Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case numbers: 5417/2014
9609/2014
12862/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing: 11 October 2021
Judgment: 24 November 2021

In the matters between:

PIERRE DU PLESSIS KRIEL N.0. (In his capacity as curator of the business of Rockland Asset Management and Consulting (Pty) Ltd)	Applicant/Plaintiff

and

ROCKLAND GROUP HOLDINGS (PTY) LTD	Respondent/Defendant
BORN FREE INVESTMENTS 247 (PTY) LTD	Respondent

and

BORN FREE INVESTMENTS 247 (PTY) LTD	Applicant

and

PIERRE DU PLESSIS KRIEL N.0. (In his capacity as curator of the business of Rockland Asset Management and Consulting (Pty) Ltd)	Respondent

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JUDGMENT

(Delivered by email to the parties and release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on 24 November 2021.)

BINNS-WARD J:

[1] Pierre Du Plessis Kriel is the duly appointed curator of the business of Rockland Asset Management and Consulting (Pty) Ltd ('RAM'). He was appointed in that capacity in orders in terms of s 5(2), and thereafter s 5(4), of the Financial Institutions (Protection of Funds) Act 28 of 2001 ('the FI Act') made in case no. 15844/2012 during 2012. He was also appointed as curator of two bewind trusts, Rockland Targeted Development Investment Fund ('TDI') and Rockland Property Investment Fund ('PIF'). I shall refer to him in this judgment as 'the curator'.

[2] In his capacity as curator of RAM, the curator is the plaintiff in pending litigation against Rockland Group Holdings (Pty) Ltd ('RGH') in case no. 5417/2014, in which he is claiming the capital sum of R31 282 386.46 in repayment of a loan made by RAM to RGH**.** I shall refer to the action between RAM and RGH as 'the loan claim action'. RGH's defence in that action is that the loan is not repayable on demand, but only out of dividends declared by RAM which RGH would become entitled to receive.

[3] In other proceedings, in case no. 9609/2014, the curator is the defendant in an action instituted by Born Free Investments 247 (Pty) Ltd ('Born Free'). In that matter Born Free claims payment of R2 896 165,68 as the capital sum allegedly owed to it by RAM in respect of rental for certain premises in Wynberg from which RAM used to conduct its collective investment scheme and financial services provider businesses. I shall refer to that action as 'the rental claim action'.

[4] RAM's sole director and chief executive officer at the time it was placed under curatorship was Mr Wentzel Oaker ('Oaker'). Global Pact Trading 151 (Pty) Ltd ('Global Pact') was the corporate trustee of both TDI and PIF until they were placed under curatorship. Oaker was Global Pact's nominee trustee of TDI and PIF in terms of s 6(4) of the Trust Property Control Act 57 of 1988. RAM had a management contract with each of

TDI and PIF. TDI's beneficiaries are, and at all times have been, certain trade union and employee pension funds and provident funds. In the context of the factual and statutory context of the current case it is convenient to refer to the aforementioned funds as 'the investors'.

[5] TDI's major asset is its investment in PIF. TDI is the sole beneficiary of PIF.

[6] RGH, of which Oaker is the sole director, is the sole shareholder in RAM, Global Pact and Born Free. RGH's sole shareholder is the Johnny Bravo Trust. The Johnny Bravo Trust was founded by Oaker. Oaker and his wife are the trustees, and the beneficiaries include Oaker's wife and children.

[7] On the basis of the interrelationships just described, the curator's attorney, who was the deponent to the principal affidavit on the curator's behalf in the current proceedings, averred that Oaker 'had effective control over every aspect' of what he called 'the TDI structure'.

[8] The curator was appointed pursuant to an application by the Financial Services Board ('FSB') (the precursor of the current Financial Sector Control Authority) consequent upon a complaint by one of the investors and an investigation by FSB into the way in which the business of RAM was being conducted.

[9] The order placing RAM under curatorship contains a provision (in para 6.2) in the following terms '*whilst the curatorship exists, all claims, actions, proceedings, the execution of all writs, summonses and other processes against any of the entities* [are] *stayed and not instituted or proceeded with, without the leave of the Court*'. The provision, although ineptly framed because it went beyond the wording of the empowering provision, is of the sort expressly provided for in 5(5)(a) of the FI Act[1] as one of an open-ended list of directions that

[1] Section 5(5)(a) of the FI Act provides: '*The court may, for the purpose of a provisional appointment* [of a curator] *in terms of subsection (2)(a) or a final appointment in terms of subsection (4), make an order with regard to – (a) the suspension of legal or foreclosure proceedings against the institution for the duration of the curatorship*'.

a court is empowered to give when making an order in terms of s 5(1) of the Act appointing a curator to an 'institution' (as defined).

[10] Born Free instituted the rental claim action without first obtaining the leave of the court, and accordingly in breach of the aforementioned provision of the curatorship order. The curator raised an objection by way of a special plea in abatement. The special plea had a somewhat tortuous history. It is fully described in the appeal court's judgment in *Born Free Investments 247 (Pty) Ltd v Kriel NO* [2019] ZASCA 21 (26 March 2019). That court ultimately ordered that the rental claim action be stayed pending (i) an order by this Court granting Born Free leave to proceed with the action, or (ii) the termination of the curatorship.

[11] In the current proceedings, in case no. 12862/2019, Born Free seeks leave to proceed with the action in case no. 9609/2014. The curator opposes Born Free's application. He contends that Born Free should be permitted to proceed to trial in its action only if the action is consolidated for hearing together with the loan claim action. The curator has applied for such a consolidation. He has also contingently counter-applied in the application by Born Free for an order staying the prosecution of the action in case 9609/2014, if Born Free is granted leave to proceed with it, until after the determination of his action against RGH in case no. 5417/2014

[12] Born Free opposes the consolidation application. It says that there is no commonality of issues between the two actions and that a consolidation would not be convenient. On the contrary, a consolidation would involve Born Free in an unduly prolonged and expensive trial, protracted by the hearing of evidence on issues in which it had no interest. It bears mention that in Born Free's replying affidavit, the deponent, Mr Wentzel Oaker, testified that RGH had applied as a matter of urgency for the uplifting of the curatorship of RAM, TDI and PIF, alternatively the appointment of substitute curators. It is unnecessary for me to say

anything about those proceedings, save that Born Free did not press for a postponement of the current proceedings on account of them.[2]

[13] A dismissal of the application for leave to proceed would not involve the dismissal of the rental claim action. The only import of a dismissal of the application would be that Born Free's action could not proceed *at this stage*. That was the clear implication in the appeal court's decision to set aside a decision by the full court to dismiss the action when the latter court upheld the curator's special plea.[3] The curator's contingent counter-application for a stay of the rental claim action is consequently, in essence, the other side of the coin of Born Free's application for leave to proceed. The core issue for determination is therefore whether Born Free's ability to proceed with its pending action should be fettered in either of the ways proposed by the curator, viz. by consolidation with the loan claim action or by being stayed until after the loan claim has been finally adjudicated.

[14] The curator has indicated that he will not oppose Born Free's application for leave to proceed with the rental claim action if that action is consolidated for hearing with the loan claim action. Implicit in that concession is a recognition by the curator that the effect of the appeal court's order is that his only basis for preventing Born Free's action going ahead goes not to *whether* that should happen, but rather as to *when* it should be permitted to happen. On

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[2] In Born Free's answer to the curator's application for a consolidation of the actions, Oaker submitted that in the event of the court not being disposed to dismiss the application, it should be postponed for hearing after the determination of RGH's application for the cancellation of the curatorship. The court was informed in the heads of argument filed by the curator's counsel that the latter application has in point of fact since been dismissed and that an appeal by RGH from that decision is pending.

[3] The full court's judgment (per Dolamo J, Hlophe JP and Le Grange J concurring) is listed on SAFLII as *Kriel NO v Born Free Investments 247 (Pty) Ltd* [2017] ZAWCHC 122 (13 October 2017). The full court's finding that the institution of the rental claim action without the prior leave of the court rendered the action null and void (see para 29 of the judgment) was reversed on appeal. The appeal court found the full court's conclusion in that regard to be unjust, and incompatible with Born Free's fundamental rights in terms of s 34 of the Constitution (see para 15 of the SCA's judgment). The court could, in my respectful opinion, also usefully have found that on a proper interpretation of s 5(5)(a) of the FI Act a court does not have the power to prevent the institution of legal proceedings, merely the power to order that any proceedings instituted be suspended, for the duration of the curatorship, and that the pertinent provisions of the curatorship order fell to be read down accordingly.

any approach he has no objection to the rental claim action going to trial after the determination of the loan claim action.

[15] I consider that the question of when, or in what circumstances, the court should give leave to a party to proceed against a company under curatorship in terms of the FI Act when the order placing the company under curatorship includes a provision provided in s 5(5)(a) of that Act must be decided with due regard to the apparent purpose of the restriction imposed in terms of the curatorship order. The purpose of such a restriction in the legislative scheme created by the FI Act has to be a central consideration. That follows because it must be assumed that the court which made the curatorship order incorporated the restriction as part of the order for the very purpose of giving effect to the legislative scheme in the context of the given facts. The obvious intention behind the provisions of s 5(5) is to empower the courts to craft orders that will lend efficacy and efficiency to the curatorship of the institution concerned.

[16] A curator appointed under the FI Act discharges his or her functions under the oversight of the Financial Sector Control Authority,[4] which is referred to in the language of the statute as 'the registrar'. It is the registrar who is invested with the authority in terms of the FI Act to apply to court for the appointment of a curator to an institution. At the time RAM and various related entities were placed under curatorship in 2012 and 2013, the registrar's decision to apply to have an institution placed under curatorship would ordinarily be informed by the report of an inspection into the affairs of the institution in terms of the (since repealed) Inspection of Financial Institutions Act 80 of 1998. The appointment of a curator is a means to seek to achieve one of the objects of the FI Act which is to protect invested funds and 'trust property' (as defined).[5]

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[4] Section 5(6) of the FI Act.

[5] 'Trust property' is defined in s 1 of the FI Act to mean '*any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership,*

[17] The appeal court had occasion to consider s 5(5) of the FI Act in *Ovation Preservation Pension Fund and Others v Executive Officer, Financial Services Board* 2009 (1) SA 485 (SCA). Leach AJA noted that curatorship orders are more often than not required when financial institutions are in crisis, and that in order to be effective '*drastic steps might have to be taken, even if they impinge on the rights of third parties*'.[6] He referred in this regard to the observations in a full court judgment of this Division (Friedman JP and Brand and Farlam JJ) in *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) at 798A-C, which stressed that the object of the legislation (in that case Act 39 of 1984, the predecessor of the 2001 FI Act) was the protection of the public from the potential consequences of the mismanagement or collapse of financial institutions as defined in the Act. The full court noted that achieving that object permitted of orders being made with '*far-reaching effects on the rights of third parties*'. In *Ovation*, Leach AJA pointed to s 5(5)(a) of the FI Act as a manifestation of the legislature's recognition that '(d)*rastic times require drastic measures'*. The learned judge explained that a curtailment of third parties' rights to the extent reasonably necessary to assist in the achievement of the purpose of a curatorship was justifiable for sound policy reasons.[7]

[18] The reference in s 5(5)(a) of the FI Act to the suspension of 'foreclosure proceedings' indicates that that the suspension of rights permitted in terms of the provisions goes not only to proceedings in respect of disputed claims but also to those in respect of the enforcement of the consequential rights arising out of the admitted or uncontested indebtedness of the institution under curatorship. It is a characteristic of the provision that weighs against the argument of Born Free's counsel that the statutorily authorised suspension is primarily

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company or trust for, or on behalf of, another person, partnership, company or trust, and such other person, partnership, company or trust is hereinafter referred to as the principal'

[6] In para 11.

[7] In para 17-18.

directed at sparing curators from vexatious claims of no merit and at giving curators time in the early stages of a curatorship to investigate the validity of claims against the institution under curatorship, and that orders made in terms of the provision should be applied restrictively in accordance with those objects.

[19] Born Free contends that the order in terms of s 5(5)(a) of the FI Act impinges on its rights in terms of s 34 of the Bill of Rights. The appeal court's judgment in respect of the curator's special plea in the rental claim action acknowledged as much. There is, however, sensibly, no attack by Born Free on the constitutionality of the provision. Any court seized of an opposed application for leave to proceed against an institution during a curatorship should, nevertheless, be mindful of the limitation of constitutional rights occasioned by any order in terms of s 5(5)(a) and weigh the competing interests involved with appropriate regard to proportionality.

[20] I agree with the submission by Born Free's counsel that the respective applications for leave to proceed and for consolidation fall to be decided discretely notwithstanding the manner in which the curator's approach might appear to make the outcome of the former contingent on the determination of the latter. The curator's willingness to concede the lifting of the stay on the rental claim action if it is consolidated for hearing with the loan claim action makes it appropriate to consider his application for a consolidation of the actions first.

Should the actions be consolidated for hearing?

[21] The matter of the consolidation of actions is regulated in terms of rule 11 of the Uniform Rules of Court. The test is one of convenience, bearing in mind that the general object is that the separate actions involved will be determined in one judgment at the end of a single trial. The convenience is not that of one or the other party, but in the practical conduct of the proceedings. If it appears convenient to a court to consolidate one or more pending

actions, it may give special procedural directions to facilitate the attainment of the aforementioned general object of consolidation.

[22] Considerations that militate in support of the convenience of a consolidation of actions include matters such as a commonality of parties and issues, the limitation of costs and the more efficient use of court time and resources. It can also be convenient to consolidate actions to avoid the risk of an unwholesome disparity of outcome on a single issue were it to be determined in separate actions.[8] There is no closed list of matters that could bear on what might make it appear to a court to make it convenient in a given situation that actions should be consolidated, but the criterion is always whether the efficient conduct of the proceedings or the court's business would be assisted by consolidation.

[23] Notwithstanding that a consolidation of actions might be convenient, a court will, however, refuse an application for consolidation should it be apparent that it would materially prejudice any of the affected litigants. Where prejudice falls to be considered, the court weighs whether any prejudice occasioned thereby to the opposing party might be substantial enough to outweigh the advantages of the apparent convenience of consolidation; cf. *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 69B. The exercise that is involved is a manifestation of the court's discretion in the use of its inherent power, now formally entrenched by s 173 of the Constitution, to regulate its process and procedure.

[24] There is no commonality of parties or issues between the rental claim action and the loan claim action. The curator might be a party in both actions, but that in my view does not constitute a commonality of parties when the other parties in the respective actions are different and so are the matters in issue in the actions. The only commonalities that the

[8] Cf. *Nel v Silicon Smelters (Edms) Bpk en 'n Ander v Nel* 1981 (4) SA 792 (A) at 802B-D. That would constitute an instance in which it would be appropriate for the court to hear two or matters together irrespective that the facility or ease of doing so might not be particularly evident; cf. *Mpotsha v Road Accident Fund and Another* 2000 (4) SA 696 (C) at 700I-701A. For an example of a case in which consolidation was found to be inappropriate notwithstanding a high degree of commonality of parties and issues, see *AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings NV and Another; AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings NV and Others* [2020] ZAWCHC 46 (4 June 2020) at para 15-16.

curator's attorney has been able to identify are that the litigants' legal representatives are the same in both matters and that Oaker will be a key witness in both matters. He claims that there will be saving in costs if both actions are tried together, but even if that were so, which is by no means clear, it would be a saving of costs only for the curator. I cannot see that a consolidation would bring about a saving for either Born Free as plaintiff in the rental claim or RGH as defendant in the loan claim. It might well be convenient for the finalisation of the curatorship for the two actions to be determined together, but I do not consider that to be the type of convenience that is a relevant consideration for the purposes of rule 11 because it is unrelated to any forensic convenience of trying the actions together. Rule 11 is concerned with convenience in relation to the conduct and management of court proceedings.

[25] Accordingly, even if leave were granted for the rental claim action to proceed, I would not be satisfied that a case for consolidation of it with the loan claim action had been made out.

Should Born Free be granted leave to proceed?

[26] In its heads of argument Born Free advanced its argument that it should be granted leave to proceed with reference to authorities such as *Orion Pacific Traders Inc v Spectrum Shipping Ltd* 2006 (2) SA 586 (C) at 590C-D, *De Jager v National Employers' Mutual Insurance C*o 1957 (3) SA 91 (T) at 96H-97F and *Ex parte Hartley* 1964 (4) SA 598 (W) at 599H. The first mentioned case was concerned with the test for leave to be granted to an intending plaintiff to institute proceedings by edictal citation, and *De Jager* and *Hartley* were about leave to sue *in forma pauperis*. All three judgments were directed at deciding whether in the particular circumstances the intending litigants should be permitted to institute proceedings in a particular manner. The issue in the current matter is quite distinguishable from the sort of questions involved in those cases. The question is not whether Born Free should be granted leave to sue, but rather whether, having instituted proceedings, it should be

permitted *at this stage* to take the rental claim action to trial in the face of the extant order in terms of s 5(5)(a) of the FI Act and the abovementioned judgment of the appeal court in respect of the curator's special plea in those proceedings.

[27] Having regard to the aforementioned object of s 5(5)(a), the answer to the question must lie in whether it would be inimical to the effective conduct of the curatorship in the interests of investors for the suspension of proceedings incorporated in the curatorship order to be lifted to allow Born Free's pending action to go to trial now, rather than at a later stage or after the termination of the curatorship. If it would be inimical, that would suggest that the suspension should not be lifted. An exception might arise only if notwithstanding the disadvantageous implications for the curatorship of the matter going to trial now, the prejudicial consequences to Born Free of a delay would be such as to impel granting it an exception from the general effect of the order in terms of s 5(5)(a).

[28] It follows from this that the onus, or burden of persuasion as I think it is more accurately characterised, is on Born Free to show that leave should be granted. I do not agree with the submission by Born Free's counsel that the curator is in the position of an applicant seeking a stay of proceedings against it. A stay is already effectively in place by virtue of the order previously made in terms of s 5(5)(a) of the FI Act, the effect of which was confirmed in the decision of the appeal court. I reiterate in this regard the observations made in paragraph [13] above. The fact that the curator has chosen to contingently counter-apply for a stay does not alter the situation.[9] The appeal court's judgment and order confirmed the

[9] For this reason, I do not consider there is any profit in the circumstances of the current matter, where a stay is already in place, in Born Free's reliance on authority such as Solomon JA's dictum in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 273 that '*strong grounds must be shown to justify a Court of Justice in staying the hearing of an action .... and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action*'. As pointed out by Navsa J in *Williamson v Schoon* 1997 (3) SA 1053 (T) at 1066H-I, the effect of the sort of stay that is currently in place in this case is sometimes to delay justice, but never to deny it; *'...it is always visualised that the Court will eventually and finally try and decide the matter which it stayed*'.

incidence and import of paragraph 6.2 of the provisional curatorship order, which was entrenched in the final order.

[29] The curator's position is that allowing the rental claim action to proceed to trial at this stage would be detrimental to the investors' interests. It is necessary to sketch the background circumstances to understand the basis for the curator's position.

[30] In his capacity as curator of TDI and PIF, the curator instituted two actions against Oaker, Global Pact, RAM, the Johnny Bravo Trust and certain other parties. Those actions were consolidated for the purposes of trial before Mrs Justice Ndita. According to the curator's attorney, the claims involved in the consolidated actions 'were complex, but in essence alleged dishonest conduct on the part of Mr Oaker and others which resulted in self-enrichment to the detriment of the [investors]'. The court seized of those matters has delivered a preliminary judgment against the defendants, the only issue outstanding being the finite determination of the monetary amounts of the awards. The curator's attorney has testified that the Judge made 'a considerable number of credibility findings against Mr Oaker and adverse comments about his conduct, including his abuse of his control of the TDI structure by concluding agreements in which he represented both parties and which benefitted, amongst others, [the] Johnny [Bravo Trust]'. In Born Free's replying affidavit, Oaker stressed that Judge Ndita's judgment is 'incomplete' and 'may well be subject to an application for leave to appeal and an appeal thereafter'.

[31] In Ndita J's preliminary judgment, RAM has been found jointly and severally liable to TDI and PIF in a provisionally determined amount of just over R62 million in damages related to the diversion of a corporate opportunity and also in provisionally determined amounts of over R26,8 million and R26,6 million, respectively, by way of an obligation to repay management fees and performance fees to TDI and PIF. The curator's attorney has pointed out that whilst the aforementioned figures are susceptible to revision in the final

judgment that has yet to be delivered, they may safely be relied upon for the purpose of assessing RAM's financial condition. The extent of RAM's provisionally determined liability to TDI and PIF far exceeds the value of its only asset, which is the loan claim action described in paragraph [2] above.[10]

[32] In the context of the situation sketched in the preceding paragraph, the principal affidavit in opposition to Born Free's application for leave to proceed to trial in the rental claim action described the basis for the curator's position as follows in para 28 to 31:

> 28. Should the RGH loan action therefore be successfully defended by RGH, RAM would not have assets and would have to be liquidated. Even if the RGH loan action were to succeed, and the loan repaid to RAM, it is very probable that RAM's liabilities will exceed its assets, that RAM will be liquidated, and that the Born Free rental action, if successful, would result in Born Free becoming merely a concurrent creditor in RAM's insolvent estate. The biggest creditors by far would be TDI and PIF, represented by Mr Kriel.
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> 29. In the premises, proceeding with the Born Free rental action would be detrimental to the pension funds whose interests Mr Kriel is enjoined to represent. Legal fees would be incurred, to no purpose. From the perspective of Born Free, too, there is the possibility - indeed the probability - that it would be litigating against a company that will in due course be wound up.
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> 30. It is on those grounds that the application of Born Free to proceed with the Born Free rental action is opposed. The purpose ... of the order... requiring the leave of the Court to proceed with an action such as the Born Free rental action is precisely the protection of the pension funds from a further dissipation of their investments in TDI through incurring unnecessary legal costs. In the alternative, the incurring of unnecessary legal costs that would result from the Born Free rental action proceeding may be prevented by an order granting Born Free its leave application, but directing that the matter be stayed pending the finalisation of the RGH loan action. If the RGH loan action were to be unsuccessful, there would be no purpose in proceeding with the Born Free rental action: RAM would have no assets at all.

[10] In reply, Oaker contends that the quantification calculations that will inform the final judgment to be given by Ndita J in the consolidated actions will 'in all probability' require the curator to make payments from the bewind trusts to RAM rather than vice versa. The evidence does not qualify this court in the current proceedings to make any assessment one way or the other as to validity of the contention.

31. However, instead of either dismissing the leave application or staying the Born Free rental action, I respectfully say that the best course of action would be to consolidate the Born Free rental action with the RGH loan action. I respectfully say that convenience favours consolidation. Should this honourable Court be minded to grant an order of consolidation, Mr Kriel would of course not persist with his opposition to the leave application or with his application, in the alternative, for a stay of the Born Free rental action.

[33] Born Free's counsel stressed that the curator's plea to the rental claim against RAM was nothing more than a bare denial. He pointed out that RAM (under curatorship)'s annual financial statements for the years ended 28 February 2013, 2014 and 2015 disclosed a rental liability by RAM to Born Free and implied that it could be inferred that the curator's contestation of the rental claim was not bona fide, and merely a stratagem to delay payment. They argued that these indicators afforded cogent grounds for the court to lift the stay in place by virtue of the order in terms of s 5(5)(a) of the FI Act and grant Born Free leave to go to trial in the rental claim action.

[34] The treatment of Born Free's rental claim in the financial statements is rather peculiar. The 2013 statements reflect the claim (s.v. '*Trade and other payables*') in the amount of R933 563 at the end of the 2012 financial year rising to R1 473 428 at the end of the 2013 year, which remained the case at the end of the 2014 year before reducing to R854 684 in the 2015 year. The reason for the reduction of the liability reflected in the 2015 year is not apparent. The notes to the financials in each of the years mentioned do however refer to the contested litigation and caution that '(t)he outcome of this litigation may require an amendment to the amount due to Born Free Investments 247 Proprietary Ltd'. The notes also indicate doubt or uncertainty concerning the 'fair value' of Born Free's rental claim.

[35] A contextual assessment of this information, having regard to the evidence referred to earlier concerning allegations about Oaker's self-enriching abuses in the administration of the structure of which RAM and Born Free were part, suggests that Oaker's alleged involvement

as the controlling mind of both parties to the lease might bear in some way on the bona fides and enforceability of the contracts. No such defence has been expressly pleaded in the curator's general plea in the action, which merely denies the conclusion of the alleged lease agreements and puts Born Free to the proof thereof, but the cogency of this inference is supported by the nature of the questions put by the curator in his request for trial particulars.

[36] This court is no position to predict the outcome of the rental claim action. Suffice it to say that I am not persuaded that the opposition to it is bogus. But even were I in a position to determine that the curator's prospects of successfully resisting the claim were weak, that would not be determinant of Born Free's application for the lifting of the stay. For, as discussed earlier, the suspension of legal proceedings provided for in terms of s 5(5)(a) of the FI Act can apply even in respect of proceedings for the enforcement of an acknowledged indebtedness. The primary consideration is whether the lifting of the stay would be inimical to the interests of the curatorship, and thereby to those of the investors.

[37] The uncontested evidence is that RAM's only asset is its loan claim against RGH. It is implicit in the curator's position that he would see no point in incurring the costs of going to trial in Born Free's rental claim action if RAM does not succeed in obtaining judgment in its favour in the loan claim action. The investors' prospects of making a recovery from RAM depend on the latter's ability to successfully pursue and realise its loan claim. A conservation of resources for the purpose of pursuing that litigation does therefore appear to be in the interest of the effective conduct of the curatorship and ultimately of the investors.

[38] The curator has admitted that even if the loan claim action is successful and the resultant judgment claim realised, RAM could still be in a position in which its liabilities exceed its assets. That, however, is a bridge still to be reached. Whatever the ultimate position, the curator will not be able, in the proper discharge of his functions, to make a distribution to RAM's creditors that does not account for Born Free's pending rental claim.

Born Free will also not be in any worse position even if the curator is obliged to apply for RAM's liquidation. Therefore, except for prejudice occasioned by delay that is inherent in the stay that is already in place by virtue of the order in terms of s 5(5)(a), I do not consider that Born Free has advanced cogent grounds for lifting the stay.

[39] Indeed, Born Free has not disclosed how, in the context of RAM's current financial state, there would be any benefit to it in obtaining a judgment on its rental claim before RAM has succeeded in obtaining judgment against RGH. It maintains that is of no concern of anyone but itself. The only benefit that I am able to conceive of would be the ability it would thereby obtain to attach and sell in execution RAM's claim against RGH. Such an eventuality would obviously be inimical to the effective conduct of the curatorship.

[40] In all the circumstances I have not been persuaded that it would be appropriate to lift the suspension of proceedings currently in place in respect of Born Free's rental claim action by granting it leave to proceed to trial.

[41] As Born Free's application for leave to proceed with the rental claim action at this stage is to be refused it is not necessary to deal with the curator's contingent counter-application in case no.12862/19 for a stay. Suffice it to say that the very notion of a fresh stay is counterintuitive, for if there were good reason to lift the stay currently in place by virtue of para 6.2 of the curatorship order and para 3(b) of the order made by the Supreme Court of Appeal, it would be difficult to conceive that there could be good reason pari passu to replace it with a fresh stay. I mention the point only because if it should appear that the contingent counter-application occasioned any additional costs in the proceedings (something which is not clear, and for the taxing master to determine), Born Free should not have to bear them as an incident of the costs awarded in favour of the curator in case no. 12862/19.

Order

[42] In the result an order will issue as follows:

1. The application by Born Free Investments 247 (Pty) Ltd in case no. 12862/19 for leave to proceed to trial in the action in case no. 9609/14 is refused with costs, including the fees of two counsel where such were engaged.
2. The further conduct of the said action remains subject to suspension in terms of paragraph 6.2 of the provisional order made in terms of s 5(5) Financial Institutions (Protection of Funds) Act 28 of 2001 in case no. 15844/12 on 20 August 2012 and confirmed in the final order made on 6 December 2012 and paragraph 3(b) of the order of the Supreme Court of Appeal dated 26 March 2019 in SCA case no. 1183/17.
3. The application by Pierre Du Plessis Kriel N.O. for an order consolidating the actions in case no.s 5417/14 and 9609/14 for purposes of trial is refused with costs, including the fees of two counsel where such were engaged.
4. Subject to the observations in paragraph 41 of the judgment, no order is made in regard to the contingent counter-application by Pierre Du Plessis Kriel N.O. in case no. 12862/19 for a further stay of proceedings in case no. 9609/14.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's (Born Free and Rockland Group Holdings) counsel:	**J.G. Dickerson SC** **F.J. Gordon-Turner**
Applicant's attorneys:	**Bradley Conradie Halton Cheadle** **Cape Town**
Respondent's (the Curator) counsel:	**E.W. Fagan SC** **M.W. Janisch SC**
Respondent's attorneys:	**Werksmans** **Cape Town**