REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

10 MARCH 2020 — DATE

SIGNATURE

Case No.: 19419/19

In the matter between:

National Union of Metalworkers of S A	**First Applicant**
Ian McNeil	**Second Applicant**
The 147 Individuals listed in Annex "A" to the Notion of Motion	**Third to further Applicants**

and

VR Laser Services (Pty) Ltd	**First Respondent**
Kurt Robert Knoop N O	**Second Respondent**
Johan Louis Klopper N O	**Third Respondent**
Bank of Baroda	**Fourth Respondent**
VR Laser Services Employees' Crisis Committee	**Fifth Respondent**

JUDGMENT

Vally J

Background

[1] The first respondent, VR Laser Services (Pty) Ltd (VR Laser), conducted the business of laser and plasma cutting services, CNC drilling and precision press brake bending. Its services were primarily used in the production of armour-plated vehicles. In about 2013 the shareholding in VR Laser underwent a fundamental change. It became 100% owned by various companies that were themselves effectively owned by members of a family whose surname is Gupta (the Gupta family), and by persons associated with the Gupta family. It is a notorious fact that the Gupta family have been accused of, amongst others, theft and misappropriation of monies and other assets belonging to the state and state-owned enterprises. Around 2015 – 2016 four commercial banks in the country took a decision to terminate all banking contracts they had with companies associated in one way or another with the Gupta family. Naturally, VR Laser was directly affected by this decision. All its banking facilities with those banks were removed. By April 2016, the only bank that VR Laser had banking facilities with was the fourth respondent, the Bank of Baroda (the Bank). The loss of banking facilities had a profound impact on the business operations of all these companies to the extent that many of them were incapable of continuing with their commercial operations. VR Laser was one of them. Consequently, on 16 February 2018 its directors resolved to place it into business rescue (BR).

[2] The second and third respondents, Mr Kurt Robert Knoop and Mr Johan Louis Klopper, were jointly appointed as the business rescue practitioners

(BRPs). They took control of the assets, liabilities and business operations of VR Laser. They held a first meeting with creditors on 5 March 2018 at the Protea Hotel at OR Tambo International Airport. On 15 March 2018 they issued a notice to the body of creditors informing them that, as from 19 February 2018, all services rendered thenceforth "*shall be categorised as a claim/cost due within the* [BR] *proceedings and therefore regarded as post commencement financing* [(PCF)] *and will therefore be paid as a preferent claim as contemplated in Section 135 of the Companies Act, 2008* [(the Act)]." The notice urged all service providers to continue rendering their services so that the business could endure whilst the BRPs worked on a plan to rescue it. They made a promise that the remuneration due them for the services rendered post 15 March 2018 would be paid in full in terms of the preference as set out in s 135 of the Act.

[3] On 31 March 2018 the Bank decided to close all its branches in South Africa, resulting in it terminating the banking contract it had with VR Laser. This left the company with no banking facilities. It resulted, amongst others, in the employees being deprived of their wages and salaries as from that date. After two months, on 28 May 2018, the BRPs decided that the most prudent course of action would be to temporarily place all employees of VR Laser on discretionary leave "*with full recognition of their entitlement to earn remuneration during the period of discretionary leave being granted*". They addressed a notice to this effect to the employees, wherein they recorded:

> "Payment for this discretionary leave period and all outstanding and past due salaries and wages will be made as soon as sufficient finance becomes available from the debt collection process which is being accelerated and an increase in the (PCF) which [the BRPs] will

> endeavour to secure on an interim basis before the conditions precedent have been met for the sale of the transaction to close and the rest of the capital to flow into the business."

[4] On 31 May 2018 the BRPs hosted a meeting of all creditors at the Southern Sun Hotel in Sandton. At the meeting, the first applicant (Numsa), which is a trade union representing many of the employees, including all of the third to further applicants, proposed that the employees be retrenched in terms of the Labour Relations Act, Act 66 of 1995 (the LRA) so that the employees could at the very least apply for unemployment benefits to the Unemployment Insurance Fund (UIF). Another trade union, Solidarity, supported the proposal. The unions informed the meeting that the employees were suffering unbearable harm as they had been without remuneration for two months and were not able to ameliorate their plight by seeking recourse to the benefits due to them from the UIF. In answer to the proposal, the BRPs alerted all the creditors present that such retrenchments would undermine VR Laser's ability to continue operating as a going concern. Nevertheless, the meeting resolved to empower the BRPs to invoke the retrenchment process as contemplated in s 189 of the LRA. Also, and very importantly, a third BR plan was presented whereby the BRPs already introduced the concept of a "*controlled liquidation*". On this the meeting resolved:

> "4. That in the event that any one or more of the offers as to be set out in the amended [BR] plan to be published on 6 June 2018 [this would constitute the fourth BR plan] failing to meet approval of the affected parties (at a meeting of the 8 June 2018), the [BRPs] are immediately mandated to commence a controlled 'liquidation' process of [VR Laser's] assets either by private treaty alternatively by public auction and that the [BRPs] 5% fee be earned against an actual sale and not as a deeming provision."

[5] On 1 June 2018 the BRPs addressed a letter to all known creditors of VR Laser, the Metal and Engineering Industries Bargaining Council, Numsa and Solidarity. The letter recorded that the employees had lost all confidence in the BR process and that Numsa was willing, on behalf of its members, to dispense with the formalities of the consultative process envisaged in terms of s 189 of the LRA. The letter goes on to record:

> 'This separation would be done on the understanding that [VR Laser] did not currently have the financial means to pay retrenchment packages. Accordingly it was proposed that the outstanding remuneration and the value of separation packages which employees qualified for as at effective date of termination would become part of [PCF] owing to the employees as unsecured preferred creditors who at the time availed themselves of the opportunity offered to separate to gain access to much needed finance.' (Underlining added.)

[6] In the meantime the BRPs attended to an offer from the company Arctitrix to purchase the entire assets and liabilities of VR Laser. The offer was withdrawn before it could be accepted by the BRPs. Another company, Blain Capital (Pty) Ltd (Blain) entered the fray by offering a management contract to the BRPs in terms of which it would take over the management of VR Laser as well as pay arrear salaries. On 11 June 2018 the BRPs circulated a fourth [BR] plan (the fourth plan) as required to do in terms of a resolution taken at the 31 May meeting. A meeting of the creditors was then held on 12 June 2018 to discuss the options available to the BRPs. The management contract offered by Blain contained three key parts (i) a timeline for the payment of the outstanding wages and salaries; (ii) the terms and conditions of a bankers guarantee for the payment of R30 million to the Bank; and (iii) an undertaking of a cession from a conveyancer attending to the transfer of immovable property against a payment of R16, 446 million to the BRPs. A representative

of Blain was present at the meeting. The Bank refused to consent to the utilisation of the assets which formed part of its security "*as debtors and materials on hand*" and demanded that if this were to be done then its security over these assets be substituted with a bankers guarantee. Further the meeting noted that Blain's request that the BR proceedings be terminated against a payment of salaries and wages in the sum of R11.5 million, which payment would be forthwith, was not practical nor legal as the BRPs had a duty to implement the substance of a fourth BR plan they had drawn up to rescue the business. As a result, Blain withdrew the offer. This left the BRP's with nothing more than the fourth plan they had drawn up. The creditors unanimously agreed to postpone the meeting in order to allow the BRPs to engage with one other party that might wish to make an offer for the business. They also mandated the BRPs to call a vote on a "*round robin*" basis if by 19 June no sustainable offer was received. To cater for the possibility that the vote would be conducted, the BRPs circulated voting slips with two options for consideration: (i) a "*controlled liquidation or winding down*" of the business be undertaken by the BRPs; or (ii) a court application seeking the liquidation of the business be launched by the BRPs.

The fourth plan

[7] Following the guidance provided by s 150 of the Act, the fourth plan consisted of three parts: a Part A dealing with the background to VR Laser's affairs leading up to the placing of it into BR; a Part B dealing with certain proposals they, as BRPs, had put forward for consideration by the stakeholders, especially creditors; and a Part C dealing with certain

assumptions they as BRPs made and certain conditions for the fourth plan to succeed. Whilst this plan took its cue from s 150 of the Act, it does not comply with the requirements of the said section. I deal with this issue later.

[8] Under Part A, the BRPs provided a list of known creditors as at the date of commencement of the BR. The two relevant ones are listed as follows:

"List of known Creditors as at commencement of Business Rescue

Pre Business Rescue Creditors	
Secured Creditors (Category "A")	
Bank of Baroda Overdraft (covering bond and cession of debtors)	29 469 400 .00
Termed Preferent Creditors (Category "B")	
South African Revenue Service	967 812.00
Employees	5 155 109.00

[9] Strangely, in Part A, which concerns the background to the BR proceedings and the proposal they wished to put forward in order to rescue VR Laser and prevent a liquidation, they include a section spelling out the possible amounts various creditors would receive if they were allowed to engage in "*a controlled liquidation*" while the BR proceedings were still active *vis-à-vis* the possible amounts the creditors would receive if the company was liquidated by a court order. In other words, they took it upon themselves to utilise the BR proceedings to propose a liquidation while BR proceedings remained alive. The relevant section reads:

"(ii) The probable dividend if Liquidated vs Business Rescue: Cents per Rand:

This is based on the mandate of 31 May 2018 to implement a controlled liquidation process, estimated on the realisation of forced realisable value: [1]

	Liquidation (Approximately)	Business Rescue (Approximately)
Post Commencement Funding: Salaries & Wages, statutories and Section 189 entitlements Secured Creditors (Category "A") **[the Bank] [this should not be part of PCF as it is a pre-commencement secured debt]**	100 cents 100 cents	100 cents 100 cents
Preferent Creditors (Creditors "B") Employees SARS (termed preferent)	100 cents 100 cents	100 cents 100 cents
Concurrent Creditors (Category "B") Trade Creditors & Accruals Only Related Party Liabilities	100 cents/Rand 3 cents	100 cents/Rand 9 cents/Rand

(The bold and underlining in the table is added)

[1] According to the BRPs they had already received a mandate on 31 May 2018 to "*implement a controlled liquidation process*", yet they issued voting slips on 19 June 2018 wherein they offered the option of voting in favour of "*a controlled liquidation process*".

[10] Under Part B, explicitly claiming to rely on ss 150(2)(b) of the Act, the BRPs say:

> "**Part B – Proposal Section 150(2)(b)**
>
> **The participating affected parties holding of a voting interest are called upon to vote in favour of the commencement of a controlled 'liquidation/winding down' procedure in the hands of the [BRPs],**
>
> **Alternatively**
>
> **To direct the [BRP's] by vote on whether the management contract proposed is acceptable in its current format alternatively on specified terms and conditions.**" (Bold and underline in original)
>
> ...
>
> 1(b) the [BRPs] recommend (in the absence of any viable offers) to authorise the commencement of the winding down process forthwith. The plan makes provision for a moratorium until the filing of a termination or substantial implementation, which will allow for the realisation of assets and the collection of book debt (which process has already commenced).
>
> 1(c) On Adoption of the plan and payment in terms of an accepted offer, the plan contemplates a write off of any shortfall not settled as a [BR] dividend. This would apply to the contemplated shortfall in respect of the related parties and other creditors to the extent necessary (dependent on the actual sum realised and/or collected in the legal process).
>
> 3. It is accordingly proposed that the creditors are paid (in the event of the plan been [sic] approved on a preliminary basis), as contemplated in section 152(2) and read with section 135 of the Act, in the following order at dividend as approximated in paragraph 8(ii) namely;
>
> **3.1 Post Rescue Creditors (PCF), then**
>
> **3.2 Secured Creditor/s, then**
>
> **3.3 Termed Preferent Creditors, then**
>
> **3.4 Trade Creditors & Accruals, and then**
>
> **3.5 Related Party Liabilities**

5. [sic] **The benefit of adopting the plan is as follows:**

(a) Secured and Termed preferent creditors shall receive **100 cents/Rand**. This will include the employee's (sic) claims in full within a few weeks of the execution date of the approved plan.

(b) Trade and Accruals shall receive **100 cents/Rand**.

(c) Related parties shall receive a dividend.

(d) The repayment period to creditors while the Company is under [BR] will be much sooner.

(e) The costs associated with the [BR] proceedings are considerably less than a liquidation scenario." (Bold and underline in original)

[11] The above quoted section unquestionably demonstrates that the BRPs encouraged the stakeholders to vote in favour of the "*commencement of a controlled 'liquidation/winding down' procedure in the hands of*" themselves acting in their capacity as the BRPs. Crucially, the proposal was not a solution to salvage the company. It was a proposal to liquidate the company – albeit in a "*controlled*" manner under their command. It is clear on any interpretation that as at 12 June 2018 the BRPs had come to the conclusion that it was no longer possible to rescue VR Laser. The focus now was on whether VR Laser should be liquidated in a "*controlled*" manner under their command or through a court order. The latter process would result in the termination of the BR proceedings. They then laid out what they claim would be the negative consequences of a forced liquidation through a court order, and which they had no control over. The paragraph reads:

"6. **<u>The negative in considering a liquidation:</u>**

(a) Whilst the employees will also immediately upon the formal liquidation of the company become unemployed, there is the additional risk of the separation of the employees claims into a preferent and concurrent component thereby incurring the additional risk of employees sharing in the loss attributed to such concurrent creditors.

(b) The administration costs are substantially greater in a liquidation scenario than the costs to continue the trading operations, whilst in [BR].

(c) The prospect of selling the assets at a greater value than as estimated will be highly unlikely.

The Plan for consideration is for the payments to be made in the order of preference as set out in paragraph 3 [quoted above] ***in PART B.***

The contemplated distributions are subject to payment in terms of Section 135 of the Companies Act." (Bold, underline and italics in original.)

[12] The BRPs point out that the employees would be rendered unemployed should VR Laser be placed in liquidation, but failed to mention that their proposal of a "*controlled liquidation*" would produce precisely the same consequences. They further indicate that the distributions would be on the basis of a preference in terms of s 135 of the Act without any regard for the provisions of s 134(3) of the Act. I deal below with the content and meaning of this subsection.

[13] Under Part C, which deals with "*Assumptions and Conditions*" the BRPs remind all persons eligible to vote that:

"... The [BR] Plan must be approved by creditors holding at least 75.1% of the voting interest of [VR Laser] and Director as required

in terms of Section 152(2) and Section 152(3) of the Companies Act."

[14] Whilst they continue to refer to it as "*The Business Rescue Plan*" it was anything but. It was a liquidation plan.

[15] On 2 July 2018 the BRPs circulated the voting slips to the creditors with a letter explaining that they had reached the end of the road with the BR process. The voting slips provided the creditors with exactly the same options that were discussed at the meeting of 12 June 2018. In the letter they expressed the options to be:

> "***OPTION ONE:***
> ... that the [BRP's] are forthwith mandated to commence and implement a **controlled liquidation / winding down** of [VR Laser] and to have all the requisite powers to give effect thereto in line with the facilitation of a better result / return for affected parties than would result from the immediate court liquidation;
>
> ***OPTION TWO:***
> ... That the [BRPs] proceed to **apply to Court** for an Order discontinuing the [BR] proceedings and placing the company in liquidation;" (Bold, underlining and italics in original)

[16] The options presented clearly indicated that there was no longer a plan that could rescue the company. The BRPs, however, operated on the basis that these options were part of the fourth plan. But, to the extent that it was not a plan to rescue the company it did not comply with the provisions of s 150 of the Act.

[17] A large majority of the eligible voters voted in favour of option 1. The Bank was one of those voters. Some voted for option 2. The South African

Revenue Service was one of them. The majority vote was higher than the required 75.1% necessary for it to be adopted. Acting on the basis that it was a BR plan, the BRPs adopted the view that, by virtue of the outcome of the vote, it had been approved on a preliminary basis and would become final in terms of s 152(3)(b) of the Act.

[18] Two weeks after distributing the voting slips (between 16 July 2018 and 2 August 2018), the BRPs finally terminated the services of all employees. Thus, the implementation of their plan produced precisely the same conclusion they said would occur if VR Laser was forcefully liquidated through a court order.

[19] These employees are owed a substantial amount of money. The debt to them can be divided into two categories: a debt that arose prior to the placing of the company in BR, and a debt that arose from their continued employment post the BR process and the termination of their services by the BRPs. The latter debts include severance pay due to them in terms of the Act and the LRA. This debt constitutes PCF. A substantial portion of the PCF debt only arose because the BRPs asked them to continue to render services, without making sure that they had or would obtain the funds to pay them. The request by the BRPs was accompanied by a promise that they (the BRPs) would pay the employees before the BR proceedings were terminated.

[20] On 20 September 2018 the BRPs instructed auctioneers to sell certain assets, namely plant and machinery, which the Bank held a security over. The

instruction to sell the assets was given without obtaining the prior consent of the Bank. The existence of the security is noted in the plan. The proceeds from the sale of these assets amounted to approximately R32m. The BRPs had not, as of the date of the hearing of this matter, furnished a full and detailed account of the proceeds of the sale of these assets despite being legally obliged to do so. It is important to note though that the amount owed to the Bank as at the date of the plan was R29 469 400 .00. The proceeds from the sale would therefore be sufficient to liquidate the debt of the Bank. Hence, the failure to obtain the consent of the Bank prior to instructing the auctioneers to sell the assets is of no moment.

[21] The BRPs were intending to liquidate the debt of the Bank from the proceeds, but did not alert all other creditors of their intention. The applicants learnt of this intention and called on the BRPs to pay their debt first, before they attended to the debt of the Bank. Two employee representatives wrote to the Group Human Resources Director (GHRD) informing him that the employees intended to challenge the BRP's decision to pay the proceeds of the sale over to the Bank. Their message reads:

> "The aforementioned employee representatives are indicative of a growing groundswell [sic] ex- and retrenched [VR Laser] employees who are intent on formally challenging any decision whereby the pre-[BR] general notarial bond of the [Bank] is considered to outrank the legitimate [PCF] claims of all amounts due and payable to employees in terms of employment and labour law and Pension Funds Act. This, inter alia, includes all PCF remuneration, provident fund contributions, statutory deductions like Income Tax based on earnings that were due and payable as well as the statutory entitlement to severance pay as per their retrenchment authorized by the Joint BRPs and the Body of Creditors.
> In the light of this initial proof of challenge the Joint BRP's (sic) are requested by employees please not to proceed with making payment

> to [the Bank] in order for thee [sic] challenge to be properly assessed and considered."

This note was accompanied by the following letter also sent to the GHRD by one of the other employees.

> "It is with great concern that I have been made aware of the intentions of the BRP's [sic] regarding the non-payment of outstanding monies to employees of [VR Laser].
>
> I hereby raise my formal objection in this matter and request you advise on the way forward as existing case law should surely be considered.
>
> I am also not aware of any communication in this regard other than your own to any of the employees and fear that they might not even be aware of the current intention."

The above communications to the GHRD were immediately forwarded to the BRPs and their legal representative, Smit & Sewgoolam attorneys (Smit & Sewgoolam). Another letter with 141 signatures attached to it was sent directly to the BRPs and their legal representative. This letter is dated 2 November 2018. It is lengthy and contains a number of legal contentions. Their key contentions are:

> "3.2 Once a [BR] Process commences the company under [BR] should meet all of its financial commitments without the commission of any acts of insolvency.
>
> ...
>
> 3.5 In as far as the ranking of claims in a [BR] is concerned, in the cases of Merchant West Capital Solutions (Pty) Ltd v Advance Technologies & Engineering Company (Pty) Ltd & Another [2013] ZAGPJHC 109 (10 May 2014) and Redpath Mining South Africa (Pty) Ltd v Marsden N.O. & Others [2013] ZAGPJHC 148 the court held that the effect of Section 135 of the Companies Act is that claims rank as follows:
>
> 3.5.1 the [BRP] and other professionals, for remuneration and expenses;

3.5.2 **employees for any remuneration which became due and payable after [BR] proceedings began i.e. [PCF]**;

3.5.3 secured lenders or other creditors for any loan or supply made after [BR] proceedings began, i.e. PCF;

3.5.4 unsecured lenders or other creditors for any loan or supply made after [BR] proceedings began, i.e. PCF;

3.5.5 secured lenders or other creditors for any loan or supply made before [BR] proceedings began;

3.5.6 **employees for any remuneration which became due and payable before [BR] proceedings began; and**

3.5.7 unsecured lenders or other creditors for any loan or supply made before [BR] proceedings began.

4 In light of the above, all salaries and wages, employee benefits and income taxes which are significantly in arrears that became due and payable after [BR] proceedings began, as well as the retrenchment severance packages that also became due and payable to employees after the commencement of [BR], in terms of settlement of claims should rank ahead of the [Bank] as a secured lender; regardless of any general notarial bond over movable assets, which in any event was never stipulated as such in the [BR] plans or communications formally brought to the attention of employees and/or concurrent trade creditors as affected parties.

5 Even though the Bank may have a greater vote in terms of its position as secured lender **pre-[BR]**, based on current case law all amounts owing to employees – classified as ***Post Commencement Finance (PCF)*** – would **rank higher** than the banks (sic) claim as secured lender with a general notarial bond over moveable property.

...

7 In respect of all PCF outstanding amounts, in our collective view, it should not be necessary for employees to seek legal recourse to have their rights in as far as priority ranking recognised and adhered to as the Joint [BRPs] have a statutory, ethical, moral and professional responsibility to conduct [BR] proceedings within the framework of applicable legislation including case law.

8 In the light of the Bill of Rights as enshrined in Constitution of South Africa consequently implore yourselves as Joint [BRPs]

> and your advisors to demonstrate your commitment to the creation of a society based on democratic values, social justice and fundamental human rights to apply your minds collectively to all applicable legislation in order to protect poor, and who many would consider defenceless, employees who have not been paid since March 2018." (quote is verbatim)

[22] The tone and content of the note and the letter demonstrate that the employees were aggrieved at the conduct of the BRPs. They had good reason to be since, as recorded in the letter, they were required to endure a situation of having worked for several months without receiving a cent in remuneration since March 2018. This was purely a result of the BRPs conduct and decisions.

[23] The papers do not reveal whether the BRPs responded to the employees. However, the BRPs sent a letter on 2 November 2018 to the Bank alerting it to the correspondence. Their letter reads:

> " **RE: [VR Laser]-IN BUSINESS RESCUE**
>
> Further to prior correspondence on the 31st October 2018, the [BRPs] have received a formal objection to the status afforded to the [Bank's] claim termed as "secured".
>
> We attach correspondence formally recording the objection. The contention by the employees is that their entire claim ranks ahead in law to that of the [Bank]. The sum claimed as employee liabilities total R 17 575 697.11 (remuneration costs) and R 16 984 363.20 (as separation costs).
>
> In the premises, two competing points of contention exists. The [BRPs] are therefore not in a position to release any funds until the impass (sic) is either resolved in writing between the employees and the [Bank] alternatively a declaratory order is received."

[24] There are a number of problems with the letter of the BRPs.

a. First. It is not true that the correspondence (at least that which was attached to the papers) reveals that the employees

challenged the status of the Bank's claim. What the employees said is that even though the Bank's claim is secured it does not enjoy preference over their claim.

b. Second. The BRPs have no basis or reason to place the word secured in parenthesis. If by doing so they mean that they themselves are unsure as to whether the debt is secured or not, they ought to have raised their doubts the moment the Bank forwarded the claim. They did not do that. Instead, they always accepted that the debt was secured. This is manifest in all four of the BR plans they placed before the creditors. This can only mean that they had already determined that the debt was secured. By seeking at this stage to query whether the debt is protected the BRPs' conduct raises a serious question as to whether they were acting in good faith or not.

c. Third. The BRPs do not commit themselves as to whether they accepted the amounts claimed by the employees. In fact, the amounts claimed by the employees are not consistent with what they had listed in the plan. To the extent that it may be a PCF, the BRPs were obliged to stipulate in a report what the PCF amounts were and how they were computed. These were easily determinable once the employees' employment contracts were terminated. The BRPs should have spelt it out in an updated report.

d. Fourth. They stated unequivocally in their fourth plan that should a "*controlled liquidation*" process be followed, which is what they asked all the creditors and persons holding voting rights to vote on, then the secured creditors such as the Bank and the employees would receive 100 cents in the rand. If this was correct, then there would be no problem with paying over the amount received from the sale of the encumbered assets to the Bank as they intended to do before the intervention of the employees.

e. Fifth. The BRPs' plan was no longer workable as they were unable to pay both the Bank and the employees' PCF debts. They were thus required in terms of their statutorily imposed duties[2] to bring this to the attention of the affected parties immediately, and to take the necessary steps to limit the harm suffered by them. In short, in response to the employees' correspondence, they should have, at the very least, told them that it was no longer possible to pay them and the Bank in full, rather than leaving them and all other affected parties with the impression that the objectives of the plan were still achievable.

[25] As a result of the refusal of the BRPs to pay either the employees or the Bank, the employees, who have all been out of pocket because of the conduct

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[2] See s 76(3) read with s 140(3)(b) of the Act

of the BRPs, were forced to bring this application. Although not part of the relief sought, the applicants called upon the BRPs to disclose in an affidavit to this Court the amount realised from sale of the encumbered assets, from any other sources, the amounts held in trust and the amounts paid to any creditors. The BRPs chose not to respond.

The relief sought

[26] The applicants ask for:

a. a declarator to the effect that:

i. the PCF claims of the former employees of the company rank ahead of the secured claim of the Bank;

ii. the sum of approximately R32m held by the BRPs representing the proceeds of the sale of the encumbered assets shall be used to settle the former employees' claims; and,

b. an order directing the BRPs to pay the employees' PCF claims from the proceeds of the sale of the encumbered assets before settling the claim of the Bank.

[27] We know from the letter sent to the BRPs that the applicants' claim is based on their interpretation of the common law, which is that the BRPs' remuneration and other expenses rank first, their claim second and the Bank's claim third.[3] That the proceeds arise from the sale of assets which are

[3] See para 3.5 of their letter quoted in [21] above

encumbered in terms of the security held by the Bank is, according to their interpretation of the law, irrelevant. Their contention is founded upon a particular reading of *Merchant West* [4] and *Redpath Mining*[5] as well as on the outcome of the vote regarding the plan, which according to them established that the plan was accepted and was legally binding on the Bank. This, they say, is bolstered by the fact that the Bank itself voted in favour of the plan.

The Bank's case

[28] According to the Bank the vote was delinked from the plan. Moreover, it says that nowhere in the plan was the claim of the employees given preferential status over its claim. The preferential status was given in the Blain proposal which was conditional upon Blain securing new funding for VR Laser. As the Blain proposal came to nought, the preferential status accorded to the employees' claim fell away. Its case is that the PCF claims of the ex-employees of the company cannot be preferred over its claim, as its claim is protected by s 134 of the Act and the common law derived from it.

The statutory and common law concerning BR

[29] Chapter 6 of the Act innovatively introduces the concept and practice of BR into our law. It is an innovation with profound implications. It places a financially distressed company temporarily in intensive care with the sole objective of trying to rescue it, or put it on a footing where there is a reasonable prospect that it would be rescued. To achieve the objective it[6]:

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[4] *Merchant West Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd & Another* [2013] ZAGPJHC 109 (10 May 2014)
[5] *Redpath Mining South Africa (Pty) Ltd v Marsden N.O. & Others* [2013] ZAGPJHC 148
[6] Sub-section 128(1)(b)

a. allows for a temporary supervision of the affairs of the company by an independent third party referred to as a BRP[7];

b. temporarily freezes the rights of claimants to seek recourse against the company or its property; and,

c. requires the BRP to develop and implement a BR plan that is to be approved by the creditors and which will by "*restructuring its affairs, business, property, debt and other liabilities and equity*" either rescue the company and allow it to continue its existence on a solvent basis, or place it in a position where there is a reasonable prospect that it would be rescued.

[30] The plan must be prepared by the BRP(s) after consultation with the creditors, affected persons and the management of the company. It is prepared with a single purpose in mind: for consideration of, and acceptance by, creditors and other persons with voting interests.[8] It clearly anticipates the creditors taking a haircut. The plan must be divided into three parts:

a. A background which, *inter alia*,:

i. lists all the material assets, and identifies those in which (a) creditor(s) held security when the business rescue proceedings commenced;

ii. lists all the creditors of the company with an indication as to which of them "*would qualify as secured,* [statutorily]

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[7] The Act does not preclude the appointment of more than one BRP as has occurred in this case.

[8] Sub-section 150(1)

preferent or concurrent in terms of the laws of insolvency"[9];

iii. "*spell*[s] *out the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation*"[10];

iv. includes a copy of the written agreement concerning the BRP(s) remuneration[11].

b. A set of proposals, which are to include *inter alia*:

i. the order of preference to be applied to creditors who are to be paid from the proceeds of the sale of any of the company's assets if the plan is adopted[12];

ii. the benefits of adopting the plan as well as the benefits that creditors would obtain should the company be immediately placed in liquidation[13].

c. The assumptions and conditions which must *inter alia* include the conditions that must be met if the "*plan is to come into operation and be fully implemented.*"[14]

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[9] Sub-section 150(2)(a)(ii)
[10] Sub-section 150(2)(a)(iii)
[11] Sub-section 150(2)(a)(v)
[12] Sub-section 150(2)(b)(v)
[13] Sub-section 150(2)(b)(vi)
[14] Sub-section 150(2)(c)(i)

[31] The Act unequivocally requires the BRP(s) to specify in the plan the security held by any creditor.[15] It is a peremptory requirement. The clear intention is to alert all and sundry that certain assets are encumbered. There should be no doubt about the particular asset. Should a BRP(s) fail to do so, s/he would be acting in breach of the Act.

[32] Other provision germane to our case are ss 151 and 152. Section 151 compels the BRP(s) to hold a meeting of creditors and "*other holders of a voting interest*" for them to consider the plan.[16] At that meeting the BRP(s) must introduce the plan and "*inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued.*"[17]

[33] Once the plan is presented and debate over it has taken place, creditors are entitled to vote for the preliminary approval of the plan.[18] The Act sets out a requirement of a favourable vote of 75%+1 by the creditors for it to be preliminarily approved. A preliminary approval is deemed to be a final approval, in terms s 152(3)(b) and (c), if it does not alter the rights of the holders of any class of securities, or if it does, it has been approved by vote by the holders of the various classes of the securities. As the rights of the holders of the various

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[15] Sub-section 150(2)(a)(ii)
[16] The phrase "*other holders of a voting interest*" is according to an *obiter* remark by Tuchten J, "*is tautologuous and that the meeting contemplated in those sections is a meeting of creditors alone*". *Shoprite Checkers (Pty) Ltd v Berryplum CC and Others* (47327/2014) [2015] ZAGPPHC 255 (11 March 2015) at [32]
[17] Sub-section 152(1)(b)
[18] Section 152 only allows for the creditors to vote for the approval of the plan

classes of securities are not in issue here we need not concern ourselves with these sub-sections.

[34] If the plan is not approved, the BRP(s) or "*any affected person*" is entitled to ask for a vote to allow the BRP(s) to file a revised plan or to apply to a court to set aside the vote of rejection "*on the grounds that it was inappropriate.*"[19] If neither the BRP(s) nor any affected person calls for a revised plan or seeks to have the vote set aside then the BRP(s) "*must promptly file a notice of termination of the* [BR] *proceedings.*"[20] This is important for it ensures that the BR proceedings do not continue in perpetuity. In my judgment, it applies to a situation where the BRP(s) is unable to devise a plan that would rescue the company.

[35] That is the broad architecture of the Act. Of particular pertinence for our present purposes is s 134 of the Act and the common law derived therefrom. Section 134 attends to the issue of a creditor's security which was obtained prior to the commencement of the BR proceedings. It provides for the protection of the security and specifies the manner in which the encumbered asset is to be disposed of by the BRP(s). The relevant sub-section reads:

> **"Protection of property interests-**
>
> ..
>
> (3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must-

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[19] Sub-section 153(1)
[20] Sub-section 153(5)

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

(b) promptly-

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person."

[36] The provision is robust and firm. Leaving no room for doubt, the legislature has made crystal clear its intention. The security in an asset obtained prior to the commencement of the BR proceedings can only be removed with the written consent of the creditor holding the security, or if the debt associated with the security is fully liquidated, or the security is replaced in full to the satisfaction of the said creditor. The sub-section ensures that as far as the particular encumbered asset is concerned the creditor, in whose favour the encumbrance exists, will not lose the protection granted by the encumbrance without his/her consent or without his/her debt being liquidated. The protection granted to such a creditor is all encompassing, or to put it differently fully-proofed against all eventualities. Non-secured creditors whose debts arose pre the commencement of BR proceedings are not so privileged.

[37] The protected and privileged status of the secured creditor is consistent with the common law as it existed before the introduction of BR. BR did not interfere with the common law principle, it simply ensured that the BR process does not dilute or diminish it. Section 134 of the Act simply clothed the existing

common law with statutory approval. The Supreme Court of Appeal (SCA) has spoken authoritatively on this question of the security:

> "From the sections of chapter 6 that deal with security, it is apparent that security is treated in the same way as it is in the law more generally. There is, in other words, no indication that, in business rescue proceedings, security is to be diluted or undermined in any way. For instance s 134(3) provides that if a company wishes, during business rescue proceedings, to dispose of a property that is held as security by another person, it may only do so with that person's prior consent, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security; and then the company must pay the person promptly up to the company's indebtedness to him or her or provide satisfactory security for that amount. This is consistent with what was held in *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* and others, namely that the 'purpose and context' of business rescue 'are not aimed at the destruction of the rights of a secured creditor'."[21]

[38] It should be borne in mind that the BR plan should specify which creditor holds security over which asset of the company. Hence, as soon as the plan is published, all stakeholders are immediately made aware of their respective stakes and all creditors are made aware of the legal ranking of their claims *vis-à-vis* the claim of the secured creditor.

[39] That is the position of creditors whose debts are pre the BR proceedings. But what of creditors whose debts arise post the commencement of the process? Their position is attended to by s 135 of the Act, where their claims are categorised as part of the PCF. The section reads:

> "**[PCF]**-
>
> (1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due

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[21] *Diener v Minister of Justice* 2018 (2) SA 399 (SCA) at [14]. The reference for *Energydrive, Systems* is 2017 (3) SA 539 (GJ) at [18]

and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee-

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection (3)(a).

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing-

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in the order of preference set out in subsection 3(b).

(3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated-

(a) in subsection (1) will be treated equally, but will have preference over-

(i) all claims contemplated in subsection (2), irrespective whether or not they are secured; and

(ii) all unsecured claims against the company: or

(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

(4) If the business rescue proceedings are superseded by the liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation."

[40] The security attached to an asset pre the BR proceedings is not affected by the PCF as set out in s 135. Section 135 sets out the preference that PCF creditors are to receive *vis-à-vis* other creditors, save for secured ones whose claims are to be processed in terms of s 134(3) of the Act. In short, in terms of ss 135(1) read with ss 135(3)(a) the remuneration due to employees post the commencement of the BR proceedings receive preference over some PCF

creditors[22] and over the pre BR unsecured creditors, but it does not place them in preference to those pre BR proceedings secured creditors.

[41] In the result, the applicants' first contention that their PCF claims reign superior to that of the Bank is incorrect. Should this have been the only contention it would be rejected and the BRPs would be made aware that they are obliged in law to pay over the proceeds of the sales of the encumbered assets to the Bank forthwith.

[42] It is to the second contention of the applicants that I now direct my focus: that their PCF claims have been ranked higher in the fourth plan which was adopted in accordance with the provisions of the Act. And, they contend further, that by voting in favour of that plan the Bank had waived the protection it enjoyed in terms of s 134(3) of the Act. Apart from being factually problematic, the contention is legally flawed.

[43] The BRPs did not comply with their legal duties by calling for the vote in the manner they did. Legally, they were required, and are only allowed, to call for a vote on the acceptance or rejection of their fourth plan. The fourth plan contained a proposal from Blain to manage VR Laser. This proposal was not recommended by the BRPs and withdrawn by Blain. Thereafter the BRPs decided to engineer a situation where they would continue to control the affairs of the company while they engaged in a "*controlled liquidation*" process. This,

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[22] the BRP's remuneration and some expenses in terms of s 143, which are not relevant for our purposes, rank higher than the employees' PCF claim

the law does not allow. Once there was no proposal to rescue the company, or place it in a position where it would have a reasonable prospect of being rescued, the BRPs were obliged to proceed in terms of s 153(5) to "*promptly file a notice of termination of the* [BR] *proceedings*", as BR had reached a *cul-de-sac*. In short, having put four plans before the two meetings (the second meeting ran over many days – it sat for a day then was adjourned for another day and so on until 12 June 2018) of creditors and "*other holders of a voting interests*", the BRPs had run out of options. Hence, their request for an opportunity to engage in a "*controlled liquidation*" process.

[44] The BRPs had taken it upon themselves to liquidate the company while the BR proceedings were still active. This as I said earlier is unlawful. A liquidation is an alternative to a BR: a BR process is designed to rescue not liquidate a company. It cannot be used to circumvent the liquidation process. The latter takes place in terms of the Insolvency Act 24 of 1936. The BRPs may believe that they had received the approval of more than 75% of the creditors to engage in a "*controlled liquidation*" allowing them to circumvent the liquidation process contemplated by the Insolvency Act. That belief is of no moment. It bears noting, too, that it was they who made the proposal that the BR process be exploited to liquidate the company. In addition, the manner in which they couched the proposal made it very difficult for the creditors to reject it. The proposal was presented as being part of the fourth plan thereby allowing them to act (once the vote was counted) as if they were still in control and the company was still in BR. And, it cannot go unnoticed that they stood to benefit

handsomely from this "*controlled liquidation*", as they were to receive a fee of 5% of the "*actual sale*" of any asset.[23]

[45] Furthermore, insofar as the BRPs in their fourth plan decided to elevate the PCF claims of the employees above that of the Bank they acted, again, unlawfully. They do not have the legal authority to destroy the security enjoyed by the Bank. That security was at all times legally protected by ss 134(3) of the Act and the common law. The BRPs failed to take note of s 134(3) of the Act and treated the security held by the Bank as if it fell under s 135 of the Act. The security referred to in s 135 of the Act refers to security given to a creditor whose debt arises post the commencement of the BR. That debt, in terms of the law as set out is section 135(2)(a) of the Act, is one that arises from a BRP obtaining finance by encumbering any non-encumbered asset of the company in order to run the company while it is in BR. The Bank's debt and the security it obtained in this case was not obtained in terms of s 135(2)(a) of the Act. It arose prior to the commencement of the BR. It follows that its security could not be confused with the security obtained in terms of s 135(2)(a).

[46] Furthermore, the Bank's vote in favour of allowing the BRPs to commence with a "*controlled liquidation*" did not establish as a fact that the Bank had waived its right to its security. The Bank was never asked to waive its security. There was no explicit waiver of its security. It was, like all other creditors, asked to vote for a "*controlled liquidation*" not to vote on its security. And, it was promised that should the option of a "*controlled liquidation*" be

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[23] See the quote in [4] above

accepted, it would receive 100 cents in the Rand, and given the terms in which the vote was couched it would be a strained conclusion to treat its vote as a tacit waiver on its part. The Bank said that on its understanding it was only voting in favour of a "*controlled liquidation*" in terms of which it was guaranteed full repayment of its debt. In the light of the contents of the voting slip its understanding is not unreasonable. The Bank also points out that at the 12 June 2018 meeting, on the strength of an undertaking made by the BRPs, the BRPs were directed to ensure "*that no compromise of claims shall be effected on the declaration of interim dividends.*" Thus, it says, there was an understanding by all that its and the other creditors' claims would not be compromised. The minutes of that meeting support the claim of the Bank. It follows that even on a factual basis the applicants' second contention is incorrect.

The BRPs' conduct

[47] Before closing it is necessary to record that in my judgment the BRPs were reckless in the following respects:

a. by promising the employees that they would be paid all their PCF claims in full once the BR proceedings were terminated. They held on to this promise for a period of two months during which period they failed to pay any of the employees their salaries. They had to be pressurised by the first applicant, Numsa, to initiate the process contemplated by s 189 of the LRA. It was only then that they took the responsible decision to terminate the

employment contracts. As a result of their conduct, the employees remain out of pocket for a substantial sum of money.

b. by failing to take note of ss 134(3) of the Act;

c. by elevating the PCF claims of the employees over the secured claim of the Bank;

d. by pursuing a liquidation process under the auspices of a BR;

e. by failing to accept the invitation to inform this Court of the exact amount realised from the sale of the encumbered assets, the exact amounts received from the sale of any other assets, the total amounts held in trust by themselves and amounts paid out to any creditor.

[48] This case highlights in acute form the need for creditors and other stakeholders to reign in the BRPs in order to ensure that BR is not abused, or does not cause considerable harm, or does not result in the BRP(s) being the main beneficiaries of the process. In this case the BRPs and Smit & Sewgoolam have earned a considerable amount of money from the BR process.

[49] To conclude, the application cannot, on a fair analysis of the facts and the law, succeed. Although the Bank did not bring a counter-application it

would be appropriate to indicate clearly that the BRPs are obliged to promptly pay over the proceeds of the sale of the encumbered assets to the Bank.

Costs

[50] At the hearing the Bank did not pursue the issue of costs with any vigour. It, according to its counsel, was agnostic on this issue. It recognised that the employees were placed in an invidious positon by the manner in which the BR process had unfolded and by the conduct of the BRPs forcing them to approach the court for assistance. They acknowledged that the application was *bona fide* and born from the desperation of the employees. As for the first applicant the Bank acknowledged that had it not assisted the employees they would not have been able to seek the assistance of the court and therefore did not pursue a claim for costs against it. It follows that each party should be bear its own costs.

Order

[51] The following order is made.

a. The application is dismissed.

b. Each party is to pay its own costs.

Vally J

Dates of hearing:	5 February 2020
Date of judgment:	10 March 2020
For the Applicant:	L M Spiller
Instructed by:	Cheadle Thompson and Haysom Inc
For the Fourth Respondent:	A Bham SC with Avasthi Kolloori
Instructed by:	Mervyn Taback Inc