THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 982/18

In the matter between:

CARATCO (PTY) LTD **APPELLANT**

and

INDEPENDENT ADVISORY (PTY) LTD **RESPONDENT**

Neutral citation: *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* (Case no 982/18) [2020] ZASCA 17 (25 March 2020)

Coram: CACHALIA, WALLIS, NICHOLLS AND DLODLO JJA AND KOEN AJA

Heard: 25 February 2020

Delivered: 25 March 2020

Summary: Companies Act 71 of 2008 – whether special fee for remuneration of business rescue practitioner outside of s 143 prohibited – special fee agreed with creditor of company under business rescue – whether void for illegality or contrary to public policy – business rescue practitioner's duties under ss 75 and 76 considered.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Makume J, sitting as court of first instance):

The application is dismissed with costs.

JUDGMENT

Cachalia JA (Wallis, Nicholls and Dlodlo JJA and Koen AJA concurring)

[1] This is an application for leave to appeal against an order of the Gauteng Local Division of the High Court (Makume J) ordering the applicant, Caratco (Pty) Ltd, to pay to Independent Advisory Services (Pty) Ltd (IAS) the amount of R2 280 000 plus costs on an attorney and client scale. IAS claimed the amount from Caratco as a 'success fee' for having implemented the business rescue of a financially distressed company, Galaxy Jewellers (Pty) Ltd. Caratco is a creditor and holds an indirect controlling interest in the Galaxy group of companies. It is therefore a company 'related' to Galaxy as envisaged in s 2 of the Companies Act 71 of 2008[1] (the Act). IAS sued Caratco because

[1] '**Related and inter-related persons, and control**
(1) For all purposes of this Act-
(a) . . .
(b) . . .
(c) a juristic person is related to another juristic person if-

it alleged that Caratco had undertaken liability for payment of the success fee. Caratco denied liability, but the court a quo rejected all its pleaded defences and also refused it leave to appeal against the order. Caratco then applied for leave to appeal to this court, which referred the application for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013, with the parties having to be prepared to address the court on the merits if necessary.

[2] In order to be granted leave to appeal in terms of s 17(1)*(a)*(i) and s 17(1)*(a)*(ii)[2] of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive.[3] Caratco must satisfy this court that it has met this threshold.

[3] IAS is a company specialising in business rescue. On 9 October 2015, two of its directors, Mr Frederick Johannes Klopper and Ms Rynette Peters

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(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
(ii) either is a subsidiary of the other; or
(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).'

[2] '**Leave to appeal**
(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

[3] *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) paras 23 and 24.

were appointed as joint business rescue practitioners by Galaxy. Klopper discussed the payment of the success fee with Mr Stephan Olivier, Galaxy's managing director, who in turn agreed the fee of R2 million with Mr Tom Watson. Watson is Caratco's managing director and the Galaxy group's controlling mind. On 20 February 2016 he confirmed this agreement in an email to Klopper. On 24 March 2016 Caratco's attorney, Mr Christopher Holfeld of Webber Wentzel Attorneys, informed Klopper that he would advise him in due course which entity in the Galaxy group would be chosen to be responsible for payment of the fee so as to maximize any income tax advantage to the group.

[4] On 30 March 2016, Holfeld requested Klopper by email to submit his company's invoice to Caratco. He added that IAS had to file its notice of substantial implementation to bring an end to the business rescue proceedings with the Companies and Intellectual Property Commission and publish a notice to this effect in terms of the applicable regulation. He stated further that 'until this has occurred, our client (Caratco) is not obliged to pay any further amount to you'. IAS complied with the notice and publication requirement on the same day and duly invoiced Caratco for payment of the R2 million, excluding VAT. But Caratco ignored the invoice and IAS's subsequent demand for payment.

[5] Relying on these essential facts IAS launched motion proceedings against Caratco for payment of the debt on 4 August 2016. Watson deposed to Caratco's answering affidavit opposing the relief claimed. Importantly, he admitted the agreement between IAS and Caratco but denied liability on several other grounds. On 3 March 2017, the motion court referred the matter

to trial. IAS filed its declaration to which Caratco filed a plea, and IAS a replication.

[6] Despite having initially conceded that it had concluded the agreement with IAS in its answering affidavit, Caratco now denied this in its plea. Among several other defences it also pleaded that if there was an agreement, Holfeld had not been authorised to conclude it on its behalf. In the alternative it pleaded that the agreement was concluded due to its unilateral mistake, induced by Klopper's misrepresentation that a special fee was due in terms of s 143 (when it was not a fee contemplated in the section) and was therefore void. As a measure of last resort Caratco pleaded that the agreement was illegal and contrary to public policy.

[7] Klopper testified for IAS. He was the only witness who testified at the trial. He was cross-examined at length. His version of the events and correspondence preceding Holfeld's communication with him on 30 March 2016, when he was asked to invoice Caratco, was largely unchallenged. Significantly, no version was put to him regarding the factual basis for any of Caratco's pleaded defences other than that no agreement was concluded. Caratco closed its case without calling any witnesses to rebut Klopper's version. In particular it did not call Watson to explain why he had accepted that an agreement was concluded in his answering affidavit, which was now denied in its plea, or to support its unilateral mistake defence. And Holfeld, being an attorney, was unsurprisingly not called to confirm Caratco's pleaded case that he was not authorised to conclude the agreement, or crucially, why he had asked Klopper to invoice Caratco for the special fee, if it had no

obligation to pay the fee. He would doubtlessly have had some difficulty explaining this in the light of Klopper's uncontested version.

[8] The court a quo, therefore, had little difficulty in finding that Caratco had agreed to pay the success fee of R2 million (plus VAT) and that it had failed to establish any of its defences, including the illegality and public policy defences, which I shall consider later. The learned judge was also correct in drawing an adverse inference against Caratco for having failed to call Watson and Holfeld, and in finding that a punitive costs order was warranted against it for the manner in which it had conducted the litigation.

[9] In its application to this court Caratco, wisely, did not persist with the defences relating to mistake or Holfeld's alleged lack of authority to conclude the agreement. But it persisted with its unmeritorious defence that no agreement had been concluded. This despite Watsons's earlier admission to the contrary. It is unnecessary to consider the merits of the 'no agreement defence' in any detail because there is no reasonable prospect of this court overturning the factual findings of the high court on this aspect. And it was not suggested that there is any compelling reason to entertain the appeal on this ground either.

[10] Instead, in this court Caratco focused on its statutory illegality and public policy defence/s. It contended that the issue as to whether a business rescue practitioner may earn a success fee outside the strictures of s 143 of the Act involved important questions of public policy and constituted a 'compelling reason' for the appeal to be entertained as contemplated in s 17(1)*(a)*(ii) of the Superior Courts Act.

[11] The defence was pleaded as follows:

'5.3 The consensus is illegal, alternatively, contrary to public policy and accordingly void and the Court should declare the agreement void under the provisions of section 218 of the Act; alternatively, the agreement is unenforceable;

5.3.1 In terms of section 145 of the Act, the plaintiff (as the business rescue practitioner) has powers to manage and control the company, but has the responsibilities, duties and liabilities of a director as set out in sections 75 to 77 of the Act.

5.3.2 In terms of section 75(3) of the Act, a business rescue practitioner may not approve or enter into any agreement in which he/she or a related person has a personal financial interest; or determine any other matter in which the person or a related person has a personal financial interest.

5.3.3 Section 76 prohibits the business rescue practitioner from gaining an advantage for itself.

5.3.4 A business rescue practitioner is not entitled to earn a special fee from a third party in consequence of acting as the business rescue practitioner, such special fee not being one in terms of section 143 of the Act.

5.3.5 Properly construed, section 143 of the Act is the only means by which a practitioner can be remunerated for her services in business rescue proceedings.'

[12] I shall consider the illegality defence first. Caratco has pleaded no facts to support this defence. It is however beyond dispute – now that the 'no agreement' defence has been found to have no reasonable prospect of success – that Caratco undertook the obligation to settle the success fee. That being so, it contended that s 143[4] of the Act, which provides for the remuneration of

[4] Section 143 reads:

'**Remuneration of practitioner**

(1) The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).

(2) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to-

(a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or

business rescue practitioners, is the sole means by which they may be remunerated. Therefore, the argument continued, any fees agreed upon outside of its terms are impliedly prohibited. The court 'should' therefore, it concluded, declare the agreement void in accordance with its powers under s 218 of the Act.

[13] The first difficulty with this contention is that s 143 regulates the remuneration of business rescue practitioners by the company under business rescue. It says nothing about any other fee arrangements that may be concluded between a practitioner and a third party, which is what the agreement in issue in this case is. So, whatever the scope of s 143 regarding such fee arrangements, it does not apply here.

[14] But even if we accept the dubious proposition that s 143 is the sole basis by which business rescue practitioners may be paid, there are no indications in the section suggesting that an agreement that does not fall within its ambit

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(b) the attainment of any particular result or combination of results relating to the business rescue proceedings.

(3) Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by-

(a) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145(4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and

(b) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.

(4) A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that-

(a) the agreement is not just and equitable; or

(b) the remuneration provided for in the agreement is egregiously unreasonable having regard to the financial circumstances of the company.

(5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.

(6) The Minister may make regulations prescribing a tariff of fees and expenses for the purposes of subsection (1).'

is void. In the absence of any such clear expression, the question as to whether or not the agreement is void depends on whether this inference may be drawn from the language of the statute, or put differently, whether such intention may be imputed to the lawmaker. One such indication would be if the statute penalises the act; it could then be said to impliedly prohibit it and render it null and void. But this is not a hard and fast rule. It is only if a court is convinced that the lawmaker intended to invalidate the act that a court would so hold.[5] Section 143 contains no language entitling a court to draw any such inference, much less here where the agreement is with a third party.

[15] Realising the difficulties it faced relying on s 143 to invalidate the agreement, Caratco attempted to bolster its case by relying generally on two other provisions, ss 75(3) and 76. It pleaded that because a business rescue practitioner has the powers to manage and control the company in terms of s 140(3)*(b)*,[6] and the responsibilities, duties and liabilities of a director as set out in ss 75(3) and 76, its failure to fulfil its responsibilities and duties for which these sections provide renders the agreement void.[7]

[16] Section 75 deals with a director's duty not to have personal financial interests in future or existing contracts with the company.[8] Section 140(3)*(b)*

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[5] *Geue and Another v Van Der Lith and Another* 2004 (3) SA 333 (SCA) para 18.
[6] Mistakenly pleaded as s 145 of the Act.
[7] Caratco also included s 77 among the responsibilities, duties and liabilities of director and business rescue practitioner it pleaded. But no argument was presented regarding this section.
[8] '**Director's personal financial interests**
(1) In this section-
(a) **"director"** includes-
(i) an alternate director;
(ii) a prescribed officer; and
(iii) a person who is a member of a committee of the board of a company,
irrespective of whether the person is also a member of the company's board; and

(b) **"related person"**, when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member

(2) This section does not apply-

(a) to a director of a company-

(i) in respect of a decision that may generally affect-

(aa) all of the directors of the company in their capacity as directors; or

(bb) a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director; or

(ii) in respect of a proposal to remove that director from office as contemplated in section 71; or

(b) to a company or its director, if one person-

(i) holds all of the beneficial interests of all of the issued securities of the company; and

(ii) is the only director of that company.

(3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not-

(a) approve or enter into any agreement in which the person or a related person has a personal financial interest; or

(b) as a director, determine any other matter in which the person or a related person has a personal financial interest,

unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.

(4) At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

(5) If a director of a company, other than a company contemplated in subsection (2) *(b)* or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director-

(a) must disclose the interest and its general nature before the matter is considered at the meeting;

(b) must disclose to the meeting any material information relating to the matter, and known to the director;

(c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;

(d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph *(b)* or *(c)*;

(e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs *(b)* and *(c)*;

(f) while absent from the meeting in terms of this subsection-

(i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and

(ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and

(g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

(6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.

(7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, only if-

(a) it was approved following disclosure of that interest in the manner contemplated in this section; or

(b) despite having been approved without disclosure of that interest, it-

imposes the same general obligations and fiduciary duties of a director under s 75 upon a business rescue practitioner when he or she assumes this responsibility, *mutatis mutandis*.[9] The directors remain in office under s 137(2) acting under the practitioner's authority. The practitioner does not become a director. At common law, which applies to s 75, a director has a fiduciary duty to avoid any conflicts of interest with the company. In general, therefore, a director cannot have an interest in a contract with the company unless it approves the contract at a general meeting after disclosure of the interest by the director. Where no disclosure is made the contract is voidable (not void) at the company's instance.[10]

[17] Section 75(3), one of the two provisions Caratco attempts to rely upon to invalidate the agreement, deals with one such instance where an 'only director of a company' is required to disclose any personal financial interest in a contract with the company to its shareholders. To assist the reader the section is repeated here. It provides:

'(3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not-

(a) approve or enter into any agreement in which the person or a related person has a personal financial interest; or

(b) as a director, determine any other matter in which the person or a related person has a personal financial interest,

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(i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or

(ii) has been declared to be valid by a court in terms of subsection (8).

(8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders, as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section.'

[9] Section 140(3)*(b)* provides that during a company's business rescue proceedings, the practitioner has the responsibilities, duties and liabilities of a director of the company, as set out in ss 75 to 77.

[10] See generally P Delport *Henochsberg on the Companies Act 71 of 2008* Vol 1 [issue18] at 292(2)–292(5) (online version).

unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.'

[18] There are several problems with Caratco's attempt to rely on this section. The first obvious one is that it applies only where there is a single director, who does not hold all the shares in the company. In addition, even assuming the section is broad enough to include agreements between the director and a third party, as opposed to with the company itself, the agreement must, at the very least, be one in which the company has a material interest.[11] The agreement between IAS and Caratco is not one in which Galaxy has any interest. It therefore did not apply to Galaxy, which has a board of directors, not a single director; secondly, Caratco did not specify which subsection – s 75(3)*(a)* or s 75(3)*(b)* – applied in this case; thirdly, it pleaded no facts to bring the contract within the ambit of the provision,[12] nor did it even suggest to Klopper in cross-examination that Galaxy had any interest in the agreement or that the business rescue practitioners had a duty to disclose the agreement with Caratco to the Galaxy board.

[19] On the contrary it is clear from the evidence that Watson, who was the managing director of Caratco and the controlling mind of the Galaxy group, was a central figure in negotiating and concluding the agreement. So, neither Caratco nor anyone else in the Galaxy group can complain that they were unaware of the agreement or that it amounted to a conflict of interest having

[11] See s 75(6) and s 75(7).
[12] Cf *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623F-H; *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) at 563F-G; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 27.

regard to the business rescue practitioner's fiduciary duty to Galaxy. On the contrary if anyone had cause to complain it may have been Galaxy (the entity under business rescue) and not Caratco, which now deploys this argument cynically to escape the consequences of its agreement.

[20] Caratco's reliance on s 76 of the Act is equally unmeritorious. The section deals with directors' fiduciary duties and their duty of care, skill and diligence owed to the company. At common law the duty includes a prohibition against a director gaining an advantage for himself by, for example, misappropriating the company's corporate opportunities. As with s 75, and also by virtue of s 140(3)*(b)*, these duties apply equally to business practice practitioners.

[21] Section 76 is extensive in its scope and comprises five sub-sections that also contain further sub-sections.[13] Here too, Caratco has not pleaded which

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[13] '**Standards of directors conduct**
(1) In this section, **"director"** includes an alternate director, and-
(a) a prescribed officer; or
(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,
irrespective of whether or not the person is also a member of the company's board.
(2) A director of a company must-
(a) not use the position of director, or any information obtained while acting in the capacity of a director-
(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
(ii) to knowingly cause harm to the company or a subsidiary of the company; and
(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-
(i) reasonably believes that the information is-
(aa) immaterial to the company; or
(bb) generally available to the public, or known to the other directors; or
(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.
(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-
(a) in good faith and for a proper purpose;
(b) in the best interests of the company; and
(c) with the degree of care, skill and diligence that may reasonably be expected of a person-
(i) carrying out the same functions in relation to the company as those carried out by that director; and

sub-section it specifically relies upon or the facts that supposedly bring the business rescue practitioner's conduct in concluding the success fee arrangement with it, within its ambit. And, as I pointed out earlier in relation to the s 75(3) complaint, it did not suggest to Klopper during his cross-examination how his conduct supposedly fell foul of any of its provisions. IAS cannot sensibly be expected to answer this allegation.

[22] Finally Caratco pleaded that because the agreement is 'illegal' the court 'should' declare it void under the provisions of s 218 of the Act.[14] Section 218

(ii) having the general knowledge, skill and experience of that director.
(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company-
(a) will have satisfied the obligations of subsection (3) *(b)* and *(c)* if-
(i) the director has taken reasonably diligent steps to become informed about the matter;
(ii) either-
(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
(b) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph *(aa)*; and
(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and
(b) is entitled to rely on-
(i) the performance by any of the persons-
(aa) referred to in subsection (5); or
(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and
(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).
(5) To the extent contemplated in subsection (4) *(b)*, a director is entitled to rely on-
(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;
(b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters-
(i) within the particular person's professional or expert competence; or
(ii) as to which the particular person merits confidence; or
(c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.'

[14] '**Civil actions**
(1) Subject to any provision in this Act specifically declaring void an agreement, resolution or provision of an agreement, Memorandum of Incorporation, or rules of a company, nothing in this Act renders void any other agreement, resolution or provision of an agreement, Memorandum of Incorporation or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect regarding that agreement, resolution or provision.

contains three sub-sections but Caratco did not specifically refer to the sub-section it wishes to rely upon, either. But it seems that it had s 218(1) in mind for this purpose. The section permits a court to declare an agreement void if it is 'prohibited, void, voidable or may be declared unlawful'.

[23] I have already indicated that there is no substance in any of Caratco's 'illegality' complaints. On that basis it is unnecessary to consider the court's power to declare a contract concluded contrary to the provisions of the Act, void under s 218(1). That point is not reached in this case.

[24] What remains is Caratco's public policy defence. It contended that the agreement is contrary to public policy on two grounds: First, it said that Klopper 'subverted the democratic vote of the majority of creditors' by claiming the debt under the pretext that it was due in terms of s 143, when it was not. In this regard s 143(3) provides for a meeting of the creditors to consider and approve the proposed agreement, and s 143 (4) provides for a creditor, who voted against the proposal, to apply to a court within 10 business days of the meeting for an order setting aside the agreement on the grounds that it is not just and equitable or that the fee charged is egregiously unreasonable having regard to the financial circumstances of the company. Thus, submitted Caratco, the other creditors could have secured a greater dividend for themselves than the amount they received and the conclusion of the private treaty between IAS and one of the creditors – Caratco – without

(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.
(3) The provisions of this section do not affect the right to any remedy that a person may otherwise have.'

disclosure to the other creditors was inimical to the legislative purposes of the Act.

[25] Secondly, and related to the first ground, it contended that because business rescue practitioners have a duty of impartiality and independence towards the company under business rescue, the agreement for payment of a success fee with a single creditor without seeking the approval of the general body of creditors offended this duty. This is so, it is contended, because the creditor with whom the agreement is concluded would be 'captured' by the business rescue practitioner and secure its own interests outside of the general body of creditors. This implied that there was some sort of bribery or collusive behaviour between the practitioner and the creditor.

[26] These submissions were not only extraordinary but utterly without any merit. It is trite that it is for the party seeking to impugn an agreement on public policy grounds to plead and prove the facts upon which it is founded.[15] Caratco has done neither. Even worse, the proven facts are against it.

[27] The evidence reveals that Klopper had initially included the success fee in the draft business rescue plan that he had prepared on 19 February 2016, which would be voted on as envisaged in s 143(4). However, Holfeld requested him to delete the fee from the plan so that it could be dealt with in a separate agreement with another company – Outlast (Pty) Ltd – that is also controlled by Mr Watson and his co-directors. Klopper agreed to this proposal. That agreement never materialised because Caratco subsequently

[15] *AB v Pridwin Preparatory School* [2018] ZASCA 150; 2019 (1) SA 327 (SCA) para 27.

undertook liability for the payment of the success fee. So, when Galaxy's creditors and shareholders adopted the business rescue plan on 1 March 2016 there was no separate success fee to be voted on. There was therefore no factual basis for the suggestion that Mr Klopper was subverting the democratic vote of the creditors by agreeing to delete the success fee at Mr Holfeld's request. If there was any prejudice to the other creditors that would have to be laid at Caratco's door, not IAS.

[28] The facts, however, show there was no prejudice to any creditor either. Caratco submitted that in consequence of the fee, the creditors had to take less money than was otherwise available for distribution to them. But Mr Klopper's evidence contradicted this expressly. He testified that the fee had no financial impact on creditors at all as it was an additional amount that Caratco had undertaken to pay. It was not earmarked for the creditors and if they were dissatisfied with their dividend, they would have voted against it, but they did not.

[29] It hardly lies in the mouth of Caratco, which seeks only to avoid having to meet its payment obligations, to now opportunistically invoke some unproven prejudice to creditors, to this end. If this was truly its concern, it would have joined the other creditors to enable them to make this case.

[30] Even more extraordinary is the submission that the agreement for payment of the success fee with a single creditor, without seeking the approval of the body of creditors, was offensive because it would lead to a creditor being 'captured' by the business rescue practitioner to the disadvantage of the general body of creditors. But it was Watson and Holfeld, Caratco's managing

director and attorney respectively – not IAS – who proposed that the additional fee be deleted from the draft plan. The idea that IAS through Klopper was somehow engaged in some sort of collusive process that resulted in Caratco's 'capture' was not only at odds with the facts, but also defies any logic.

[31] Importantly, Caratco did not contend – and was unable to make a case – that the fee it freely negotiated and agreed upon with the business rescue practitioner was either unjust, inequitable or 'egregiously unreasonable' as envisaged in s 143(4) of the Act. In these circumstances the public policy defence is also without any merit.

[32] For these reasons Caratco has neither made out a case that it has reasonable prospects of success in the appeal nor that there are other compelling reasons to grant it leave to appeal.

[33] The application is accordingly dismissed with costs.

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JUDGE OF APPEAL

Appearances

For appellant:	D J Vetten
Instructed by:	Nel Van der Merwe & Smalman Attorneys, The Willows
	Honey Attorneys, Bloemfontein
For respondent:	G D Wickins
Instructed by:	Brooks & Braatvedt Inc, Johannesburg
	Symington & De Kok, Bloemfontein