REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 21570/2012

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

....
DATE SIGNATURE

In the matter between -

JAN HENDRIK NEL N.O.	First Applicant
CHARMAINE NEL N.O.	Second Applicant
And	
INDEPENDENT TRUSTEES (PTY) LTD	First Respondent
LIEBENBERG, DAWID RYK VAN DER MERWE	Second Respondent
ASSET AUCTIONS (PTY) LTD	Third Respondent
FIRSTRAND BANK LTD t/a FNB	Fourth Respondent
TREVOR PAYNE	Fifth Respondent
THE REGISTRAR OF DEEDS, PRETORIA	Sixth Respondent
THE COMPANY & INTELLECTUAL PROPERTY COMMISSION OF THE RSA	Seventh Respondent
PANAMO PROPERTIES (PTY) LTD (In business rescue)	Eighth Respondent
PINK PARROT INVESTMENT (PTY) LTD (Registration No. 2012/081958/07)	Ninth Respondent
CHRISTOPHER JOHN ALLANSON	Tenth Respondent

JUDGMENT

SHAKOANE, AJ

1 During October 2012 the Applicants instituted application proceedings in their capacities as trustees of the Jan Nel Trust No. 660/86 against the Respondents. The application was, as it appears from the notes on the Court file, first set down for hearing on 22 January 2013. It then came before Wepener J on 12 February 2013 and an order was made that it be removed from the roll and that the costs incurred in relation to the hearing are disallowed and may not be recovered from either the Applicants or the Respondents.[1]

2 It appears that the matter again came before Rautenbach AJ on 20 February 2013 when an order was made in terms of a draft order which is stated to have been marked "X".[2]

3 Then that application later came before me on 18 March 2013, and after hearing Counsel for the parties I reserved judgment. The argument by Counsel started off on some points *in limine* by the Fourth Respondent, but was later limited to the issue of costs and the scale thereof. I deal briefly below with what I regard as the relevant events and background for purposes of this judgment.

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[1] See: White sticker on the face of Court file, with notes thereon
[2] See: Notes on face of Court file

4 In the Notice of Motion in terms of which the application proceedings were initiated the Applicants sought the following relief:-

"*1. That pending the finalisation of the action instituted by the first and second applicants against the abovenamed Respondents under the above case number, the First, Second, Third, Fourth, Fifth, Sixth, Ninth and Tenth Respondents be interdicted from effecting transfer and/or alienating the property known as The Remaining extent of Portion 502 (a portion of Portion 109) of the Farm Boschkop 199, registration division I.Q., Province of Gauteng, measuring 2.5688 hectares and held by Deed of Transfer No. T155635/2000, which property is situated at Blueberry Street, Honeydew, Roodepoort, Johannesburg ("the property");*

2. That the Second Respondent, and insofar as he acts through it, the First Respondent be removed as Business Rescue Practitioners of the Eighth Respondent;

3. That in the event of this application being unopposed, the costs hereof be costs in the action;

4. That in the event of any of the respondents opposing this application, that such Respondents be ordered to pay the costs hereof;

5. That such further and/or alternative relief be granted to the Applicants as the above Honourable Court may deem meet".

5 The said Notice of Motion is dated 29 October 2012 and appears to have been served on all the Respondents, bar the Third Respondent, on 30 October 2012. The Third Respondent was served on 31 October 2012.

6 Before me, the First, Second, Fourth and Eighth Respondents opposed the application and relief sought by the Applicants. The First, Second and Eighth Respondents gave notice of their opposition on 7 November 2012, whilst the Fourth Respondent gave its notice on the following day, 8 November 2012. Then on 28 November 2012 the First, Second and Eighth Respondents lodged their Answering Affidavit, and the Fourth Respondent lodged its Answering Affidavit on 4 December 2012.

7 The Applicants, replied to the First, Second and Eighth Respondents' Answering Affidavit on 15 January 2013, in which reply they included the Ninth and Tenth Respondents, although they do not seem to have lodged any answering affidavits. To the Fourth Respondent, they replied on 21 January 2013.

8 For the Applicants, Mr Kloek appeared. Immediately after Mr Kloek rose to address me on the merits of the application, Mr de Villiers who appeared for the Fourth Respondent addressed me, pointing out that the Fourth Respondent will not be persisting with its argument pursuant to an application to strike out certain averments in the Founding Affidavit of the Applicants *inter alia* in that same are irrelevant, scandalous and prejudicial to the Fourth Respondent, and consequently inadmissible. He, however, indicated that the Fourth Respondent would be persisting

with its first *in limine* point founded on the basis that "*no case [had been] made out for an interim interdict*" by the Applicants in their founding papers.

9 While Mr de Villiers was dealing with the introductory part of his argument on that aspect, Mr Kloek for the Applicants interjected requesting for a short adjournment, which I granted.

10 When the hearing resumed, Mr Kloek rose to address me when he informed me that the Applicants were withdrawing their application and tendering the costs on party and party scale. In turn Mr de Villiers informed me that his client, the Fourth Respondent would seek punitive costs against the Applicants. Then in his address to me, Mr Gilbert for the First, Second and Eighth Respondents informed me that he held similar instructions from his clients. It became inevitable therefore that the issue of costs, particularly the scale on which the Applicants had to pay the costs of the application had to be fully argued before me for my decision. I turn to deal with the relevant argument on this issue by Counsel for each of the disputing parties.

11 The starting point is on the principle that in special cases the Court may award a litigant costs against an adversary on an attorney-and-client basis. In that event, the successful litigant becomes entitled to recover from the unsuccessful party all the costs that on taxation, are due by him

to his attorney.[3] An award of costs in such cases is based on special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party.[4]

12 The leading case on the award of cost on an attorney-and-client basis his **Nel v Waterberg Landbowers Ko-operatiewe Vereeniging**[5], interpreted in **Mudzimu v Chinhoyi Municipality & Another**.[6] In the **Nel** case Tindall JA (two other Judges concurring) stated that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the Court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party-and-party costs that a successful party will not be out of pocket in respect of the expense caused by the litigation.[7]

13 In considering a punitive costs order, a Court should warn itself against using hindsight in assessing the conduct of a party.[8] Also, an award of attorney-and-client costs will not be granted lightly, as the Court looks upon such orders with disfavour and is loathe to penalise a person who

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[3] See: **Herbstein & Van Winsen: "The Civil Practice of the High Courts of South Africa"** (5th Ed), Vol 2, pp 953 to 954 & footnote 18 therein

[4] **Gamevest v Regional Land Claims Commissioner** [2001] 4 All SA 534 (LCC) at 561 g & footnote 30 therein; See also: **Gamevest (Pty) Ltd v Regional Land Claims Commissioner** 2003(1) SA 373 (SCA) at 388, para [35] & [36]

[5] 1946 AD 597

[6] 1986(3) SA 140 (ZH) at 143 D – I to 144

[7] at 607

[8] **AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd** 2000(1) SA 639 (SCA) at 648

has exercised a right to obtain a judicial decision on any complaint such party may have.[9]

14 It is against the backdrop of the aforegoing cardinal principles that I have to confront the issue at hand. In that process, I am necessarily required to examine the relevant facts and conduct of the parties as emerge from the affidavits and covered in argument before me by Counsel for the parties.

15 Mr Kloek for the Applicants contended that the party and party scale on which his clients tendered the costs of the application following their withdrawal thereof, was an appropriate scale, in the circumstances of the matter.

16 In substantiation of his contention in this regard, Mr Kloek argued in essence that insofar as concerns the Fourth Respondent, the Applicants have succeeded in setting out and satisfying the requirement of a *prima facie* right pursuant to the interdictory relief they sought in this matter. What is not dealt with by the Applicants however, so continued Mr Kloek, is the requirement of balance of convenience. That being the case, Mr Kloek argued, the Fourth Respondent's argument based on alleged vexatiouness on the part of the Applicants is unwarranted. I agree with the last statement by Mr Kloek, but for the reasons I mention later below.

17 Turning to the First, Second and Eighth Respondents' request for punitive costs, the nub of Mr Kloek's submission was that the Applicants

[9] **Herbstein & Van Winsen,** *supra* p 971 & footnote 169 therein

were, in the circumstances, justified in exercising their rights to obtain a judicial decision on the complaint they had as against these respondents. That, so contended Mr Kloek, was so mainly in that the First and Second Respondents had failed in their obligations pursuant to the business rescue plan, to deliver a report in terms of Section 132 of the Companies Act.[10] This, Mr Kloek contended is so because where there is such non-compliance or failure on the part of the said respondents, the Applicants were entitled in terms of Section 139 of the Act to move for the removal and replacement of the First and Second Respondents. He argued further that this is particularly so in that the report which the First and Second Respondents were required to provide in terms of the provisions of Section 132 appeared for the first time in the Answering Affidavit of the First, Second and Eighth Respondents.[11]

18 It appears to me to be common cause that the Answering Affidavit of the said respondents to which the report is annexed[12] was lodged on 28 November 2012.[13] The relevant allegations in the First, Second and Eighth Respondents' Answering Affidavit[14] run thus:-

> "*61. <u>AD PARAGRAPHS 58.9, 58.11 & 58.14 TO 58.18 & 58.20</u>*
>
> *61.1 In fact I did submit a written report to CIPC before the expiry of the three month period elapsed. On*

[10] No. 71 of 2008
[11] See: Bundle F, pp 501 to 503
[12] as Annexure "WA23"
[13] See: Bundle C, pp 259 to 261
[14] See: Bundle D, p 308, para 61 to p 310, para 64

*12 January 2012 I furnished a written report to Ms Amanda Lotheringen, the head of the Business Rescue division of CIPC, on a number of Business Rescue matters I was attending to, including that of the Eighth respondent. A copy of that report is attached marked "**AA23**".*

*61.2 I admit that I did not furnish a formal report to creditors. Instead, I regularly by way of either e-mail or telephone conversations kept all the interested creditors informed of what was transpiring. By way of example, I refer to the notification or update to creditors dated 30 May 2012 annexed as "**LL**" to the Founding Affidavit.*

*61.3 As set out above, the creditors and the applicants as shareholders were involved in the adoption of the business rescue plan. As far as I was aware the company had no employees. I have since published to all affected parties a report as is required, a copy of which is annexed as "**AA24**".*

62. AD PARAGRAPHS 58.10

I admit that the Trust and the applicants contend that they are creditors of the company. I do not concede the veracity of their claims.

……

64. AD PARAGRAPHS 58.19 & 58.21

64.1 I admit that the Business Rescue proceedings have taken longer than anticipated. This is because the Applicants have rendered no assistance at all in

implementing the Business Rescue plan which they adopted together with the other creditors but instead have embarked upon litigation to frustrate the implementation of the Business Rescue Plan.

64.2 *My attempts to give effect to registration of transfer of the property to the purchaser have also been delayed by various misrepresentations made by the Applicants and their conduct as directors of the company whilst under their directorship. For example, the Blueberry property does not appear on the City of Johannesburg's Municipal valuation roll and remains as unrated agricultural land. What this means is that at no stage has the company paid any Municipal rates to the City of Johannesburg, with the result that the conveyancers have been unable to obtain a clearance certificate in order to effect registration of the transfer of the property.*

64.3 *Our conveyancers are presently engaged with the City of Johannesburg in an attempt to obtain the clearance and which in turn involves having the Blueberry property valued and placed on the Municipal valuation roll.*

64.4 *Further, the Blueberry property is not connected to the Municipal electrical, water or sewerage reticulation system. Instead, the property makes use of borehole water and obtains electricity direct from Eskom.*

64.5 What this means is that not only is transfer of the property delayed, but the value of the property is significantly deflated.

64.6 The applicants have had no qualms for years to operate the company "below the radar" and so avoid making payment of the usual municipal rates and consumption charges that would otherwise have been payable.

64.7 It does not suit the creditors, the bank or me as business rescue practitioner to delay the implementation of the business plan".

19 The Applicants lodged their Replying Affidavit to the First, Second and Eighth Respondent's Answering Affidavit on 15 January 2013[15], just over a month after receipt of the Answering Affidavit, in which they replied to the excerpt above as follows[16]:-

"*175. <u>AD PARAGRAPH 61 (Ad paragraphs 58.9, 58.11 & 58.14 to 58.18, and 58.20)</u>*
<u>Ad paragraph 61.1 – 61.2</u>

175.1 I deny these allegations strongly.

175.2 The Second Respondent did not file a report as claimed in paragraph 61.1 of his Answering Affidavit.

[15] Bundle G, pp 670 to 672, especially the Registrar's date stamp and receipt signature therein
[16] Bundle H, p 776, para 175 to p 781, para 180

175.3 The "report" referred to by the Second Respondent marked as "AA23" is a merely a letter concerning various matters and this is a blatant and flagrant lie.

175.4 The following should be noticed from the so-called report marked "AA23":

175.4.1 in paragraph 1 the Second Respondent states:

> *"Towards the end of last year your Ms Lothering requested that we furnish you with **some form of a report** on the matters in which the writer had been appointed as Business Rescue Practitioner".*

175.4.2 In paragraph 2 the Second Respondent states:

> *"We **understood the request not as a formal request**, but **simply to assist** the Commission **in assessing the practical impact** Business Rescue ("BR") has had, it[s] successes and its shortcomings".*

175.4.3 In paragraph 3 the Second Respondent states:

> *"Accordingly **this report has been compiled with the view of assisting***

the Commission by supplying information and reporting on each matter as follows".

175.4.4 The above information clearly states that the Second Respondent understands the request not as formal, that it is simply to assist the Commission in assessing the practical impact of Business Rescue and that the report has been compiled with the view of assisting the Commission.

175.5 I respectfully submit that the above letter marked "AA23" is not a report as required by CIPC or as envisaged by Section 132 and 141 of the Act read with Regulation 125.

175.6 I further submit that the report has to be completed on a CoR 125.1 form as annexed hereto as "REP33" which clearly states that this form is issued in terms of Section 132 and 141 of the Act 2008 and Regulation 125.

175.7 I therefore respectfully submit that the so-called written report is again an attempt to mislead the above Honourable Court.

176 <u>AD PARAGRAPH 61.3</u>

176.1 I note the contents hereof.

176.2 I respectfully submit that the Second Respondent had to submit his reports on a CoR 125.1 form

which "AA24", significantly dated 26 November 2012, one day before the signature of his answering affidavit, is however December 2012.

176.3 No report was received for December 2012.

176.4 The Second Respondent clearly did not and does not comply with the Act and Regulations.

176.5 Further legal argument will be submitted in this regard.

176.6 I further submit that the remark with relation to any employees is also incorrect and it is clear that the Second Respondent is evasive in this regard.

176.7 I however respectfully and with all due respect submit that the above CoR 125.1 (AA24) is the 1st report filed and further submit that:

176.7.1 the Second Respondent failed to firstly approach the Court as required in Section 3 of the Act; and

176.7.2 the Second Respondent in any event has failed to file 9 (NINE) previous CoR 125.1 documents as required by the Act and Regulation 125 and 1 subsequent report for December 2012.

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178. <u>AD PARAGRAPH 62 (Ad paragraphs 58.10)</u>

178.1 I note the contents hereof.

178.2 The Second Respondent disingenuously refuses to admit the veracity of the Applicant's claims which he should have dealt with in terms of Section 141(1).

178.3 I reiterate that the shareholders claims are valid and enforceable and the statement another attempt to try to mislead the above Honourable Court.

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180. <u>AD PARAGRAPH 64 (Ad paragraphs 58.19 & 58.21)</u>
<u>AD PARAGRAPH 64.1 – 64.7</u>

180.1 I deny these allegations.

180.2 The Second Respondent once again attempts to mislead this Honourable Court by not replying to my statements chronologically and fully.

180.3 I further submit that the Second Respondent fails to reply to various statements at all which I have been advised stands as admitted.

180.4 Further legal argument will be submitted in this regard.

180.5 I deny that the legal proceedings are to frustrate the process.

180.6 The property was on the City Municipal Valuation roll before a portion was sold to African Brick before the rescue proceedings the Local Authority has ceased to render accounts to the Company.

180.7 The property has borehole water and a French drain sewerage system.

180.8 The electricity is supplied by City Power who has since the sub-division and transfer to African Brick also not rendered any accounts.

180.9 The Company was therefore not operated below the radar as alleged and its value is not inflated".

20 In advancing the First, Second and Eighth Respondents claim for a punitive cost order against the Applicants, Mr Gilbert moved from the premise that the Applicants were aware of the issue taken *in limine* in respect of the failure to deal with and meet the requirement of balance of convenience pursuant to the interdictory relief sought by the Applicants in their application before me. In substantiation thereof Mr Gilbert referred to the Answering Affidavit of the Fourth Respondent.[17] The said Answering Affidavit appears to have been lodged on 4 December 2012[18], also just over a month after the lodging of the application by the Applicants.

21 The Applicants replied to the Fourth Respondent's point *in limine* aforesaid on 21 January 2013,[19] and in their relevant Replying Affidavit

[17] See: Bundle F, p 561 to p 562, para 6.1
[18] *Ibid*, p 558, especially the receipt date stamps therein
[19] See: Bundle I, pp 896 to 897, especially the dates of receipt and signature therein

they deal with the allegations in paragraph 6.1 of the Fourth Respondent's Answering Affidavit as follows[20]:-

"*9.* *AD PARAGRAPH 6 (Ad paragraph 6.1)*

9.1 *I deny these allegations.*

9.2 *I respectfully submit that the Applicants have made out a clear case for the relief claimed.*

9.3 *Further legal argument will be submitted in this regard.*

10 *AD PARAGRAPH 6.1.1*

I deny the contents hereof. Further legal argument will be submitted in this regard.

11 *AD PARAGRAPH 6.1.2*

11.1 *I deny the contents hereof.*

11.2 *Further legal argument will be submitted in this regard.*

12 *AD PARAGRAPH 6.1.3*

12.1 *I deny the contents hereof.*

[20] See: Bundle J, p 905, para 9 to p 906, para 13

12.2 Further legal argument will be submitted in this regard.

13 <u>AD PARAGRAPH 6.1.4</u>

13.1 I deny the contents hereof.

13.2 Further legal argument will be submitted in this regard".

22 Regarding the submissions made by Mr Kloek on behalf of the Applicants in explaining the Applicants' move to withdraw the application and tender the costs on the party and party scale[21], Mr Gilbert contended that the Applicants do not, in light thereof, provide a satisfactory explanation or at all why they are withdrawing the application. I must say when considering Mr Kloek's submission based on the Applicants' failure to deal with the requirement of balance of convenience as being the underlying reason for their withdrawal of the application,[22] juxtaposed with the Applicants' reply in paragraph 9.2 of the excerpt quoted above from their Replying Affidavit,[23] I am inclined to agree with Mr Gilbert's submission.

23 That I say because the said excerpt from the Applicants' Replying Affidavit ostensibly shows that when the Applicants were confronted with the Fourth Respondent's point *in limine* alleging a failure on their part to

[21] See: paras 15 to 17
[22] *Ibid*
[23] Para 21, *supra*

meet the requirements for the interdictory relief sought by them, they appeared to have been adamant that they "*have made out a clear case for the relief claimed*" and that "*[f]urther legal argument will be submitted in this regard*" by them.[24] There was no explanation before me advanced by the Applicants or Counsel on their behalf as to why and when was this stance abandoned by them.

24 It seems to me that the Applicants only began to have second thoughts and/or doubt about their stance aforesaid when they were at the doors of Court on the date of the hearing. However, Mr Gilbert had his suggestions as to the reason behind the Applicants' withdrawal of the application. In that regard Mr Gilbert drew attention to the Heads of Argument of the First, Second and Eighth Respondents[25] and contended that the actual reason for the withdrawal is that the application by the Applicants had as its purpose simply to frustrate the implementation of the business rescue plan by the first and Second Respondents[26], and in that regard, Mr Gilbert sought to draw similarity with what transpired in the case of **Hudson & Others NN.O. v Wilkins N.O. & Others**.[27]

25 In his further submissions in that regard Mr Gilbert argued that the business integrity of a business person, being the Second Respondent is being attacked by the Applicants in an unwarranted manner.[28] In elaborating on that submission Mr Gilbert referred to what he termed

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[24] See: Bundle J, p 905, para 9; para 21, *supra*
[25] P 35, para 93
[26] *Ibid*, para 93.1
[27] 2003(6) SA 234 (T) at para [4]; see also footnote 32, *infra*
[28] **1st, 2nd & 8th Respondents' Heads of Argument,** p 35, para 93

"*scathing attack*" on the Second Respondent[29], as well as what he referred to as "*outbursts*"[30] and to alleged allegations of collusion which, he submitted, have not been withdrawn by the Applicants.[31] Based on these, Mr Gilbert advanced the argument that the *dictum* in the **Hudson** case[32] remains relevant and should be followed by this Court. He argued that paragraph [20] of the **Hudson** judgment is in fact directly relevant to the present matter. I am not persuaded that this is so, and I state my reasons in this regard later below.

26 Mr de Villiers for the Fourth Respondent supported the argument by Mr Gilbert regarding what he referred to as vexatious and blameworthy allegations by the Applicants, which he also submitted should warrant a punitive costs order on the attorney and client scale, and in that regard he placed reliance also on the Fourth Respondent's Answering Affidavit wherein it is *inter alia* alleged that the Applicants have made "*unsubstantiated aspersions about persons with no basis in fact or in law for such aspersions*".[33]

27 Insofar as the paragraph[34] relied upon by Mr Gilbert in his reference to the **Hudson** case[35], it reads thus:-

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[29] Bundle E, p 486
[30] *Ibid*, p 488
[31] Bundle J, p 907, para 15.3 & p 947, para 44.2
[32] At 243, para [20]
[33] Bundle F, pp 562 to 563, para 6.3
[34] Para [20]
[35] At 243

"*[20] Mr Brett persuasively argued that the applicants should bear the costs of the application on the scale as between attorney and client for the following reasons:-*

first, the application was ill-conceived since Wilkins and Bowman were not liquidators of Ranch International at the time of the launching of this application. Secondly, the applicants deliberately accused the liquidators of being dishonest, deceitful and incompetent. They are accused of conspiring and colluding with creditors without any cogent evidence to support such far-reaching allegations. These allegations are indeed too serious to be taken lightly. It was known to the applicants prior to initiating the application that the charges of impropriety on the part of the liquidators would be strenuously denied. The applicants' persistence in attacking the integrity of both Wilkins and Bowman is tantamount to malice. Thirdly, the applicants launched the proceedings in terrorem; after the filing of the application papers, the applicants took no further steps to bring the matter to finality. It is quite apparent that the delay in the hearing of this application was caused exclusively by their refusal or failure to deliver their replying affidavit timeously. Concomitantly, it has also delayed the finalisation of the winding-up of the estate of Ranch Transvaal. Therefore, under the circumstances, counsel for the respondents rightly submitted that the applicants should bear the costs of the application on the scale as between attorney and client, including the costs incurred by the employment of two counsel. There is certainly a justification for such an order of costs".

28 In my view, when regard is had to the facts and evidence[36] in the present matter the considerations and sentiments expressed in the excerpt from the **Hudson** decision above, cannot be said to be so relevant as to be the basis for this Court to justify the granting of a punitive cost order. In fact, to my mind, it is neither similar nor relevant to the present matter. Rather, I am of the view that, if this Court is to grant a costs order as sought by the participating respondents, it should be on other founded basis as may be justified on the facts and evidence in the present matter. I say this for the following reasons, amongst others.

29 Firstly, the Second Respondent makes some concession in his answering affidavit which, to me, seem to support the Applicant's complaint of an imbalance in the implementation of the business rescue plan, especially when viewed with the Second Respondent's attitude towards the Applicants and their attorneys as discussed in paragraph 31 below. The concession by the Second Respondent emerges from the following paragraphs of his answering affidavit:-[37]

> "*47.3 At the meeting with the bank, the bank's representatives were particularly disgruntled that the applicants had placed the company under business rescue and accordingly prevented the bank from foreclosing on its security. I was informed at the meeting that the bank was intent upon setting aside the resolution placing the*

[36] Paras 18 to 19, *supra*
[37] Bundle C, p 284, para 47.3 to p 285, para 48.7

company under business rescue in terms of Section 130 of the Companies Act and sought to continue with execution proceedings or to place the company under compulsory winding-up.

48.

48.1 I had formed a view that the company may nonetheless have a reasonable prospect to continue to exist on a solvent basis if an appropriate business rescue plan was adopted and implemented by only with the support of FNB as the major creditor who enjoyed security over all the company's properties. It was only after much negotiation and persuasion on my part with the bank that I was able to persuade the bank to give the business rescue a chance and not to seek to set aside the business rescue proceedings.

48.2 A notice to all the creditors on 2 November 2011, I convened the first meeting of creditors of the company in terms of Section 147 of the Companies Act, on 11 November 2011. The meeting was attended by amongst others, Louise Breet of FNB, and the first applicant.

48.3 This meeting and further discussions culminated in a further meeting with FNB on 30 November 2011. At this meeting the bank agreed in principle to a plan to rescue the business.

48.4 After the latter meeting I sent an e-mail to FNB's representatives, which was copied to the first applicant Mr Nel and to his then attorney Mr Krause, in which I set out the in-principal agreement reached with FNB. A copy of my e-mail is attached marked "AA7A".

48.5 I verily believed that the bank was only persuaded to afford the applicants and the company an opportunity to undergo business rescue proceedings based upon my long-standing professional relationship with the bank. ***I readily concede*** *that over the years as an experienced insolvency practitioner and later as a business rescue practitioner I have developed a good working relationship with FNB as I had with the other major banks. My contact with the banks is inevitable given that I am an experienced insolvency practitioner.*

48.6 An insolvency practitioner and business rescue practitioner, with respect, can hardly participate in the industry without being exposed to and developing a professional relationship with the major banks.

48.7 It is because the bank respects my professionalism that they were prepared to give the company an opportunity to rescue itself through business rescue proceedings". [emphasis added]

30 Secondly, in his reply to the argument by the Respondents' Counsel Mr Kloek referred to certain common cause facts to the effect that the Second Respondent appointed BRP on 26 October 2011 and that BRP assumed management control of the company in conjunction with the company's management.[38] After having been appointed, the BRP instructed the valuator, to provide him with an auction value of the

[38] Bundle B, p 146, para 2.3

immovable assets to enable him to determine the liquidation scenario as contemplated in Section 150(2)(a)(iii) of the Act and to enable affected persons to comply with, if necessary, Section 153(1)(b)(ii) of the Act.[39] Mr Kloek decried this as precipitate and showing of undue haste on the part of the Second Respondent. I agree. Mr Kloek also referred to further common cause information that the list of creditors included the Applicants and the Jan Nel Trust, contrary to the denials by the Respondents, particularly the Second Respondent.[40]

31 Thirdly, Mr Gilbert has accepted in the course of his submissions that the allegations against the Second Respondent as complained of, started after the Applicants' attorneys have made a statement by e-mail on 29 March 2012 *inter alia* that the "*Business rescue are* (sic) *null and void*".[41] However, in my reading of the relevant e-mail I found nothing offensive or amounting to vexatiousness as against the Second Respondent. In order to make this judgment self-contained I quote the relevant contents of the e-mail which are as follow:-

> "*Dear Mr. van der Merwe*
>
> *Your refusal to answer to our letter is hereby noted.*
> *We will however place the following on record:*
>
> *1. Our firm represents the Jan Nel Trust;*
> *2.* ***Your Business rescue are null and void*** (sic)*;*

[39] *Ibid*, p 147, para 2.4
[40] *Ibid*, p 187
[41] Bundle D, p 377

> *3. We hold sufficient funds on trust to settle the main creditor, FNB, which will be disclosed, to the High Court in the application;*
> *4. We hold further proof of development finance for a project to follow.*
>
> *We trust that you find the above in order.*
> *God Bless*
> *Tienie Kapp*
> *T.G. Bosch-Badenhorst Attorneys*
> *……*".[42] [emphasis added]

32 Fourthly, the complaints and statements or allegations made by the Applicants appear to me to be also supported to a material extent by the contents of the affidavit and annexures, including the excerpts quoted therefrom in this judgment[43], as well as a reading of the relevant provisions of the Companies Act[44] referred to by the Applicants and Mr Kloek on their behalf.

33 Lastly, Mr Gilbert has also accepted, and correctly so in my view, in the course of his submissions that there has been a "*show of emotions and tempers flying".* In that regard, Mr Gilbert referred again to the relevant contents in the affidavits.[45] He submitted that "*the applicants stepped the bound*", and in substantiation thereof he referred to the matters

[42] Bundle D, p 377
[43] See for example, paras 18 to 19, 29 and 31, *supra*
[44] No. 71 of 2008
[45] Bundle D, p 375

which I earlier stated he relied on in arguing that paragraph [20] of the **Hudson** case is particularly relevant to the present matter.[46]

34 The submissions of Mr Gilbert in this regard, in my view, are not sustainable. That I say in that in my reading of the relevant contents of the affidavits and the attached e-mail communication before me,[47] it appears therefrom that the Second Respondent fired the first salvo by referring to the Applicants and their attorneys as "*a bunch of clowns*".[48]

35 In contrast, the approach and attitude of the Second Respondent to requests or suggestions coming from other creditors or affected parties, especially the Fourth Respondent, appear to have been different and cordial.[49] Based on this and the other complaints and criticism as also articulated on behalf of the Applicants during argument[50] before me, Mr Kloek argued that the Respondents' contention that the Applicants are vexatious is unwarranted and that, in the circumstances, the Applicants were justified in exercising their rights to obtain a judicial decision on the complaint they had against the Respondents.[51] I have had regard to the relevant facts and the relevant provisions of the Companies Act,[52] as well as those referred to by Mr Kloek in argument. It seems to me that,

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[46] Paras 24 and 25, *supra*
[47] Bundle C, p 292, para 48.32 to p 293, para 48.33; Bundle D, Annexure "AA11", p 373 to 379 *et seq*
[48] Bundle D, p 375
[49] *Compare*: para 29, *supra*
[50] Para 30, *supra*
[51] Paras 16 and 17, *supra*
[52] See: Sections 132(2) and (3), 133, 134(2) and (3), 138(1) and (e), 139(2)(a), (b), (d) and (e), (3), 140 and 141, amongst others

bar the withdrawal of the application by the Applicants, there may have been merit in the submissions by Mr Kloek on behalf of the Applicants.

36 Bearing in mind the aforegoing, I am of the view, that the Applicants may well have been justified to believe that they were being attacked in their personal honour and integrity and had to stand up for their rights in the transaction involved. Indeed, to paraphrase the words of a renowned jurist, Caney J expressed more than a generation ago in **S v Tromp**[53]**,** the Respondents were, in this context the opponents to the Applicants in the litigation and the Applicants were entitled, in the circumstances, to make their case without fear or favour. Thus, if the Applicants felt that they were being ridden rough shod, as it indeed appears to be so from the facts, it was not for them to lie down to this, but to exercise their rights to assert their side of the case. The Respondents, like any other litigant, must therefore submit to such comments as came from their opponents, being the Applicants. As aptly put by Caney J, "*[h]e [or she] who enters the lists must be prepared to take verbal knocks*".[54]

37 Put differently, it is my view that the Respondents, particularly the Second Respondent, having fired the first salvo as aforesaid, may not at the same time be heard to complain that he is being subjected to unwarranted attack by the Applicants, and then seek to use that as the basis to found and justify a punitive costs order in his favour. I would on these grounds not have been inclined to accede to the Respondents'

[53] 1966(1) SA 646 at 655 C and H
[54] *Ibid*, at 655 H

application for a punitive costs order. However, I did state earlier above[55] that there appear to be other bases in law on which this Court may, nonetheless still find justification to award costs on the attorney and client scale against the Applicants. That, in my view, the Applicants brought upon themselves by their own conduct when they suddenly decided to withdraw the application.[56] I elaborate further on this in the succeeding paragraphs below. Of course, the further submissions of Mr de Villiers below become relevant in that regard.

38 Mr de Villiers, supported by Mr Gilbert submitted that in the present case, the Applicants were forewarned regarding their alleged failure to meet the requirements for an interdict, including the requirement of balance of convenience, especially when the Fourth Respondent's Answering Affidavit was filed.[57] Further, Mr de Villiers submitted that, given the sudden manner in which the Applicants withdrew the application at the doors of Court, the Fourth Respondent has been placed to unnecessary expense,[58] and that the Applicants "*should not just institute proceedings for the sake of it*". He submitted that these all constitute grounds for censure and punishment by way of a costs order on a higher scale, citing the decision in South African Bureau of Standards v GGS/AU (Pty) Ltd.[59]

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[55] See paras 25 and 28, *supra*
[56] Paras 22 and 23, *supra*
[57] Bundle F, p 561, para 6, especially p 562, para 6.1.3
[58] 4th Respondent's Heads of Argument, p 20, para 34
[59] 2003(6) SA 588 (T) at 592, para [8]

39 To my mind, there is substance in the above submissions made by Mr de Villiers for the Fourth Respondent. His submissions, in my view, also accord with the cardinal principles as adumbrated in the leading cases I referred to earlier above.[60] It indeed also appears that a party, like the Applicants in this matter, that is induced to withdraw his or its application as a result of statements appearing from the affidavit of the other party, makes himself or itself liable to censure and may for that reason, be visited with an order of costs on a higher scale.[61] It seems to me therefore that an order for costs on the attorney and client scale as sought by the Respondents is, on this basis, justified.

40 In the event, I make the following order:-

40.1 the Applicants are ordered to pay the costs of the application on the scale as between attorney and client;

40.2 this order shall not detract from the order of Wepener J of 12 February 2013 and that of Rautenbach AJ of 20 February 2013.

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G SHAKOANE, AJ
Acting Judge of the
South Gauteng High Court

DATE OF HEARING : 18 MARCH 2013

DATE OF JUDGMENT : 20 NOVEMBER 2013

[60] Paras 10 to 12, *supra*
[61] **James v Jockey Club of SA** 1954(2) SA 44 (W)

FOR THE APPLICANTS	:	MR J W KLOEK
INSTRUCTED BY	:	T.G. BOSCH-BADENHORST OF HELDERKRUIN, ROODEPOORT
FOR 1ST, 2ND & 8TH RESPONDENTS	:	MR B M GILBERT
INSTRUCTED BY	:	EVERSHEDS ATTORNEYS OF SANDOWN, SANDTON
FOR 4TH RESPONDENT	:	MR D P DE VILLIERS
INSTRUCTED BY	:	A.D. HERTZBERG ATTORNEYS OF 9 WALTERS AVE, ROSEBANK