

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
28 NOVEMBER 2023      VALLY J	

**Case Number: 2021/ 27241**

In the matter between:

**ABSA BANK LTD**

Applicant

and

**GRAVITATE MULTI VIDEO CONTENT (PTY) LTD**

First Respondent

**JUSTICE KUDUMELA N.O.**

Second Respondent

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**LEGAL SUMMARY**

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The applicant, ABSA Bank Ltd (ABSA), a major creditor of the respondent, Gravitare Multi Video Content (Pty) Ltd (Gravitare), applied for provisional winding-up of Gravitare, and before the application was heard, an application to place Gravitare into business rescue was brought and granted by the Court. The effect was that the winding-up application was put into abeyance – in terms of section 133 the Companies Act 71 of 2008 (the Act) a moratorium was placed on all legal proceedings against Gravitare. ABSA now applies to resume its winding-up application as well as

to uplift the moratorium, and asks the Court to order the winding-up of Gravitare. The second respondent, the Business Rescue Practitioner (BRP), opposes the application; and seeks condonation for the late filing of his answering affidavit.

The Court found that though the application for condonation for the late filing should be dismissed as the BRP's explanation for the delay in filing is woefully inadequate and Gravitare does not have a *bona fide* defence to the winding-up application of ABSA, the Court cannot turn a blind eye to the conduct of the BRP revealed by the undisputed facts and consequently admitted the answering affidavit (and admitted the BRP's late supplementary affidavit for the same reasons).

The Court held the conduct of the BRP has to be assessed according to the duties imposed upon him by the Act. The Court found he failed to comply with his obligations as prescribed in the Act, in particular, as regard the following sections: 141, 147, 150, and 132(3). Expressly:

- (1) Section 141 of the Act prescribes the BRP must "as soon as is practicable after being appointed, ... investigate the company's affairs, business, property, financial situation and after having done so, consider whether there is any reasonable prospect of the company being rescued." And section 147 of the Act compels a BRP to "convene and preside, over a first meeting of the creditors' within 10 days of his appointment." At that meeting he is to inform the creditors as to whether he believes the company can be rescued. The Court considers such belief must be grounded in facts. The reasons for the belief have to be rational (i.e. grounded in facts). The BRP claims to have held such a meeting and informed the meeting that he believes there is a reasonable prospect to rescuing the company, however has failed to furnish any evidence to demonstrate the veracity of his claim. As the BRP did not annex the minutes of the meeting there is no way of knowing whether there is any substance to his belief.
- (2) Section 150 requires the BRP to publish a Business Rescue Plan within 25 days after his appointment. The BRP did not publish the Plan within the prescribed 25 days, and ignored reminders that he had not yet delivered the Plan.
- (3) Section 132(3) of the Act provides that if business rescue proceedings are not completed within three (3) months of those proceedings commencing, or the court on such longer period, on application by the BRP may allow, then the BRP

must prepare and update a report by the end of each and every month for as long as the proceedings endure. In this case the proceedings have been ongoing for almost two years, and the court has not extended the lifespan of the business rescue proceedings beyond the three-month period prescribed. The BRP, after his failure to publish or file any reports was brought to his attention numerous times, sent out reports for some of the months to certain persons, however, the reports did not contain any real or meaningful account of Gravitare's business operations, financial status or of the BRP's efforts to raise post commencement finance. The Court held that a BRP must at all times be completely open, transparent and candid with the creditors and with employees, if there are any. His reports must reflect this openness, transparency and candour. He must indicate what assets the company has, which particular asset is encumbered and to which creditor it is encumbered, what its liabilities are and which liability. They must contain all the information concerning the financial distress it experiences so that the affected persons – employees and creditors – can take an informed view on the future of the company. The Court found the BRP's reports do not inform the creditors of why the Plan was still not finalised or when it will be finalised.

The Court found that as Gravitare has not traded for a considerable time; does not have funds; its shareholders and directors have been engaged in a paralysing dispute; has no immovable property; owes ABSA in excess of R14m which it is unable to pay, is factually and commercially insolvent.

The applications to uplift the moratorium and to place Gravitare in a final winding-up is granted.