints related to non-compliance with and undermining of the business rescue plans. This was that the BRPs in Islandsite were disregarding the right of first refusal given to the shareholders when selling immovable property and effect was being given to sales by public auction instead of the preferred method of sales by private treaty. The broader complaints related to a failure to provide reports and information to Mrs Gupta. In what follows the nature and basis for each complaint is examined in the light of the response by the BRPs.

Dealings with the aircraft

[59] The first complaint in regard to insurance cover for the Cessna turned out to be a storm in a teacup. This started as a complaint that the BRPs had not renewed the insurance on the aircraft. The invoices for March and April 2018 for the insurance were forwarded to Mr Knoop's office on 9 May 2018. On receipt, confirmation was sought that the aircraft was grounded and not currently being used. Instead of providing the information asked for, Ms Ragavan's response was that the BRPs had placed the aircraft at risk as it was uninsured 'at the moment'. Then followed a complaint about other requests for payment not being authorised and a suggestion that Islandsite was vulnerable and various assets were uninsured. Ten minutes later a further email was sent by Ms Ragavan saying that the fact that the aircraft was grounded did not affect the liability to ensure that it was comprehensively insured and asking that approval for payment be provided urgently. The person dealing with the matter then asked Mr Knoop to approve payment and payment was made on 14 May 2018. Emails were sent to Ms Ragavan by Mr Knoop's assistant asking whether the aircraft was grounded and its current location. These attracted the reply that she had 'no knowledge of the status of the aircraft and you may liaise with the curator.' Presumably that was a reference to Mr Knoop.

[60] The second complaint arose from the endeavour to change the registration of the aircraft to the Isle of Man. It arose on 8 June 2018, at a stage when Mr Knoop had not yet ascertained the whereabouts of the aircraft. Mr Nel from Continued Airworthiness Maintenance Organisation - South Africa (CAMOSA) sent Mr Knoop an email asking for authorisation for the registration to be changed from the South African registry to the Isle of Man. He explained that this had been put in train in

January 2018, shortly before Islandsite was placed under business rescue, and that the reason for the change was to enable the aircraft to operate in Europe and the Middle East. Mr Knoop forwarded this to Ms Ragavan asking for her input. The response, from Ms Reshma Moopanar, the Oakbay Group Head of Legal, was that this commenced prior to business rescue and it should proceed.

[61] Mr Knoop said that the BRPs found the request to alter the registration of the aircraft alarming. He explained that Islandsite was a South African company with South African directors and the expenses of maintaining the aircraft were being incurred in South Africa and paid by Islandsite. Yet until receipt of an email from Mr Nel on 13 June 2018 saying that the aircraft was parked at DC-Aviation in Dubai, the BRPs did not know its whereabouts or what it was being used for. The BRPs suspected that it was being used by the Guptas for their private affairs, not for the benefit of Islandsite. Registering it in the Isle of Man would place it even further beyond the control of the BRPs.

[62] These concerns led the BRPs to ask Mr Nel for further information about the aircraft. On 18 June 2018 Mr Knoop asked at whose instance the aircraft was to be deregistered and exported and for all relevant information and documents. The response was that the aircraft was not being exported, but needed to be registered in the Isle of Man because it was based in Europe and the Middle East and it was not practical legally to operate a South African registered aircraft in that area with limited maintenance support for regulatory reasons. This caused the BRPs further concern because there was no basis for the aircraft to be operating in those areas. The endeavours to change its registration seemed to coincide with the Guptas' departure from South Africa to reside in Dubai. Its

whereabouts had been concealed from the BRPs. For those reasons they were not prepared to agree to the change in registration. It is not clear from the papers whether this decision was clearly communicated to Mr Nel or Ms Ragavan.

[63] A claim by Mr Nel to be paid for maintenance work on the aircraft emerged in July 2018. However, the work had not been authorised by the BRPs and they did not pay for it. Again, it is unclear whether this was clearly communicated to Mr Nel and Ms Ragavan.

[64] More information emerged from Mr Knoop's supplementary affidavit. He said that the BRPs learned from Mr Nel that there was maintenance on the aircraft outstanding from January 2018 and the logbooks could not be located. He and the BRPs' attorney consulted with the pilots to obtain information with a view to retrieving the aircraft. They also used the services of two other individuals, Messrs John Taylor and Ian Greenwood, to make enquiries about the aircraft, assist in tracing the logbook, ascertain its current condition and what needed to be done to 'get it up and running'. The information obtained indicated that the costs would run to millions of Rand and the company did not possess those funds.

[65] It is convenient at this stage to deal with the offer to purchase the aircraft and the BRPs' endeavours to sell it. The offer to purchase was transmitted by Mrs Gupta's then attorney, a Mr Pieter van der Merwe. While it was dated 16 October 2018, it was forwarded to the BRPs on 27 October 2018 with no information as to its provenance. There was no indication that Mr van der Merwe had found the purchaser or how it came to be in his possession. It is an interesting document. It emanated from a

broker based in Muscat, Oman. It did not identify the buyer, saying only that the buyer would be introduced to the seller after the acceptance of the offer. The offer, in an amount of US$1.2 million, was subject to the endorsement and approval of an agreeable Aircraft Sales Agreement between 'the seller, the seller's administrator and/or liquidator' within ten weeks. Upon 'initial approval' of the offer the buyer would make an immediate site visit to see the aircraft inside and out and to collect a copy of all its documents including all technical data and aircraft documents, which would presumably have included the logbook. At this stage a deposit of US$100 would be paid to an escrow agent.

[66] The sale was subject to the seller delivering the aircraft at its sole cost. Delivery was subject to a number of conditions. The aircraft's airworthy systems and avionics were to be functioning normally. Its maintenance program was to be up to date without deferments or extensions. All its records, logbooks, flight manuals and accessories in the owner's possession were to accompany delivery. All relevant authority approvals and clearances had to be provided. Lastly it was to be free and clear of all encumbrances, which was significant as according to the business rescue plan Cessna Finance Corporation was owed R22 million and was a secured creditor. Payment of the price would be made ten days after delivery of the aircraft and no security for payment was offered.

[67] Mr van der Merwe claimed that this was an extremely good offer. The BRPs took a different view. They believed that they could not accept an offer from an unknown source, subject to onerous conditions. They did not know the precise whereabouts or condition of the aircraft, beyond the fact that it was in Dubai in the possession of DC Aviation. In reply

Ms Ragavan accused them of lacking the appropriate negotiating skills and knowledge of international sales of aircraft and said that it had been stored in a hangar since August 2018 in desperate need of maintenance and at increasing cost. It is a curious feature of this reply that in her earlier exchange with Mr Knoop she had said that she had no knowledge of the status of the aircraft, but it was apparent that she was in communication with the company storing it.

[68] When the replying affidavit was delivered it foreshadowed the possibility of an offer to purchase the aircraft and Mr Knoop indicated that the BRPs would consider any offer that was forthcoming. He said Ms Ragavan was aware of the offer. This was not disputed. When the supplementary affidavit was delivered, two offers in excess of the earlier offer had been made. One was for US$4,5 million thereby dispelling the notion that the earlier offer was a 'good' one. Endeavours were then made between July and September 2019 to obtain information from DC Aviation concerning the aircraft. It is unnecessary to rehearse these attempts beyond saying that DC Aviation's responses to perfectly simply enquiries was wholly obstructive. That is where the matter stood when the case was argued before the full court.

The offers to purchase immovable properties

[69] With the letter conveying the offer to purchase the aircraft, Mr van der Merwe also enclosed two offers to purchase immovable properties owned by Islandsite. One was in respect of 106A, 16th Road, Midrand, for an amount of R27 million and the other for units 70 and 80 in SS Thiebault House jointly for R8 855 000. Mr van der Merwe again did not explain how these offers had been obtained or why he was the vehicle through which they were being submitted. He had asked

Mr Stephan Nel, an employee of Sahara, to follow up on the offers. Mr van der Merwe's view was that if these transactions could be consummated it would be necessary to arrange the documentation to 'uplift' the business rescue, by which he presumably meant that it should be terminated. Why Mrs Gupta's attorney would think that it was for him acting on behalf of his client to attend to this is not clear.

[70] Be that as it may, the BRPs did not accept this offer. Their reasons, as explained by Mr Knoop, were that the offer was conditional on the purchaser's bank returning a favourable valuation on the property; the purchaser completing a due diligence to its satisfaction on the property; and the bank agreeing to provide the purchaser with a bond of R30.5 million on the security of the property. The BRPs did not consider it appropriate to accept an offer on the basis that the contract would be subject to such conditions. They also were not happy with the warranties in regard to defects that they would be required to give to the purchaser. Ms Ragavan's response was that this was an unduly passive approach to have taken and that she regarded the conditions as common in agreements of this type.

[71] Ms Ragavan did not comment on the offer in respect of the two units in SS Thiebault House and it is unnecessary to consider it further. The BRPs pointed out that it had lapsed by the time it was presented to them and enquiries addressed to Mr van der Merwe as to whether it had been renewed received no response.

VAT

[72] This issue arose from an instruction to the Accounts Executive of Oakbay, Ms Remona Govender, when dealing with invoices to parties

leasing premises or equipment from the two companies. A number of them were not paying rent or hire charges either timeously or at all, and were substantially in arrears. On 26 June 2018 the BRPs instructed that in respect of all clients a quotation for the rental or hire charges should be issued, and not a tax invoice reflecting a charge for VAT. The reason for this instruction was that Islandsite and Confident Concept would be obliged to include VAT on invoices as output VAT in its VAT returns in circumstances where it was not in receipt of payment. If payment was received a tax invoice would be issued and the VAT received would be included in the returns to SARS.

[73] After an exchange of emails Mr Knoop wrote to Ms Govender, copying the email to Ms Ragavan, saying:

'We are authorised to raise a quotation invoice. Upon payment the tax invoice will be issued. The Companies are in rescue and although recoverable it is a timing issue.'

Ms Ragavan's response to this in her founding affidavit was that the instruction tied her hands, but that she knew of no authority to act in this way. She complained that this was tantamount to a fraud on the fiscus.

[74] Mr Knoop's response was that the companies in question were not paying rent and Islandsite did not have the resources to pay VAT on issue of an invoice before receiving payment. If it issued an invoice it would have to write the debt off as bad in order to claim a VAT credit. He went on to say:

'The only commercially practical way to approach the problem in the circumstances was on a quotation basis. If payment was forthcoming, a VAT invoice would be issued immediately, and payment of the VAT processed. However, the payments were never received.

It is common practice in financially distressed companies under business rescue for quotations to be issued rather than VAT invoices because of the cash flow problems being experienced.'

In reply Ms Ragavan denied that this was in accordance with the VAT Act.

The sale of Confident Concept's equipment

[75] This related to the sale of certain equipment by Confident Concept. Mr Knoop arranged for offers to be submitted for this equipment. Immediately after the bids had been received and considered Mr Knoop wrote to all known affected parties and creditors advising that the combined highest bids totalled R68 651 999 exclusive of VAT. This figure was confirmed by the auctioneer and liquidity service company that had processed the offers. On 3 October 2018 Mr Knoop wrote to Mr Nath, who had represented the Guptas at the meeting of creditors in Confident Concept, informing him that the sum available for distribution from these sales was R53 086 199.59. He also set out the way in which that amount would be distributed among creditors. Three creditors, among them Sahara, were paid in full while four others received a pro rata dividend. Nothing was paid to Islandsite.

[76] The explanation for the difference between these two amounts was that, after the publication of the prices offered by purchasers, disputes arose, the resolution of which resulted in a reduction of the amount available for distribution. Sahara and Shiva claimed that certain of the equipment sold was in Shiva's possession and owned by it. In response to this claim the disputed equipment was excluded from the sale and the price adjusted accordingly. The resultant figure was R57 222 699. From this amount some R650 000 was paid to Sahara to settle its claim, thereby

removing it as an affected party in relation to Confident Concept. A little over R600 000 was used to settle a claim to a lien over tyres fitted to some of the mining equipment. The final deduction related to the BRPs' fee. Mr Knoop said that Ms Ragavan was aware of this. That seems probable from the fact that Mr van der Merwe, the attorney acting for Mrs Gupta and, according to some of the correspondence, the shareholders of the two companies, was in possession of the letter sent to Mr Nath as well as a similar letter sent to him in relation to Islandsite. Ms Ragavam annexed this letter to her founding affidavit.

[77] While dealing with this distribution, it is convenient to point out that the payment to Sahara in settlement of its claim was said to be a breach of the business rescue plan and illustrative of a conflict of interest because one related party creditor was paid in preference to Islandsite. Mr Knoop's answer was that it was neither, as it was a commercial settlement for practical business reasons.

Public auction not private treaty

[78] It is a little difficult to ascertain the precise basis for this complaint. According to Ms Ragavan Mr Nath was authorised to represent the Guptas in their capacity as shareholders of Islandsite. She said that she asked Mr Nath to meet with Mr Knoop to obtain feedback on the total amount outstanding to the respective creditors of the two companies and to assist him in identifying properties owned by the companies that could be sold in order to pay the creditors who were to be paid in terms of the business rescue plans. It is not clear what qualified Mr Nath to perform this latter task, but nothing was made of it. According to Ms Ragavan a meeting was arranged with Mr Knoop for 16 October 2018 but it did not take place.

[79] On the strength of these allegations Ms Ragavan alleged that Mr Knoop was not interested in even considering private offers at competitive prices for the respective immovable properties and was insisting on proceeding by way of sales by public auction. She said that this was contrary to the approved plans and showed a rigid and unyielding approach that was not in the best interests of the companies. She also complained that the right of first refusal given to shareholders in Islandsite was disregarded.

[80] Mr Knoop denied these allegations. He said that no valid private offers had been rejected by the BRPs, and that the sales that had taken place by public auction were authorised by the business rescue plans. In his supplementary affidavit he furnished details of a number of sales, some by public auction and some by private treaty, that had been concluded by the BRPs. In each case he said that the affected parties and creditors were informed of the sales and no-one sought to exercise a right of first refusal. Ms Ragavan did not point to any occasion when one of the shareholders wished to exercise the right of first refusal and was precluded from doing so.

The absence of reports

[81] Apart from these specific complaints Ms Ragavan said that attempts to obtain information and reports from the BRPs through enquiries by attorneys met with no or an inadequate response. She complained separately that the statutory reports required by s 132(3) of the Act had not been furnished. All of this was said to be irregular and highly prejudicial to the two companies, although there was no attempt to explain the nature of that prejudice. It was said to demonstrate a conflict of interest, a lack of independence, a failure to perform their duties as

BRPs, a failure to exercise the requisite degree of care and a lack of *bona fides*.

[82] Some of these complaints arose from correspondence between an attorney, Mr Pieter van der Merwe, and the BRPs between August and October 2018. It started with a letter from Mr van der Merwe saying that he acted on behalf of the shareholders of both companies, that is, the Guptas. When asked to furnish proof of his authority he produced a document signed by Mrs Gupta. On 3 October 2018 he was furnished with copies of two letters addressed to Mr Nath, who it will be remembered said he represented the Guptas. The one dealt with the distribution of the proceeds from the sale of Confident Concept's mining equipment and set out in terse terms the amounts owing to three specific creditors and the general body of concurrent creditors. Ms Ragavan said that this did not furnish the information requested. That was incorrect. As to the other document, although Ms Ragavan said it would be annexed it was not in the record.

[83] On 5 October 2018 Mr van der Merwe replied and grumbled about the information furnished, without being specific as to its alleged shortcomings, and requested a meeting 'to discuss viable options to take these companies out of business rescue'. He said that:

'… it seems at this stage as if there exists a strong possibility that our clients might be in a position to repay these debts, therefore resuscitating these companies.'

It is apparent that the letter was written on behalf of the Guptas, not Mrs Gupta alone. No indication was given of the viable options or how the debts were to be paid. The BRPs did not respond. On 11 October Mr van der Merwe wrote on behalf of the Guptas to the auctioneers who had notified Mr Nath, Ms Moopanar and him of a sale of one of

Confident Concept's properties, insisting that all future correspondence be addressed to him. He said in the letter that his clients were 'considering on an urgent basis to provide financial means/plans to get both these companies out of business rescue'.

[84] The insistent drumbeat of the further correspondence from Mr van der Merwe was that the companies were to be taken out of business rescue as soon as possible, with demands for further information about sales, although it was plain that he was aware of the proposed sales and did not require further information. The objection was to any sales taking place 'if our client's funding is accepted'. Whether this referred to Mrs Gupta alone, or the Guptas collectively as in the earlier correspondence, was unclear. What is clear is that there was no evidence of either the Gupas collectively, or Mrs Gupta on her own, providing any details of possible funding that could be used to pay creditors and would avoid further sales.

[85] On 25 October 2018 Mr van der Merwe wrote on a different tack suggesting, without providing any detail, that the BRPs might not have been keeping Islandsite's documents up to date and threatening claims against the BRPs 'once the business rescue proceedings have terminated'. The apparent reason for his not writing on behalf of Confident Concept emerged four days later when a different firm of attorneys, Mayet Vittee Inc, wrote on behalf of the shareholders of that company, that is, the Guptas, asking for a stay of the public auction of a property known as Alanda Lodge. The purpose of the sale was to enable their clients to obtain 'post-commencement finance'. This did not appear to contemplate finance in terms of s 135 of the Act, but simply procuring funds to pay off creditors.

[86] The response to this new line of approach was a letter from the BRPs' attorney pointing out that the sales were sanctioned in terms of the business rescue plan and had the support of the secured creditor in respect of one of the properties. The letter also displayed a wariness on the part of the BRPs about accepting funding from the Guptas. It said:

'In addition, our clients are of the opinion that it will not be in the best interests of the company to allow your clients – members of the Gupta family – to supply the company with post-commencement finance, as this may cast aspersions over the legitimacy of the process, as the perception may be created that our clients are relying on post-commencement finance obtained from a family that may have raised such finance in an illegitimate manner.'

[87] Mr Knoop respond to this correspondence saying that the affected parties were informed about the sales through the monthly status reports, which alerted them to forthcoming auctions. These were conducted in terms of the authority given by the business rescue plans. After auctions the successful bids were circulated to affected parties to enable the right of first refusal to be exercised. No shareholder ever sought to exercise that right. The complaint about the statutory reports in terms of s 132(3) of the Act was dealt with by providing copies of the statutory reports. Mr Knoop pointed out that he did not have an address for Mrs Gupta in Dubai and, although she claimed to be resident in the family home in Saxonwold, neither she nor her husband were in fact living there. They appeared to be living in Dubai where Mrs Gupta deposed to her affidavits.

[88] Ms Ragavan's reply was by way of a general denial that the statutory reports were adequate or satisfied the requirements of the Act in regard to reporting to affected persons and creditors. There was no indication of what they should have contained and what was omitted.

They deal with the sale of properties and the progress being made with each sale and the transfer of the properties. Ms Ragavan denied that Mrs Gupta or herself had received the reports, but did not say how they should have been sent to Mrs Gupta.

Westdawn

[89] The issue of a possible conflict of interest was raised again in relation to Westdawn, which leased mining equipment from Islandsite. (Mr Knoop described it as labour broker.) Its business involved what Ms Ragavan described as 'front to back mining services' for various mining companies. It appears that this involved performance of the actual mining operations for these mines. One of the mines was OCM, another of the eight companies in business rescue, of which Messrs Knoop and Klopper, together with two others were the BRPs. Westdawn was placed in final liquidation on 3 October 2018 at the instance of a third party and Oakbay launched an application on 16 November 2018 to rescind that order. On 14 November 2018 the BRPs of OCM caused a letter to be sent to the liquidators of Westdawn, terminating the mining contracts with it, on the basis of a clause in those contracts that required Westdawn to certify that it was not trading in insolvent circumstances. Ms Ragavan contended that Westdawn was not insolvent and the liquidation order should not have been granted. She said that the letter was written in a contrived attempt to avoid the mining contracts and was highly prejudicial to Islandsite.

[90] Ms Ragavan proffered no explanation for the BRPs doing this if that was indeed the case. On her version this was a profitable agreement generating a substantial cash flow for Islandsite. The BRPs were aware that a final liquidation order had been granted, but could not have been aware of Oakbay's application for the rescission of that order as that had

not yet been launched. Mr Knoop said that the four BRPs of OCM had taken advice on what to do in the light of the liquidation of Westdawn and their actions flowed from that advice. The suggestion that the letter was a contrived attempt to avoid the mining contracts was denied. In reply Ms Ragavan suggested that the BRPs were obliged in the interests of Islandsite to oppose the provisional liquidation of Westdawn, without saying how they would have had knowledge of it, and that they should have applied for the order's rescission. No ground for doing this was suggested.

Discussion of the complaints

[91] The first contention based on these complaints was that the BRPs ignored and undermined the business rescue plans. The second which was closely related to the first was that the BRPs were ignoring competitive third party offers in respect of valuable assets and insisted across the board on sales by auction. Reliance was placed on the fact that in both plans a preference was expressed for private treaty sales rather than sales by public auction.

[92] The final contention related to the instruction not to issue VAT invoices to parties defaulting on their obligations in respect of the payment of rental or hire charges. Ms Ragavan described this as 'most disturbing' but did not link it specifically to any of the provisions of s 139(2). In that sense it is a 'standalone' issue largely separate from the other complaints. It is convenient to deal with it at the outset.

The VAT instruction

[93] Although the affidavits promised legal argument on this issue, we received no detailed argument with reference to the provisions of the

VAT Act. In strict law Ms Ragavan may be correct that the instruction given by Mr Knoop was inconsistent with the obligations of the companies in regard to the payment of VAT. My starting point is s 15(1) of the VAT Act, which requires vendors to account for tax on an invoice basis, save in certain special circumstances. Although we had no direct evidence on this, I assume from the nature of the correspondence over this issue, that the companies were obliged to account on an invoice basis. Under s 16(3) the vendor is obliged to account for VAT by deducting from all output tax for the period, as determined under s 16(4), the amounts specified in the various sub-paragraphs of that section. Under s 16(4)*(a)*(i) the standard basis of accounting for output VAT is the amount chargeable when a taxable supply is made during that period. That amount should be reflected in a tax invoice issued when the supply is made. Section 20(1) requires that a tax invoice be issued within 21 days of making a taxable supply.

[94] These requirements undoubtedly create cash flow problems where the vendor is not expecting to receive payment from the recipient of the taxable supplies. Provision is made in s 22 for the recoupment of VAT already paid where a debt becomes irrecoverable, but it is not directly helpful where the supply is made in circumstances where there is little or no expectation of payment. There is a further potential difficulty when the taxable supply is made to another vendor that is a member of the same group of companies as the vendor liable to account for the tax. In terms of s 22(6) it is impermissible to make a deduction on the basis that the debt has been written off as irrecoverable for as long as the two companies remain members of the same group of companies. It seems likely that this provision would also be of application in the present case.

[95] For those brief reasons, I am prepared to accept that Ms Ragavan may be correct in saying that in strict law the instruction to issue quotations and not tax invoices was inconsistent with the provisions of the VAT Act. But where does that take the case that the BRPs should be removed? Mr Knoop said, and this was not controverted, that it was common practice in financially distressed companies to act in this fashion in order to address the cash flow problems that would otherwise arise from issuing tax invoices for supplies to parties where there was no expectation of receiving payment. He did not say whether this was known to SARS, but it would be surprising were it not.

[96] There are a few notable features of the VAT issue. The first is that Ms Ragavan does not suggest that as a director of Islandsite she raised the issue with SARS. Instead she claimed that her hands were tied. But they were not. She remained a director of the company and there was no obligation on her to accept an unlawful instruction from Mr Knoop. Why then did she not simply contact her local SARS office dealing with the company's VAT returns and check whether Mr Knoop was correct in claiming, as he did, that the BRPs were authorised to operate on this basis? Insofar as she suggested that Mr Knoop's instruction was a breach of the obligations of a director under s 140(3)*(b)* of the Act, her failure to report it must likewise have been a breach of her obligations as a director.

[97] The second feature is that while the instruction may not have been permissible it does not appear to have caused any loss to the fiscus. There is nothing to suggest that issuing tax invoices would have resulted in the tax being paid either by the beneficiaries of the supplies or by either company. The beneficiaries were in default and neither company had the resources to pay large amounts of VAT in respect of non-existent

receipts. To give one example, Islandsite was leasing mining equipment to Westdawn and the hire charges payable in terms of the lease in the documents relating to the business rescue plan was in excess of R7.5 million per month. The VAT payable on that would be of the order of R1.25 million per month. There is no evidence to show that Islandsite could have paid that.

[98] That brings me to the third feature, which is that Mr Knoop gave the instruction in the interest of the companies in business rescue to preserve their financial position and to avoid incurring further expenses and causing their financial position to deteriorate. He explained that this was the only commercially practical way of addressing the problem. That was consistent with the approach outlined at the first meeting of creditors in Islandsite that the rescue would depend on a careful management of the cash flow structure. Nothing suggests that he and Mr Klopper were not acting in good faith in adopting this approach. They may have been wrong in law in doing so, something I have been prepared to assume for the purposes of discussing this issue, but an erroneous approach on their part does not provide grounds for their removal from office.

[99] The VAT issue was stressed in the heads of argument on behalf of Mrs Gupta. Assuming that the instruction involved an illegality, something that is by no means clear, it might have fallen under s 139(2)*(c)*, but there is no reason to think that the BRPs did not bona fide believe that their approach was permissible. That would undoubtedly be the case if, as Mr Knoop says, this is a common practice in dealing with distressed companies. This was not a ground on which to remove the BRPs.

Ignoring the business rescue plans and competitive offers

[100] It is convenient to deal with these issues together. I start with whether any actions by the BRPs were in conflict with the business rescue plans. Four of the specific complaints dealt with above might be thought to support this allegation. They relate to the sale of the aircraft; the failure to accept the offers furnished through the attorney, Mr van der Merwe; the alleged insistence on selling by public auction instead of private treaty; and the payment to Sahara out of the proceeds of the sale of equipment by Confident Concept.

[101] Nothing was said in the Islandsite plan about the sale of the aircraft or any other movable. The plan proceeded on the basis that the immovable properties would, if sold, generate sufficient to pay the Bank of India and the preferent and trade creditors. It said nothing about selling the aircraft or about satisfying the secured claim of Cessna Finance Corporation. Nor did the refusal to sell it in response to the offer emanating from an undisclosed purchaser represented by a broker in Oman undermine the plan. Mr Knoop's reasons for not accepting the offer must be accepted on an application of the *Plascon-Evans* rule. The fact that Ms Ragavan did not regard them as sufficient is neither here nor there. In the absence of any evidence that the decision would undermine the achievement of the aims of the plan this factor was irrelevant. I will revert to it when dealing with the general allegations. I can find no trace in the full court's judgment that this played a role in its conclusions.

[102] In regard to the offer presented by Mr van der Merwe for the units in SS Thiebault House, Ms Ragavan said nothing and it is unnecessary to address them further. That leaves the offer in respect 106A, 16th Road, Midrand. Mr Knoop explained why that offer was not accepted. Ms

Ragavan accused him of undue caution, but the refusal was not in breach of the business rescue plan. The offer was conditional and there was no evidence that the conditions would be fulfilled. The BRPs were under no obligation to accept it.

[103] The complaint that the BRPs were not willing to accept private offers is belied by the history of sales of immovable properties. The first sale of the Sahara property was a private sale as a result of an introduction by Mr Nel from Sahara. That was registered on 31 August 2018 and the proceeds distributed to creditors. Of the five subsequent sales of immovable properties owned by Islandsite, three were by public auction and two by private treaty. The sale of equipment by Confident Concept was by a public tender process, which was consistent with the plan. Three properties owned by Confident Concept were sold by public auction, but two of those sales were cancelled. One of them has now been sold by private treaty. In the founding affidavit it was said that Mr Nath wanted to meet with Mr Knoop to help to identify properties that could be sold to satisfy claims. No properties were mentioned in the affidavit and there was no indication that Mr Nath had identified any that were especially appropriate to be sold. And if the matter was so important to the Guptas, whom he represented, why did he not write a simple letter to Mr Knoop containing his suggestions? There was no merit in this complaint.

[104] The final issue under this head was the payment to Sahara from the proceeds of the sale of equipment by Confident Concept. Mr Knoop demonstrated that Sahara was causing difficulties in proceeding with the sale for the general benefit of creditors. A settlement of its claim was reached for commercial reasons. The error underpinning the complaint

was that this payment stood on the same footing as a dividend to related creditors. It did not. It was a settlement to remove an obstacle to the recovery of over R50 million for creditors. It stood on the same footing as the payment to release the lien claimed over vehicle tyres. The necessary conclusion is that there was no merit to any of the complaints about the sale of assets. They were made in accordance with the plans. No competitive offers were produced. Some were by public auction and some by private treaty. All this was in accordance with the plans and did not undermine them.

Conflict of interest

[105] The Sahara payment was also relied on to contend that there was a conflict of interest on the part of Mr Knoop as BRP in respect of Confident Concept and as BRP of Islandsite. It was based on the same erroneous view that the payment to Sahara was by way of a dividend to a related creditor. It was therefore factually ill-founded. The full court relied on a potential conflict of interest as a reason for removing Mr Knoop as BRP of both companies, but it is unclear whether this was based on the specific issue raised on behalf of Mrs Gupta, or on the more general basis that it is undesirable for a person to be the BRP for two companies that may have claims against one another. This will be explored when I come to deal with the full court judgment.

The remaining specific complaints

[106] These can be disposed of shortly. The complaint about the distribution of the proceeds of the sale of Confident Concept's mining equipment was, at best for Ms Ragavan, attributable to a lack of understanding of the claims made after the completion of the public tender. Mr Knoop said that there was no room for misunderstanding as

she was fully informed. We do not need to resolve this issue. The factual basis of the claim was wrong and it provided no support for concluding that any of the requirements of s 139(2) were satisfied. The same is true of the alleged absence of the statutory reports that must be provided if the business rescue lasts longer than three months.[37] It will be recalled that Mr Nath identified himself as representing the Guptas and Ms Ragavan confirmed this. The reports were sent to him and Mr Knoop produced the reports and alleged that they had been sent to all affected persons. Mrs Gupta's complaint that she had not received the reports rang a little hollow, given that she has steadfastly failed to furnish an address to which they could be sent while she was in Dubai. There had been no direct interaction between her and the BRPs, to the extent that they legitimately doubted whether she had authorised Mr van der Merwe to act on her behalf or the bringing of these proceedings. That correspondence may not always have been responded to immediately, but the issues it raised were unfounded and the BRPs were entitled in the light of certain matters to which I will refer when dealing with the full court's judgment to be cautious about the endeavours to provide funds to secure the termination of the business rescue proceedings.

[107] Finally, there was the complaint about the cancellation of the Westdawn contract. Its relevance was not apparent from the founding affidavit and the reply did nothing to clarify the position. The assertion in the heads of argument that it was not in the best interests of Islandsite was an assertion and nothing more.

Conclusion on the specific complaints

[37] Section 132(3) of the Act.

[108] It is apparent from this regrettably lengthy analysis of the allegations made by Ms Ragavan on behalf of Mrs Gupta and the responses by Mr Knoop, that none of the specific complaints advanced on behalf of Mrs Gupta were established on a balance of probabilities. We cannot tell whether this was also the conclusion by the full court because it did not engage with or seek to analyse the evidence. It made no factual findings on these issues in favour of Mrs Gupta. In my view none could properly be made on the evidence before the court.

[109] Where does that leave the application for the removal of the BRPs? They were brought to court to face specific allegations about their actions as BRPs and those were not proved on a balance of probabilities. These allegations were the basis for Mrs Gupta's contentions that the court should infer that the requirements of s 139(2) were present and justified an order for the removal of the BRPs. Her failure to prove them meant that she failed to prove that there was a proper basis for their removal in terms of s 139(2). The stage was not even reached where the court would have had to exercise a discretion whether or not to remove them. The application should on ordinary principles have been dismissed, but as we know it was not. It is therefore necessary to examine the basis upon which the full court ordered the removal of the BRPs.

The full court's judgment[38]

[110] After setting out a little of the background to the business rescue the judgment quoted the general allegations made by Ms Ragavan that recited the provisions of ss 139(2) and 140(3).[39] It did not quote the specific allegations against the BRPs as set out in paras 16.1 to 16.4 of

[38] Full court, op cit fn 1.
[39] See para 11 ante.

Ms Ragavan's affidavit.[40] After reciting the definition of business rescue in s 128(1)*(b)* of the Act and s 139(2), the question before the court was summarised in the following terms:[41]

'What is vital is for this court to therefore determine whether the BRPs *in casu* executed their duties in accordance with the standard set not only by the Act but also by the courts as judicial officers or whether the applicant has successfully made out a case demonstrating that the BRPs acted in a manner short of the required standard in terms of the Act.'

[111] I pause here to point out that BRPs are not and were not judicial officers. The Act says that they are officers of the court, an expression that was discussed earlier in this judgment.[42] There appears to have been some confusion, because the description of them as judicial officers was repeated twice more in subsequent paragraphs of the judgment. There there were also two references to them as officers of the court. This was unfortunate as it may have affected the full court's approach to assessing the standard of conduct required of a BRP. I have already explained why the description of the BRP as an officer of the court was inappropriate and added nothing to their statutory obligations. A judicial officer's obligations are not comparable with those of a BRP.

[112] Reverting to the judgment, one would have expected that after identifying the question as being whether the applicant had made out a case for the BRPs removal, the court would have had regard to the case advanced in the founding affidavit and the answer to that case and weighed the evidence accordingly. Had that been done, there could only have been one conclusion, namely that Mrs Gupta had not discharged the

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[40] See para 10 ante.
[41] *Gupta 1* para 25.
[42] See paras 30 to 33 ante.

onus of proving her allegations and the requirements of s 139(2) were not satisfied. Regrettably the judgment did not deal with the evidence and whether it was sufficient to discharge the onus resting on Mrs Gupta. Instead it contains a number of general statements and adverse findings concerning the BRPs without reference to the evidence. This was not the correct approach.

The issue of fees

[113] At an early stage a theme emerged that appeared to have weighed heavily with the full court. It said:[43]

'As an officer of the court, it is an uncompromising requirement that a BRP execute his/her duties in good faith, bearing in mind that the benefit of earning fees should never outweigh the duty to act in good faith.'

The authority[44] cited for this latter proposition did not support it. More to the point there had been no accusation against the BRPs that they were abusing their position in order to sustain or increase the fees they would earn from it.[45] However, the full court returned to this in the following paragraph of its judgment, when saying:[46]

'The sale of the companies' assets seemed to be a frequent feature in the argument raised by the first and second respondents in response to the question regarding the execution of their duties. The first and second respondents argued that in the execution of their duties they had overseen the sale of numerous properties belonging to the companies. However, we find this argument to be untenable. It cannot be that the first and second respondents can unabatedly continue to sell off the assets of the respective companies and earn fees and commissions without having a plan regarding how the respective businesses are going to operate moving forward once the creditors have been paid.'

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[43] Full court op cit, fn 1, para 26.
[44] *Murgatroyd v Van den Heever NO and Others* 2015 (2) SA 514 (GJ); [2014] ZAGPJHC 142.
[45] A situation considered in the context of removing liquidators in *Standard Bank of South Africa v The Master of the High Court (Eastern Cape Division)* [2010] ZASCA 4; 2010 (4) SA 405 (SCA).
[46] Full court op cit para 27.

That this was a fundamental consideration in the full court's judgment is apparent from the following paragraph:[47]

'We therefore find the first and second respondents' continual earning of fees and commissions, despite their failure to timeously conclude the business rescue proceedings in respect of both companies, to be wholly at odds with their mandate in terms of the Act.'

[114] Ms Ragavan had not raised this issue in the founding affidavit or the reply. She did not suggest that the BRPs were dragging out the process of business rescue in order to continue to earn fees from unnecessary sales of property. The BRPs had not been called upon to respond to allegations of this type. In raising them, without the benefit of evidence, the full court took into account irrelevant considerations and misdirected itself in a very material respect. The full court made the point that business rescue proceedings are not intended to last indefinitely. It said that the BRPs had not timeously concluded the business rescue proceedings. It is unclear on what this conclusion was based. The period of three months referred to in s 132(3) is not a cut-off date for business rescue. It is merely a date after which the BRPs are obliged to prepare and circulate to affected parties a progress report in regard to the proceedings. The Islandsite plan said that the process would take some six to nine months and this had barely expired by the time the application was launched. The BRPs had been hampered in their efforts by the extensive litigation referred to below and the general lack of co-operation of Ms Ragavan and her colleagues. On the papers the BRPs were not unduly delaying the business rescue process.

[47] Full court op cit para 28.

[115] The importance of this misdirection is apparent from the stringent terms in which the full court expressed its condemnation of the BRPs' conduct. It said that:[48]

'… we find the BRPs' conduct *in casu* to be at odds with the requirements as set out in the Act. As judicial officers, the first and second respondents failed to execute their duties with the highest level of good faith, objectivity and impartiality on several fronts, the sale of the assets of the companies being the first.'

This criticism was wholly unsupported by anything in the evidence. It was not a charge levelled against the BRPs by Ms Ragavan, who showed no reluctance to level other complaints against them and who consistently accused them of acting in breach of their obligations. Yet on this she was silent. The heads of argument on behalf of Mrs Gupta were likewise silent on this issue. Given the seriousness of the imputations against the BRPs, it is necessary to say that these findings were entirely unjustified.

Prospects of business rescue succeeding

[116] The next matter raised by the full court was that the BRPs had 'failed to make out a cogent case to support their opinion that reasonable prospects of rescue existed'.[49] The short answer to this is that they were never called upon to do so. It was not an issue in the case. If one peruses the correspondence, Mrs Gupta and the other shareholders adopted the stance that the companies should be taken out of business rescue and restored to the shareholders and directors. When Mr van der Merwe sent the offers to purchase the aircraft and certain properties to the BRPs attorneys on 27 October 2018 he said that the aim was to 'uplift' the business rescue proceedings. On 5 October 2018 he had written to the BRPs' attorney saying that if information could be provided about the debts of the companies 'there was a strong possibility that our clients [the

[48] Full court op cit para 27.
[49] Full court op cit para 29.

Guptas] might be in a position to repay these debts, therefore resuscitating these companies'. On 3 October 2018 he had written suggesting that post-commencement finance could be obtained that would 'bring these businesses out of business rescue'. Far from there being no reasonable prospect of rescue, the approach of Mrs Gupta, as expressed through her representatives, was that there was no longer a need for business rescue and every prospect of bringing them out of business rescue as operating entities.

[117] The full court's concern was that there was no proposal to secure a bank account for the companies to enable them to continue with their business. No such concern is to be found anywhere in the affidavits on behalf of Mrs Gupta, or the correspondence annexed to the papers. It was a matter addressed specifically in both business rescue plans. In the case of Islandsite the plan proposed the sale of the business as a going concern or entering into a management contract at arms-length with a third party. In the case of Confident Concept the proposal was either to sell the immovable properties and movable assets or to sell the business as a going concern. This was the basis upon which the business rescue plans had been proposed to and accepted by creditors. It was not an issue in the removal proceedings. The BRPs were under no obligation to deal with it any further.

Failure to report criminality

[118] The third issue relied upon by the full court needs to be set out *in extenso*. It read:[50]

'[30] The first and second respondents' lack of good faith in conducting the affairs of the companies is again demonstrated in their contention that there exists an element of

[50] Full court op cit paras 30 – 32.

criminal unlawfulness in the manner in which the board and shareholders have conducted the affairs of the companies. As judicial officers, the first and second respondents bore the onus of reporting such suspicions to the relevant authorities. *Their failure to do so, in this court's view, is dispositive.* Not only does this mean that the first and second respondents' investigation into the affairs of the companies has been tainted as a result of their potential failure to be forthcoming regarding any dubious activities on the part of the board and shareholders, the first and second respondents' failure to report their findings to the relevant authorities in turn also taints their impartiality as officers of the court. Given the nature of the office of a BRP and that the ability to execute one's duties as a BRP requires a high level of impartiality and independence, the conduct of the first and second respondents in failing to report such findings is critical and speaks to whether the respondents are indeed fit and proper to execute the duties of a BRP.

[31] In the answering affidavit the respondents contend that, although the initial reason for the commencement of business rescue proceedings was the un-banking of the Gupta-linked companies, it later emerged that the entire group was in financial turmoil due to the gross and reckless mismanagement of the affairs of the companies. The respondents further submit that both Islandsite and Confident Concept form part of the Gupta empire through which billions of rands were channelled under the direction and control of the board of directors, management and shareholders. We, however, find the unsubstantiated nature of the first and second respondents' allegations in this regard particularly vexing. Again, if the first and second respondents were so aggrieved at the alleged mismanagement of the companies and the unsavoury and criminal activities that the companies were being subjected to at the hands of the board and shareholders, as an integral part of their judicial duty the first and second respondents could have and should have reported their findings to the appropriate authorities. Raising such allegations at this stage appears to be a grossly disingenuous litigation tactic that again does not put the first and second respondents' conduct as officers of the court in the best of light.

[32] It is in turn both intriguing and troubling that the first and second respondents have filed papers vilifying the companies' board and shareholders, alleging that they have mismanaged the affairs of the companies, and in the same breath want to rescue the companies for the ultimate benefit of the same board and shareholders. This again speaks to the credibility of the first and second respondents and begs the question

whether the accusations levelled at the board and shareholders are truly being raised in good faith. Lastly, this court cannot overlook the position of conflict that the first respondent may potentially find himself in as a BRP for both companies. This court finds that the gravity of the position held by a BRP requires the utmost level of impartiality and independence and in the event that such impartiality and independence may potentially be compromised, intervention is warranted.' (Emphasis added, footnotes omitted.)

[119] The full court was not justified in condemning the BRPs conduct on these grounds, or in harsh terms that reflected so adversely on their credibility, their integrity and their bona fides. As with the issue of fees the alleged failure to report criminal conduct to the relevant authorities was not raised as a ground of complaint or dealt with in the papers. The likelihood of it having been a ground of complaint by Mrs Gupta, speaking through Ms Ragavan, was nil, inasmuch as any such criminal conduct would have been by the Guptas and directors and employees of companies in the Oakbay Group, such as Ms Ragavan and Mr Chawla. It transpired that it was also factually incorrect. Mr Knoop set the record straight in his answering affidavit in the application for an execution order, explaining that the BRPs had reported their suspicions of potentially criminal conduct to the SAPS, the National Prosecuting Authority, the Special Investigations Unit, the Asset Forfeiture Unit, SARS and the Zondo Commission.

[120] Not reporting potential criminal conduct to the relevant authorities was not raised in the papers, and the judgment did not address the difficulties that confronted the BRPs in managing and operating the companies under business rescue. They were working against a background of public controversy about the business practices of the Guptas and their possible involvement in what was commonly referred to

as 'state capture'. Under s 141 of the Act the BRPs were required to investigate the affairs of the companies under business rescue. Under s 142 the directors were obliged to co-operate with and assist the BRPs. The evidence showed that the efforts of the BRPs to do the former was at all times obstructed by the directors non-compliance with their statutory obligation, co-ordinated as far as could be seen by Ms Ragavan. This conduct appeared to the BRPs to be furthering the interests of the Guptas and had nothing to do with the successful management of the business rescue.

The barrage of litigation

[121] The lack of co-operation manifested itself within six weeks of the companies going into business rescue and the appointment of the BRPs, when Ms Ragavan refused the BRPs access to the premises of the businesses without first making an appointment and refused access to documents and business records. Early in April 2018 the BRPs, together with the other two BRPs appointed in relation to OCM, brought proceedings to interdict and restrain Ms Ragavan and various other individuals connected to the Oakbay Group, from obstructing or refusing them or their nominated agents access to the premises from which the various businesses under business rescue operated. An order was granted on 13 April 2018 by Fisher J. On 18 April 2018 she refused leave to appeal and granted an execution order in terms of ss 18(1) and (3) of the Superior Courts Act. The urgent appeal against the execution judgment was dismissed on 3 May 2018.

[122] The BRPs also wanted access to the computer servers located on the premises and access to all information thereon relating to the various companies under business rescue. An order compelling Ms Ragavan and

the other respondents to afford such access to the BRPs was granted as a matter of urgency on 4 May 2018. It was joined with the issue of an order threatening Ms Ragavan and the other respondents with contempt of court.

[123] One might have thought that this would suffice to impress upon Ms Ragavan and her colleagues the need to discharge their statutory duty to co-operate with the BRPs. Far from it. What followed between then and the launch of this application was a barrage of litigation directed at opposing whatever the BRPs sought to do, whether in relation to these two companies, or in relation to the other six companies under business rescue. Ms Ragavan played a major role in this litigation. Sometimes it was brought in her own name and sometimes she deposed to the principal affidavit. In a few instances her role was merely supporting. Others involved were Ms Pushpaveni Govender, the financial manager of the Oakbay Group, the sole director of OCM and a director of OCT and VR Laser; Ms Moopanar; and Mr George van der Merwe, a director of Shiva and OCT and the CEO of OCM, Koornfontein and Shiva. The following litigation ensued, all of which was either directly or indirectly aimed at Messrs Knoop and Klopper in their capacities as BRPs in these and other companies in the Oakbay Group.

[124] Ms Govender launched two applications on 9 April 2018 where the founding affidavits were deposed to by Ms Moopanar. One sought the removal of Messrs Knoop and Klopper as BRPs of OCM and replacing them with the intervening party, Mr Mahier Tayob, and Mr Jeremy Mashaba. The second application sought an interdict against the other two BRPs of OCM from holding themselves out to have been duly appointed as such and purporting to exercise any powers flowing from

that office and interdict against all four BRPs from implementing certain agreements concluded by them in their capacity as BRPs. The removal application was subsequently withdrawn and the urgent application was dismissed on the grounds that Ms Govender did not have *locus standi* and that it was not urgent.

[125] Mr van der Merwe had been at court when Ms Govender's application came before Kollapen J. On 24 April 2018 he launched a similar application to remove the BRPs in respect of OCM, Koornfontein and OCT. On 26 June 2018 that application was struck from the roll. Ms Ragavan and other members of the pre-existing management of the companies under business rescue and the Oakbay Group either deposed to affidavits in support of these applications, or were signatories to resolutions purporting to authorise the intended litigation. It is plain that their actions were collective.

[126] Further litigation at this time, involved the diversion of some R90 million by way of a VAT refund from OCM to a company called In House Wages (Pty) Ltd, the director of which, Mr Maharaj, was appointed two days after OCM was placed in business rescue. The BRPs brought an urgent application on 16 April 2018 and the funds were retrieved. Mr Maharaj explained that the refund was diverted from SARS to his company on the specific instructions of Ms Ragavan and that this was not the first occasion on which such a diversion had occurred. He also informed the BRPs' attorney that he had been instructed by Ms Ragavan to oppose their application. Ms Ragavan did not deal with these statements in her replying affidavit.

[127] On 30 April 2018 Oakbay launched proceedings aimed at interdicting the BRPs for Koornfontein from convening a meeting in terms of s 151(1) of the Act. Ms Ragavan supported the application, but it was withdrawn on 4 May 2018. On 30 April 2018 Centaur Ventures Ltd (Centaur), a company registered in Bermuda, brought an urgent application to restrain the BRPs in OCM from attempting to convene a meeting in terms of s 151(1) of the Act, alternatively postponing any meeting *sine die*. The BRPs of OCM regarded Centaur as a company controlled by the Gutpas. Their allegations to that effect have never received a response. One of the shareholders and directors of Centaur, is a relative by marriage of the Gupta brothers, having married their niece. His wedding at Sun City arranged by the Gupta brothers caused controversy and the BRPs suspected that it had been financed by funds intended for the development of the Estina Dairy Farm in the Free State. The application by Centaur, like many others was withdrawn. It concerned coal supply agreements concluded between Centaur and OCM where the BRPs had been advised that OCM was not in a position to produce the quantity of coal allegedly ordered or purchased by Centaur. Money received from Centaur was not retained by OCM but, according to Mr Knoop (and not challenged by Ms Ragavan) 'the money received from Centaur was not retained by OCM for its benefit but was channelled through OCM to the Guptas and the other companies within the group.'

[128] On 2 May 2018 Oakbay launched proceedings to restrain the BRPs in Tegeta from attempting to convene a meeting in terms of s 151 of the Act. On the same day a foreign company, Charles King SA, brought an urgent application against the BRPs and Tegeta for an order declaring it to be an independent creditor of Tegeta, alternatively to postpone a meeting scheduled for 9 May 2018 pending the finalisation of urgent

arbitration proceedings to determine the lawfulness of the cancellation of a sale of shares agreement. That claim was dismissed, but it is the subject of an appeal.

[129] The focus then shifted to Shiva. Westdawn sought an order against the BRPs requiring it to amend its business plan, which reflected Westdawn's claim against Shiva as disputed. The following day Oakbay launched proceedings against the BRPs to interdict and restrain a proposed meeting of creditors of Shiva. In October 2018 the BRPs and Shiva issued an application out of the Companies Tribunal in order to prevent the unlawful appointment by Mr George van der Merwe of Messrs Tayob and January as substitute BRPs in respect of Shiva. That was challenged and very specific allegations were made that Mr van der Merwe was party to endeavours by the Guptas to disrupt and frustrate the business rescue process of the eight companies in the Oakbay Group. These allegations were not denied and the attempt to appoint Messrs Tayob and January failed. They then tried to interdict the implementation of the tribunal decision. Their application was dismissed on 21 December 2018 and their subsequent application for leave to appeal was dismissed on 22 February 2019.

[130] Lastly, in the latter stages of 2018 Oakbay brought an application to procure the removal of Messrs Knoop and Klopper as BRPs of Tegeta. The application was unsuccessful. Leave to appeal against that judgment was refused by Potterill J, but an application for such leave has been referred for oral argument to this court.

[131] The present proceedings were said to be a continuation of this tsunami of litigation against the BRPs in the various companies. Whilst

the identity of the applicants may have varied and the target of the litigation may have changed from time to time, the picture painted by Mr Knoop was of a campaign of litigation directed at the BRPs and aimed at disrupting the process of business rescue. None of this evidence was disputed. It was not a matter of 'vilifying the companies' board and shareholders' as suggested by the full court. It was no more and no less than a description by the BRPs of the background circumstances against which they asked the court to view the present application. Their case was that these proceedings were a further endeavour to hijack the business rescue process because the Guptas, represented by Ms Ragavan and her colleagues, disliked the direction it was taking.

Concerns over financial mismanagement and inter-company transfers

[132] The full court described the BRPs' allegations that the entire group of Gupta-linked companies was in financial turmoil due to gross and reckless mismanagement, and that Islandsite and Confident Concept form part of the Gupta empire through which billions of rands were channelled under the direction of the shareholders, directors and management, as 'unsubstantiated' and 'particularly vexing'. It said they were 'a grossly disingenuous litigation tactic' that did not show them in the best of light.

[133] This criticism was entirely unjustified. Apart from the background of non-cooperation by Ms Ragavan and other staff at the Oakbay Group and the failure to provide information to the BRPs, there was clear evidence that amply justified the concerns of the BRPs. From the outset it was apparent in both companies that there were major inter-company transactions involved in the network of the Oakbay Group so that the viability of one company depended on the viability of the others. The rentals that formed the principal source of income of Islandsite emanated

to a substantial extent from other companies in the group. The hire charges that formed the major source of income to Confident Concept came from Shiva and Westdawn, the latter a subsidiary of Islandsite. In turn the revenue of Westdawn came substantially, if not entirely, from contracts to undertake mining activities in respect of OCM, Koornfontein and Shiva. By way of illustration of the inter-connected state of the finances of the companies, Westdawn claimed that Shiva owed it some R52 million; according to the business rescue plan, inter-company loans in Islandsite show a total of some R673 million in relation to Oakbay, Sahara and Westdawn; the plan in respect of Confident Concept showed that all its debtors were persons or companies linked to the Gupta family totalling over R70 million, while its largest creditor was Islandsite in an amount of over R119 million.

[134] Given this web of transactions, there was manifestly a real risk that the entire corporate edifice could collapse like a house of cards. The BRPs were perfectly entitled to be concerned about this. Their concern would have been exacerbated by the report they obtained from the forensic auditor Mr Harcourt-Cooke in May 2018. This showed that some R2.3 billion rand had been transferred from OCM to Tegeta between May 2016 and January 2018. In the same period Tegeta transferred some R1.2 billion rand to OCM and some R2.7 billion was transferred from Koornfontein to Tegeta. Tegeta's bank accounts with the Bank of Baroda for the period from 28 February 2017 to 21 February 2018 showed that R366.4 million was paid to Oakbay and Oakbay paid Tegeta some R36 million.

[135] One of the claims that the BRPs in Islandsite were confronted with involved an amount of R200 million paid to it by Westdawn and

described as a 'security deposit'. According to a tax invoice issued by Islandsite to Westdawn this was security for the leasing of equipment to Westdawn. On the face of it this amount needed to be retained against the possibility that it would have to be repaid. On 8 June 2018 the BRPs asked Ms Govender, the accounts executive, where these funds were being held. The answer was that the information was being collated and would be sent shortly. The only explanation by Ms Ragavan in her replying affidavit was that by October 2018 the services of all the staff of Islandsite had been terminated. There was silence on the question of where the R200 million paid as a deposit was held.

[136] Finally, when dealing with whether there was a factual basis for the concerns of the BRPs in regard to the business operations of the Oakbay Group and the inter-company loans that featured so prominently in the accounts, the BRPs had obtained from Bank of Baroda the bank accounts of Islandsite for the period from 23 February 2017 to 10 January 2018. The picture painted by these would alarm any BRP and it is surprising that it had not attracted the attention of the bank's compliance officers. They showed that money was transferred between the different companies in the group with bewildering rapidity. A few examples of many will suffice. On 1 March 2017 R28 million was received from Oakbay and transferred on the same day to Sahara. On 6 March 2017 Oakbay deposited R711 000 and it was transferred the same day to Confident Concept. On 14 March the process was repeated save that the amount was R8.5 million. On 16 March Oakbay transferred R25.25 million to Islandsite and this amount was immediately transferred to Coalcor Mining. On the same day another transfer from Oakbay of R199 638 was immediately repaid. On 17 March Oakbay deposited R2 736 000 and a payment of the same amount was made to Confident

Concept. On 23 March Oakbay deposited R25 million and R20 million was paid to Sahara, R480 000 to Confident Concept and R674 000 to Oakbay.

[137] These examples appeared on a single page of the bank statements. The same picture was repeated on the following sixteen pages. The image of a washing machine or spin dryer springs to mind when looking at these bank statements, with money coming in from group companies and going out almost immediately to other group companies in enormous quantities on virtually a daily basis. This was plainly something of legitimate concern to the BRPs and on 4 October 2018 an email was addressed by the BRPs' attorney to Mr van der Merwe asking for an explanation of these payments. The request was simple:

'Kindly explain why this was done. What were the relationships between these parties?'

Despite a follow-up email on 29 October 2018 there was never a response to this enquiry. A month later the application for the removal of the BRPs was launched. Mr Knoop said this enquiry had 'touched a nerve' and led to the institution of the present proceedings.

[138] There was no factual response by Ms Ragavan to this simple and direct question. Instead she referred to a number of leases and said that the suggestion that the application had been launched because of these enquiries was 'replete with sound and fury but, in the end, signifying nothing'. The quotation showed a closer acquaintance with the works of Shakespeare[51] than with the realities of litigation and the fact that

[51] Macbeth Act 5, scene 5, lines 24-28:
'Life's but a walking shadow, a poor player,
That struts and frets his hour upon the stage,
And then is heard no more; it is a tale
Told by an idiot, full of sound and fury,

Mrs Gupta needed to respond to these serious allegations. Ms Ragavan, as a director of Islandsite and the acting CEO of the Oakbay Group, should have been able to explain these transfers if there was a satisfactory explanation for them, but none was forthcoming.

Conclusion on failure to report criminality

[139] The full court said that this 'failure' was dispositive of the application. It was not. The complaint, like others that were referred to in the judgment, appears to have been raised by the court *mero motu*. For that reason alone, the judgment cannot stand. However, given the stringent criticism of the BRPs the basis for this finding advanced by the full court had to be examined in detail. For the reasons set out above it was without foundation.

Conflict of interest

[140] The allegations of conflict of interest made by Ms Ragavan related to the payment to Sahara from the proceeds of the sale of Confident Concept's equipment and the Westdawn contract termination. Neither complaint was justified. Neither involved a true conflict of interest. There was no suggestion that either Mr Knoop or Mr Klopper would benefit personally from either of these decisions. They were the type of decision that have to be made on an everyday basis when dealing with the financial problems of a group of companies in financial difficulties, where there are significant overlapping relationships between the companies, both in terms of active business relationships, as with the leases and hiring of equipment, and in terms of inter-company loans.

Signifying nothing.'

[141] It has long been the practice in liquidations of a number of companies in the same group for the Master to appoint one or two lead liquidators and some others to ensure that there is an ongoing working relationship between all the liquidators, to enable information to be shared and to enable the liquidators to build a clear picture of the overall position in the group. This facilitates the winding-up process and is generally beneficial to the winding-up process.[52] The fact that one company in the group may be indebted to another does not normally present a problem. Where there is a genuine dispute about the claim this may give rise to a problem, but in the ordinary course that should not be the case. There was an obvious advantage to the creditors for the investigation into the affairs of the companies under business rescue to be undertaken by someone having access to the books and records of all of them. That was far and away the best way in which to untangle the web of inter-company loans and determine whether these were genuine or whether they might involve transactions falling within s 141(2)*(c)* of the Act.

[142] It is unclear whether the full court adopted the view that appointing the same BRP in two companies in the same group, where there was a debtor and creditor relationship between the two, was inevitably a situation giving rise to a conflict of interest on the part of the BRP. If that was its view it erred. It equally erred if its view was that the potential for a conflict of interest to arise, alone sufficed to warrant the removal of the BRPs and presumably should have precluded their appointment.[53] The existence of a disqualificatory conflict of interest under s 139(2) must be determined on the facts of a particular case and what is required is an

[52] *Pellow NO and Others v The Master of the High Court and Others* 2012 (2) SA 491 (GSJ) paras 33 - 34.
[53] Section 138(1)*(e)* of the Act.

actual conflict of interest not a notional one. In this case the facts revealed no such conflict of interest. No conflict of interest or lack of independence was proved in relation to either Mr Knoop or Mr Klopper.

Conclusion in relation to the full court's judgment

[143] In the result all of the grounds advanced by the full court in support of its conclusion that the BRPs should be removed were unfounded. Had it confined itself to a consideration of the factual allegations advanced on behalf of Mrs Gupta it should have concluded that they failed to make out a case for the BRPs' removal. The grounds relied on in its judgment should not have been relied on, as they dealt with matters not in issue between the parties. They were in any event unsustainable on the facts and the applicable legal principles. For those reasons the judgment cannot stand.

Result

[144] The appeal must succeed. In regard to the costs occasioned to the BRPs by Mr Tayob's attempt to intervene, his counsel conceded that they had to follow upon the result of his intervention. It was without merit for the reasons set out in *Gupta 1* so he must pay those costs, including the costs occasioned by the employment of two counsel. I did not understand Mr Tsatsawane SC to suggest that any additional costs incurred by his client as a result of the abortive intervention should be paid by Mr Tayob.

[145] Before concluding it is appropriate to remark that the application papers in this matter reflect little credit on the legal practitioners responsible for their preparation. They were replete with allegations in emotive terms not borne out by any of the evidence. Ms Ragavan's allegations against the BRPs did not stand up to scrutiny and the charges

of incompetence, conflict of interest, lack of independence, a failure to live up to the high professional standards expected of BRPs and the like, were unwarranted. It should not be necessary to remind legal professionals who draft affidavits for their clients that they bear a responsibility for the contents of those documents and may not use them for the purpose of abusing their client's opponents. Such allegations should only be made after due consideration of their relevance and whether there is a tenable factual basis for them. This aggressive tone was likewise reflected in the affidavits of Mr Knoop where he described Ms Ragavan and others as 'Gupta acolytes', an expression more appropriate to a newspaper report than an affidavit. On many points, he would have been better advised to set out greater detail and less rhetoric. As to some of the correspondence between the attorneys, the less said the better. It was marked by aggression, hostility and accusations but little of great relevance to the case and little that reflected well on the authors.

[146] The following order is made:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is set aside and replaced with:

'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

3 The costs occasioned to the appellants by the application to intervene by Mr Tayob, including those consequent upon the employment of two counsel, are to be paid by Mr Tayob in his personal capacity.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	P Stais SC (with him GD Wilkins SC)
Instructed by:	Smit Sewgoolam Inc, Johannesburg;
	McIntyre Van der Post, Bloemfontein
For respondent:	NK Tsatsawane SC (with him J Snijder)
Instructed by:	BDK Attorneys, Johannesburg;
	Honey Attorneys Inc, Bloemfontein.
For Mr M M Tayob:	NA Cassim SC (Heads of Argument by MA Chohan and L Kutumela):