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CASES

Maddocks N.O and Another v South African Reserve Bank and Another (D8203/2019) [2021] ZAKZDHC 13 (1 April 2021)

Insolvency law and other acts- Currency and Exchanges Act, and its regulations, contemplate the application of insolvency law to determine the rights of the parties- Reserve Bank declared the monies in the bank accounts of the two companies which had been blocked to be forfeited, and directed that the monies should be disposed of (by the banks concerned) by deposit into the national revenue fund. Ordered that the liquidators get the money back.

The applicants in this matter are the joint liquidators of two companies, Sun Candle Products (Pty) Limited and Xinming Mountain Textile (Pty) Limited. Winding-up orders in respect of these companies were made by this court, provisionally on 17 February 2017 and finally on 10 March 2017. The *concursus creditorum* in respect of each company is taken to have been established on 13 February 2017 when the applications were lodged with this court. In each of those cases the orders were made under the Companies Act, 1973 on the application of a creditor, Pathema CC.

On 10 September 2015 (ie well before the winding-up commenced) the South African Reserve Bank, which is the first respondent in these proceedings, issued “blocking orders” in respect of the amounts standing to the credit of each of the companies in various South African banks. (Where I use the words “bank” or “banks” I mean the commercial banks at which the accounts were held by the companies. The Reserve Bank will be referred to as such.) Such orders had the effect that “no person may withdraw or cause the withdrawal of funds together with interest thereon and/or accrual thereto in accounts held” at the banks. (I quote from the notifications sent to the banks.)

By notices published in the Government Gazette under the hand of a deputy governor of the Reserve Bank, a Mr Naidoo, after the winding-up of the two companies had commenced, the Reserve Bank declared the monies in the bank accounts of the two companies which had been blocked to be forfeited, and directed that the monies should be disposed of (by the banks concerned) by deposit into the national revenue fund. For that reason, and because the liquidators want the money back, the National Treasury is cited as the second respondent in these proceedings.

The applicants seek orders declaring the forfeiture orders made by the Reserve Bank null and void and directing the National Treasury to pay the amounts in question to the applicants in their capacities as joint liquidators of the companies.

The contentions of the applicants are in relevant part summarised as follows in the founding affidavit.

'I submit:-

(a) that by virtue of the winding-up and the establishment of the *concursus creditorum* on 13 February 2017, the monies held in the bank accounts to the credit of Sun Candle and Xinming fall into the insolvent estates and are subject to the provisions of s 391 and s 342 of the (old) Companies Act;

(b) that the applicants in their capacity as liquidators are under a statutory duty to take possession of these assets;

(c) that the first respondent does not have any superior right to these funds in preference to the rights of proved creditors …;

(d) that the first respondent mistakenly believes that it is not bound by the aforementioned provisions [of] the Companies Act in that it can act in disregard of the statutory duties of the applicants.'

The powers which the Reserve Bank exercised (or purported to exercise) are derived from the **Currency and Exchanges Act 9 of 1933** and the regulations made thereunder. Little of any consequence of the original Act remains in force besides s 9 which is headed "Regulations regarding Currency, Banking or the Exchanges".

[7] In relevant part s 9 of the Act reads as follows.

'(1) The [President] may make regulations in regard to any matter directly or indirectly relating

to or affecting or having any bearing upon currency, banking or exchanges.

(2) (a) Such regulations may provide that the [President] may apply any sanctions therein

set forth which he thinks fit to impose, whether civil or criminal.

(b) Any regulation contemplated in paragraph (a) may provide for-

(i) the blocking, attachment and obtaining of interdicts for a period referred to in paragraph (g) by the Treasury and the forfeiture and disposal by the

Treasury of any money or goods referred to or defined in the regulations or

determined in terms of the regulations or any money or goods into which

such money or goods have been transformed by any person, and-

(aa) which are suspected by the Treasury on reasonable grounds to be

involved in an offence or such suspected offence against any

regulation referred to in the section, or in respect of which such offence has been committed or so suspected to have been committed;

(bb) which are in the possession of the offender, suspected offender or any other person or have been obtained by any such person or are due to any such person and which would not have been in such possession or so obtained or due if such offence or suspected offence had not been committed; or

(cc) by which the offender, suspected offender or any other person have been benefited or enriched as a result of such offence or suspected offence;

provided that, in the case of any person other than the offender or suspected offender …

(ii) in general, any matter which the [President] deems necessary for the

fulfilment of the objectives and purposes referred to in sub-paragraph (i), including the blocking, attachment, interdicting, forfeiture and disposal referred to in sub-paragraph (i) by the Treasury of any other money or goods belonging to the offender, suspected offender or any other person in order to recover an amount equal to the value of the money or goods recoverable in terms of the regulations referred to in sub-paragraph (i), but which can for any reason not be so recovered.

(c) Any regulation contemplated in paragraph (a) may authorise any person who is vested with any power or who shall fulfil any duty in terms of the regulation, to delegate such power or assign such duty, as the case may be, to any other person.

It is argued on behalf of the applicants that the forfeiture orders had the unlawful effect of disturbing the *concursus creditorum*. Reference is made to the classic formulation of the rule by Lord De Villiers CJ in *Walker v Syfret* **1911 AD 141** at 160.

'The effect of a winding-up order is to establish a *concursus creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors.'

With regard to this formulation of the effect of a *concursus creditorum*, and with regard to other provisions of the Companies Act which featured in argument, Mr *Maritz* SC, who appears for the Reserve Bank, has argued that the error perpetrated by the applicants is to regard the Reserve Bank as a creditor of the companies. Before dealing with the argument, I think it is important to note that the effect of a *concursus creditorum* is somewhat wider, and logically so; and that the words in the judgment just quoted were not intended, and should be not misinterpreted, to confine the protection afforded on insolvency to what might be called misconduct on the part of creditors.

[33] My attention was drawn in argument to the fact that there are other statutes which contain provisions which exclude the application of insolvency law in particular circumstances. One of those is s 10 of the Admiralty Jurisdiction Regulation Act, 105 of 1983, referred to in paragraph 22 of the judgment in *CSARS v Van Der Merwe NO*. The applicants argue that it is significant that neither the **Currency and Exchanges Act, 1933** nor the regulations under it, contain any such provision. The argument can in my view be developed a little further. For the sake of convenience, I restate s 9(3) of the Act again here.

'[The President] may, by any such regulations, suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with any such regulation shall be deemed to be suspended insofar as it is in conflict or inconsistent with any such regulation.'

Properly construed, this provision means that where what is sought to be done by regulation under the Currency and Exchanges Act may come into conflict with, or be inconsistent with what is to be done under any other law (including any Act of Parliament), that other Act or law may be deemed to be suspended by regulation to the extent necessary to extinguish the conflict or inconsistency so that the regulations may prevail. The Currency and Exchanges Act recognises that regulations for the achievement of the objects contemplated by it may very well come into conflict with or be inconsistent with other law ordinarily applicable. The remedy for that was left (rightly or wrongly) to the President (originally the Governor General) who was empowered to declare by regulation that the other Act or law be suspended to the extent necessary. That could have been done here, as was done, for instance, in the Admiralty Jurisdiction Regulation Act. It was not done. The fact

that it was not done supports the conclusion that in the circumstances we are confronted with in this case, the Currency and Exchanges Act, and its regulations, contemplate the application of insolvency law to determine the rights of the parties.

[34] The second respondent (the National Treasury) initially argued that it was not lawful for the court to order the payment of monies to the liquidators out of the National Revenue Fund. That argument was correctly abandoned.

[35] I find for the applicants, but I should make it clear that I do not do so upon the basis that the intervention of the winding-up of the companies rendered any forfeiture order at all unlawful. I do so upon the basis that it rendered unlawful the issue of forfeiture orders which made it mandatory for the banks to ignore the companies' claims, and pay the amounts in question into the National Revenue Fund. The question as to whether there is room for a creditor's claim generated by a forfeiture order made post-liquidation does not need to be decided.

The following forfeiture orders are declared null and void:

(a) Notice 515 of 2018 which is annexure "JM6" annexed to the founding affidavit;

(b) Notice 527 of 2017 which is annexure "JM9" annexed to the founding affidavit;

(c) Notice 514 of 2018 which is annexure "JM11" annexed to the founding affidavit.

2. The second respondent is directed to pay the amounts set forth in the aforementioned forfeiture orders together with interest thereon into the applicants' banking account, particulars of which are as follows-

The costs of this application shall be paid by the respondents, jointly and severally, including the costs of two counsel where employed.

Wilkinson v Magistrate Ramahanelo N.O and Others (14668/2021) [2021] ZAGPPHC 193 (6 April 2021):

Interrogations- Section 152 of the Insolvency Act, 24 of 1936, until such time as the trustees are "properly" authorized by the Master to do so. The Third Respondent is interdicted and prohibited from participating in and being present at the enquiry in terms of **Section 152** of the **Insolvency Act, in** the insolvent estate of J.J. Wilkinson T299/2017, pending the judgment in case no 26586/2013 in this court. The Second Respondent is ordered to pay the costs of this application on the scale as between attorney and client, including the costs of two counsel, where utilized.

This is the judgment in a dispute regarding the continuation of an enquiry in terms of section 152 of the Insolvency Act, 24 of 1936, which dispute came before the urgent court last week. At the time of hearing the application, the parties were in agreement that the reservation of the judgment for the week would not prejudice any of them.

[2] The parties

2.1 The applicant is Mr Wilkinson. He is an esrtwhile attorney of this court and he was finally sequestrated on 11 June 2018.

2.2 The Second respondent is the co-trustee of Mr Wilkinson's insolvent estate and she acted in the matter with the acquiescence of her co-trustee.

2.3 The first respondent is a magistrate before whom an insolvency enquiry in Mr Wilkinson's insolvent estate is pending.

2.4 The third respondent is Willbo Investments 4 (Pty) Ltd ("Willbo"). It is a company for which Mr Wilkinson has previously acted as an attorney when he was still practicing as Wilkinsons Attorneys. The business relationship between Willbo and Wilkinsons Attorneys extended beyond the mere attorney/client relationship and involved business dealings negotiated between Mr Wilkinson and Willbo's controlling mind, Mr Menno Parsons. It involved, *inter alia*, the purchase and subsequent selling of a farming property and various investments, which commenced more than a decade ago.

2.5 The fourth respondent is the Master of this Court.

[3] The relief claimed

Mr Wilkinson claims the following relief on an urgent basis:

3.1 That the magistrate and the trustees be interdicted and "prohibited" from continuing with the enquiry in terms of Section 152 of the Insolvency Act, 24 of 1936, until such time as the trustees are "properly" authorized by the Master to do so.

3.2 That Willbo "*be interdicted and prohibited from participating and being present*" at the enquiry pending the delivery of the judgment under case number 26586/2013.

[4] History of litigation between Mr Wilkinson and Willbo

In order to understand the basis upon which Mr Wilkinson claims the relief mentioned in paragraph 3.2 above and to determine whether he is entitled to such relief, it is necessary to have regard to the litigation history between the said parties. This has been set out in the founding affidavit along the following terms:

4.1 In 2010, Mr Wilkinson, acting on instruction of Mr Parsons negotiated the purchase of a farm in Zeerust which Absa Bank intended to sell in execution. The farm was purchased in the name of Willbo, of which Mr Parsons was the majority, but not sole, shareholder. He was the financier of prospective business ventures, including the purchase of the farm, for which he, through a company of which a trust under his control was the shareholder, provided bond cover to secure the financing of the purchase price.

4.2 The farm was subsequently sold to the Department of Rural Development and Land Reform pursuant to a land claim, for a substantial profit. A dispute arose between the shareholders of Willbo and Mr Wilkinson regarding the distribution of the proceeds. Issues relating to shareholding percentages, loan accounts, distribution agreements, fees and costs abounded. On 20 August 2012 Mr Wilkinson rendered his version of the distribution account relating to the proceeds of the

sale. This was followed by various meetings and auditors' scrutiny, still resulting in a disputed claim in excess of R 4,6 million.

4.3 Pursuant to the above dispute, on 2 May 2013, Willbo launched an application in this court in case no 26586/13 for urgent relief in camera against Mr Wilkinson and Wilkinsons Attorneys for payment into trust of the above amount pending a statement and debatement of accounts (the "debatement application").

4.4 Pursuant to the in camera application, a provisional order was granted. At that time, an amount of R 481 658,91 was all that was left in Wilkinson Attorneys' trust account in respect of the transaction in question. Willbo consequently launched a contempt application, which was dismissed with costs by Potterill, J on 30 May 2013.

4.5 Willbo also launched an application for discovery in terms of **Rule 35(12)** as well as an application to compel. Upon this becoming opposed, these applications were abandoned.

4.6 The debatement application was heavily contested before Preller J on 11 August 2014, during which the claim for payment of a specific amount also fell by the wayside pending finalisation of the application. After having heard the debatement application, Preller J reserved judgment. To date hereof, some 6½years later, judgment still hasn't been delivered.

4.7 While judgment remained reserved, Willbo submitted a claim at the Attorneys Fidelity Fund during 2016, to which Willkinson Attorneys responded. Although there is no certainty as to what happened with this claim, having regard to the further conduct of the parties, it appears in all probability, that it was unsuccessful.

The section 152 enquiry has been authorized by the Master and the relief claimed by Mr Wilkinson as referred to in paragraph 3.1 above cannot succeed. Counsel for the second respondent, Adv Klopper, has stated that had Mr Wilkinson or his "very senior attorney" (being the description used by Adv Klopper and by the second respondent, repetitively in her affidavits) simply picked up the telephone, this would easily have been established. At least, so they argue, this should have been clear after the delivery of the answering affidavit. I agree, but this does not detract from the remainder of the relief.

7.2 The remainder of the relief claimed by Mr Wilkinson is of a (hopefully) limited duration, that is, an interdict described in paragraph 3.2 above, until such time as retired judge Preller delivers the judgment in the "debatement application" in case no 26856/2013. I am of the view that, in order to prevent an abuse of the process envisaged by section 152 by Willbo, this relief should be granted.

7.3 Although costs *de boniis propriis* were no longer pursued against the second respondent, it was sought against her as opposing party. Even if the result of a costs order against her in her official capacity will have the result of the insolvent estate being liable, I find no reason to depart from the general rule that costs should follow the event. In the notice of motion, costs were only claimed against Willbo in the event of opposition. In its absence and, having not opposed the application, it would be improper to now grant a costs order against it, even if it was, as indicated above, the instigating party. Whether the costs should be awarded at a punitive scale is something else. In respect of the opposition to the issue of whether the enquiry had been authorized by the Master or not, the opposition was justified. In respect of the more important issue, namely that of abuse, not only was the

opposition unreasonable, but there was an almost deliberate failure to furnish the court with any particularity as to the status of the estate and its administration, the nature of the outstanding information required, the extent of the trustees' enquiries to date or whether and why they had been so hampered that an enquiry was needed. Large portions of the answering affidavits are vague and purely argumentative. As far as the court has been informed, nothing of substance has been done since the first meeting of creditors in April 2019, save for correspondence with Willbo's attorneys which led to the current application. These lapses, omissions or apparent lackadaisical approach to both the finalization of the estate or to litigation, justify, in my view, a punitive costs order.

[8] Order:

8.1 The Third Respondent is interdicted and prohibited from participating in and being present at the enquiry in terms of **Section 152** of the **Insolvency Act, in** the insolvent estate of J.J. Wilkinson T299/2017, pending the judgment in case no 26586/2013 in this court.

8.2 The Second Respondent is ordered to pay the costs of this application on the scale as between attorney and client, including the costs of two counsel, where utilized.

Seevnarayan v Ramjathan (38751/2019) [2021] ZAGPJHC 46 (16 April 2021):

Sequestration application-benefit for creditors- even if the price realised from the sale of the property leaves no free residue available for creditors but only settles the debt (R1 788 340.80) owing to the secured creditor (SA Home Loans), the respondent will no longer be required to continue repaying the debt owing to the secured creditor in monthly instalments of R19 436.14. There will then be a prospect, which is not too remote, that an advantage to creditors may result from an increased contribution from the respondent's earnings.

[1] The applicant, Mr Prasanth Seevnarayan, seeks an order that the estate of the respondent, Mr Kuvesh Ramjathan, be placed under provisional sequestration. Section 10 of the Insolvency Act 24 of 1936 (the Insolvency Act) provides that '[i]f the court to which the petition for the sequestration of the debtor has been presented is of the opinion that *prima facie- (a)* the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and *(b)* the debtor has committed an act of insolvency or is insolvent; and *(c)* there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally. It is only the last-mentioned requirement that is in issue *in casu.*

[2] The main object of insolvency proceedings is to benefit creditors, not one creditor or some creditors, but the general body of creditors insofar as a *concursus creditorum* comes into being once a sequestration order is made. A further object of insolvency proceedings is achieved insofar as creditors are protected against 'the possible greed and mendacity of other creditors.' *(LAWSA* Vol 12 2nd Ed para 199 with reference to *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223.)

[3] In *Investec Bank and another v Mutemeri and another* 2010 (1) SA 265 (GSJ) at 274-275, Trengove AJ pointed out that while the creditor's underlying motive may be to obtain payment of his debt, an applicant for sequestration in fact does not constitute proceedings for the recovery of a debt, but rather-

'[i]ts purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally. An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor's claim is governed by the same rules that apply to the claims of all the other creditors in the estate. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim.'

[4] The applicant and the respondent have been involved in litigation since 2011. On 17 April 2012, the applicant caused summons to be issued against the respondent to recover an amount of R4 million in respect of moneys lent and advanced to the respondent in terms of a written loan agreement. On 18 August 2015, this court granted judgment in favour of the applicant, and the respondent was ordered to pay to him the amount of R4 million plus interest thereon at the rate of 11% per annum compounded monthly in arrears from 20 February 2011 until date of payment and costs of the action.

The valuation report on which the applicant relies is thus not a mere a bald assertion of value and cannot be said to be hopelessly inadequate. The expected high, estimated, and expected low values of the property are derived from a sophisticated statistical calculation of values from various sources including the Surveyor General's Office, Deeds Office (recent sales in the area), banks and estate agents. The valuation report tabulates the details of the most relevant comparative sales and where those comparable sales are situated in relation to the property with graphs showing the average price and total volume of sales in the suburb by Freehold and Sectional properties. From the valuation report it appears that statistically there is a high probability of the property being sold at the valuation amounts as reflected in the report. The improvements on the property and state of the dwelling are matters that fall within the knowledge of the respondent about which he remained silent.

[25] Furthermore, the creditors may also resolve not to sell the property by way of public auction, but rather by way of private treaty. As was said by Fourie AJA in *Swart v Starbuck and others* 2016 (5) SA 372 (SCA) para 21, 'the creditors of an insolvent estate are in law the masters of the realisation of the assets of the estate'. (Also see *Swart v Starbuck and others* 2017 (5) SA 370 (CC) para 26.) Section 80bis of the Insolvency Act provides that, at any time before the second meeting of creditors, a trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the master in writing accordingly, stating his or her reasons for such recommendation. The master may thereupon authorise the sale of such property on such conditions and in such manner as he or she may direct. In terms of s 82(1) the trustee of an insolvent estate shall, as soon

as he or she is authorised to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct. However, if the creditors have not, prior to the final closing of the second meeting of creditors given any directions, the trustee shall sell the property by public auction or public tender.

[26] Also, even if the price realised from the sale of the property leaves no free residue available for creditors but only settles the debt (R1 788 340.80) owing to the secured creditor (SA Home Loans), the respondent will no longer be required to continue repaying the debt owing to the secured creditor in monthly instalments of R19 436.14. There will then be a prospect, which is not too remote, that an advantage to creditors may result from an increased contribution from the respondent's earnings.

[27] I am in all the circumstances of the opinion that the applicant has established that *prima facie* there is reason to believe that it will be to the advantage of creditors of the respondent if his estate is sequestrated, as contemplated in s 10(1 *)(c)* of the Insolvency Act.

In the result the following order is made:

(a) The estate of the respondent is placed under provisional sequestration.

(b) The respondent and any other party who wishes to avoid the provisional order of sequestration, are called upon to advance reasons, if any, why the court should not order final sequestration of the said estate on Tuesday, 20 July 2021, at 10h00 or so soon thereafter as the matter may be heard.

(c) A copy of this provisional order must be served on:

(i) the respondent personally;

(ii) all employees of the respondent, if any;

(iii) all trade unions of which the employees of the respondent are members, if any;

(iv) the Master of the High Court; and

(v) the South African Revenue Service.

(d) The respondent's costs of opposition are not to be included in the taxed costs of sequestration.

FirstRand Bank Limited v Master of the High Court (Pretoria) and Others (1120/19) [2021] ZASCA 33 (7 April 2021):

Creditors-contributions-section 106-and sect 89 (2) and **14** (3) – liability for costs of sequestration when there is no free residue or free residue is insufficient – whether secured creditors relying solely on their security are liable to contribute – whether petitioning creditor is solely liable-secured not liable

[1] This appeal concerns the interpretation of **s 106**, read with ss 89(2) and 14(3), of the Insolvency Act 24 of 1936 (the Act) dealing with the liability of creditors

to pay a contribution where there is insufficient or no free residue in an insolvent estate to meet expenses, costs and charges connected with the sequestration. Such costs are a charge against the free residue in terms of s 97(2)*(c)* of the Act.

[2] This issue has been a subject of controversy for a while within the insolvency law academic circles. The debate centres on the question of which creditors are liable to pay a contribution for costs where there is a shortfall in the free residue. Does the burden to contribute lie with all creditors who have proved claims against the estate? Does that include secured creditors who have proved their claims but relied solely on their security? And what about the petitioning creditor who applied for the sequestration of the estate in the first place? These questions engaged Vilakazi AJ in the Gauteng Division of the High Court, Pretoria (the high court). But first, the background that led to the application before Vilakazi AJ.

[3] The insolvent, Mr J Z Msimango, prior to his sequestration, owned two sectional title units, which were separately bonded, one to Nedbank Limited in the amount of R577 800 (property 1) and the other to First National Bank (FNB), a division of the appellant (FirstRand), in the amount of R645 840 (property 2) respectively. The unit mortgaged in favour of Nedbank (property 1) fell within the sectional title scheme administered and managed by the second respondent (the Body Corporate).

[4] On 7 October 2009, the Body Corporate launched an application in the high court for the sequestration of the insolvent's estate on the basis that the insolvent owed it R22 000 in arrear levies. A year earlier it had obtained a default judgment against the insolvent in the Pretoria Magistrates' Court for payment of the sum of R8 895.64.

[5] The Body Corporate approached the high court on the strength of a *nulla bona* return issued by the sheriff which rendered the insolvent's conduct an act of insolvency within the ambit of s 8*(b)* of the Act. In its sequestration application, the Body Corporate contended that, '[b]oth properties will be sold when the Respondent [the insolvent] is sequestrated and that as such the probability of a substantial dividend becoming available to concurrent creditors is very likely'. A security certificate was issued by the Master of the High Court, Pretoria (the Master) stating that sufficient security had been given by the Body Corporate for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings, and of all costs of administering the estate until a trustee had been appointed and, if no trustee was appointed, all fees and charges necessary for the discharge of the estate from sequestration.

[41] Only if there are no other proved and concurrent creditors (including the petitioning creditor) able to contribute, would the secured creditors who have relied solely upon their security be called upon to pay (s 106*(a)* read with s 89(2). This interpretation is sensible as it does not do violence to the words 'to make good the whole of the deficiency, each in proportion to the amount of his claim [not the concurrent portion]' in s 106*(a)*. These words in fact strengthen that construction. The fact that the proviso operates to oblige secured creditors who rely solely on their security to meet the entire deficiency illustrates that there is no other creditor to meet the shortfall. This is consistent with the basic principle that a proviso is not to be construed as if it were an independent enacting provision, but as qualifying the enactment in relation to which it stands as a proviso.**[21]** Accordingly, in the case where there are two such secured creditors and a petitioning creditor, the petitioning creditor would be solely liable to pay the costs of sequestration based on their claim.

[42] This construction overcomes the potential unfairness, to secured creditors, that may creep in with friendly sequestrations and in instances where petitioning creditors do not prove their claims, such as in this case. When applying for sequestration a claim would be made that the sequestration of the insolvent would be to the advantage of the creditors whereas the facts may not be supportive of that allegation. The insolvent may only have one or two bonded properties and a shortfall would arise with no benefit realised to creditors.

[43] The appellant gave examples of where it suffered losses running into millions of rands, in instances where it was called upon by trustees or liquidators in various matters to make contributions for costs of sequestration notwithstanding that it had relied solely on its security. Section 14(3) seeks to avoid a situation where a creditor would petition for the sequestration of the estate and not prove a claim, only for other creditors 'to pick up the costs'. In a case like the present one, the unfairness is heightened because bodies corporate petition for sequestration, recover outstanding monies in terms of s 15B(3)*(a)*(i)*(aa)* once a unit is sold and, where there is a shortfall in the free residue other creditors, who have proved their claims (including secured creditors who rely solely on their security), bear the costs, including the costs paid by the petitioning creditor to their attorneys.

[44] This analysis illustrates that *Snyman* was wrongly decided. It further confirms that the Master was wrong in absolving the Body Corporate from paying the contribution on the basis of his reasoning which I have quoted in para 10 above. Lastly, the high court erred by holding FNB and Nedbank liable as co-contributors to the costs of sequestration together with the Body Corporate. For that reason, its decision must be set aside.

[45] In conclusion, having determined the meaning of ss 106, 89(2) and 14(3), it is clear that the Body Corporate as the petitioning creditor is solely liable to pay the costs of sequestration as the other two creditors (FNB and Nedbank) are secured creditors who relied solely on their security. Had there been other creditors found to have been liable to contribute, it would have had to contribute in proportion to the amount of its claim in the petition (R22 000). It is however not necessary to have regard to that amount, as the Body Corporate has been found to be solely liable for payment of the entire R43 680.35 in respect of the taxed bill of costs. Lastly, since this matter is not opposed, there will be no order as to costs.

[46] In the result the following order is made:

1 The appeal is upheld.

2 Paragraph 3 of the order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following order:

> '3. That the Third and Fourth Respondents are directed to amend the first and final liquidation, distribution and contribution account to reflect that the Second Respondent is solely liable to pay the contribution of R46 663.16.' [The body corporate: THE BODY CORPORATE OF VICTORY PARK]

3 There is no order as to costs.

Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd (91/2020) [2021] ZASCA 43 (13 April 2021)

Business rescue- moratorium on legal proceedings – s 133 of the Companies Act 71 of 2008 (the Act) – moratorium on legal proceedings against company in business rescue – sale of company's assets – deposit provisionally paid pending conclusion of sale agreements – sale not concluded – deposit not property belonging to company or lawfully in its possession – recovery of deposit not precluded by s 133.

Business rescue-Section 145(1)*(a)* of the Act – notice of court proceedings to creditors concerning business rescue proceedings – a general notification requirement – duty to notify creditors rests on business rescue practitioner.

Timasani was placed in business rescue and the practitioner was authorized to sell its assets in terms of the business rescue plan. Afrimat made an offer to purchase a farm and equipment, and paid a deposit of R1,7 million, however, the contracts for the purchase of these assets did not materialise due to the non-fulfilment of suspensive conditions.

The issue was whether Afrimat was precluded from launching proceedings for repayment of the deposit by the moratorium on legal proceedings in section 133 of

the Companies Act 71 of 2008. The High Court found section 133 inapplicable and ordered Timasani to repay the deposit, together with interest.

On appeal, **Schippers JA** discusses non-joinder; the interests of creditors; the allegation that Afrimat "effectively hijacked the online auction" – para [21]; whether the deposit was non-refundable; and whether the general moratorium in section precluded Afrimat from claiming repayment of the deposit.

The appeal is dismissed with costs.

The first appellant, Timasani (Pty) Ltd (Timasani), which formerly conducted iron and manganese mining, was placed in business rescue on 28 July 2015. The second appellant, Mr Werner Cawood, an attorney, is the business rescue practitioner of Timasani (the BRP), and was authorised to sell its assets in terms of a business rescue plan adopted by its creditors. The respondent, Afrimat Iron Ore (Pty) Ltd (Afrimat), is a mining company that made an offer to purchase Timasani's assets, namely a farm located in Kuruman together with fixed improvements, buildings and fittings of a permanent nature (the farm), and mineral rights and mining equipment. In terms of that offer, Afrimat paid a deposit of R1 700 000 to Timasani. However, the contracts for the purchase of these assets did not materialise due to the non-fulfilment of suspensive conditions.

The central issue in this appeal is whether Afrimat was precluded from launching proceedings for repayment of the deposit by the moratorium on legal proceedings in s 133 of the Companies Act 71 of 2008 (the Act). The Gauteng Division of the High Court, Pretoria (the high court), declared that s 133 of the Act was inapplicable and ordered Timasani to repay the deposit, together with interest, and the BRP to pay the costs of the application. The appeal is with its leave.

[3] The basic facts are uncontroversial. The BRP instructed Park Village Auctions (the auctioneer) to invite offers for the purchase of the farm, mineral rights and mining equipment. The auctioneer published an invitation on its website in terms of which offers for Timasani's assets were required to be submitted to the auctioneer's office by 10 March 2017. A deposit of 15% was payable on submission of an offer and the balance within 30 days of confirmation of its acceptance. The managing director of Afrimat raised certain queries concerning the offer with the auctioneer. The latter answered those queries, provided Afrimat with a draft offer to purchase the assets which it had prepared (the OTP) and advised Afrimat to contact the BRP directly if it had further enquiries.

[4] This led to Afrimat making a written counter-offer for the purchase of the assets on 10 March 2017, subject to certain amendments and additions to the OTP. The material terms of the counter-offer were these. The base purchase price for the farm, mineral rights and mining equipment was R17 million excluding VAT, transfer duties and agent's commission. Afrimat undertook to pay a deposit of 15% of the base purchase price within 48 hours of written acceptance of its offer. The deposit

was to bear interest which would accrue for Afrimat's benefit. The balance of the purchase price was payable upon fulfilment of the following conditions precedent: the conduct of a legal, technical and financial due diligence investigation yielding satisfactory results and approval of an agreement by Afrimat's Board of Directors. Afrimat would not be liable for any liabilities of Timasani, including any costs associated with its business rescue.

[5] By letter dated 27 March 2017, the BRP confirmed that Afrimat's offer had been circulated to all affected parties and unanimously accepted by creditors. The BRP was therefore authorised to accept Afrimat's offer on behalf of Timasani. The letter also stated the following. Afrimat's offer was accepted on the terms as supplemented in correspondence between the parties after receipt of Afrimat's counter-offer on 10 March 2017 (although a deposit of 15% of the purchase price was required in terms of the OTP, the parties had agreed subsequently on a deposit of 10%). The offer was also accepted on the basis that the agreed 21-day due diligence period would commence on 28 March 2017. The deposit of 10% of the purchase price of R17 million, ie R1 700 000 (the deposit) had to be paid directly into a separate investment account of Timasani held with Investec Bank. In conclusion the BRP said:

'We further confirm that the deposit will be retained on behalf of yourselves in this interest-bearing account pending the outcome of the due diligence proceedings and conclusion of the final agreements.'

[34] Thus, in Cloete Murray v FirstRand Bank,[21] the cancellation of an instalment sale agreement by a creditor rendered unlawful the continued possession by a company in business rescue of the goods that formed the subject matter of that agreement. This Court held that although the moratorium in s 133(1) of the Act grants the company breathing space, the legislature did not intend to interfere with contractual rights and obligations of parties to an agreement. Likewise, in Kythera Court v Le Rendez-Vous Café CC,[22] it was held that the moratorium did not preclude vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue. The case concerned legal proceedings for ejectment where a lease had been validly cancelled and the company was an unlawful occupier.

[35] Applied to the present case, the agreement in terms of which the deposit was paid did not materialise. It is trite that when a contract is subject to a suspensive condition which is fulfilled, the obligations under the contract become enforceable.[23] On the other hand, if the condition is not fulfilled then it is as if the contract never came into existence, ie it is regarded as being void ab initio.[24] A party who has made a payment under a contract in anticipation of the fulfilment of a suspensive condition is entitled to the return of the money, unless the contract provides otherwise.[25] Once Timasani and Afrimat did not conclude the draft agreements submitted by Afrimat, there was no right to retain the deposit because it was not money that belonged to the company; neither was it property lawfully in its possession. The agreement in regard to the deposit was that it would be held in a specific account and would accrue interest for the benefit of Afrimat. That made it

clear that if the anticipated agreement did not materialise the deposit had to be repaid. Timasani was rightly ordered to repay the deposit.

[36] The deposit was not property over which Timasani exercised the powers of a trustee as contemplated in s 133(1)(e) of the Act. The high court, with reference to the definition of 'trustee' in the Concise Oxford Dictionary, namely 'a person or a member of the board given control or powers of administration of property in trust with a legal obligation to administer it solely for the purposes specified', concluded that s 133(1)(e) also limited the application of the moratorium.

[37] The high court erred. Timasani held no title to any trust property belonging to Afrimat. The deposit was not paid as property in trust. Timasani was not given any powers of administration typically exercised by a trustee, such as taking investment decisions regarding trust assets, advancing trust capital or distributing trust assets to beneficiaries. It did not incur any fiduciary duty in respect of the deposit. Fundamentally, Afrimat's claim was not founded on any breach of trust on the part of the appellants. The section is addressed to companies that hold funds in trust, such as incorporated firms of attorneys, estate agents, professional trustees and financial institutions owing fiduciary duties in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001.

[38] In the result the appeal is dismissed with costs.

Cooper and another NNO v Myburgh and others [2021] 2 All SA 114 (WCC)

Company law-directors – Section 424(1) of the Companies Act 61 of 1973 – Where the business of a company has been carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on application, declare that any person who was knowingly a party thereto, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company – Director's actions, which were not to the advantage of company's creditors, constituting reckless or fraudulent conduct within the meaning of section 424(1) of the Companies Act, attracting personal liability for company's debts.

As co-liquidators of a company ("Transport"), the applicants sought a declaration in terms of section 424(1) of the Companies Act 61 of 1973 that one or more of the respondents should be responsible, without any limitation of liability, for all of the company's debts.

A trust established by the first respondent ("Myburgh") was the owner of Transport. Myburgh was also the sole shareholder of the second and third respondents ("Trucking" and "Hauliers"). Myburgh was the sole director of Transport, which was liquidated at his instance. He was also the sole director of Trucking and Hauliers.

Held – Section 424(1) provides that where the business of a company has been carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on application, declare that any person who was knowingly a party thereto, shall be personally

responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

When a company finds itself in financial difficulty, and especially if it is in a state of insolvency, those charged with the carrying-on of its business are obliged in addressing the situation to have reasonable regard for the interests of its creditors. The premise is that those involved in the carrying on of a company's business should not ordinarily permit it to continue to trade or carry on business in circumstances where it is reasonably foreseeable that it will be unable to pay its debts when they fall due. If that situation should arise, there is a duty on the persons concerned to conscientiously consider liquidation, business rescue, or a compromise with the creditors. A director has an affirmative duty to safeguard and protect the affairs of the company.

The evidence established that by 2014, Transport began experiencing serious financial difficulty. Myburgh responded by taking steps which could not be seen as being to the advantage of the company's creditors. On the contrary, they were manifestly, and foreseeably, to their prejudice. Myburgh, with the knowledge that Transport could not legitimately continue to trade because it was factually and commercially insolvent, decided to dispose of its assets to another company controlled by him. The effect of the transactions was to deprive Transport's creditors with currently due and payable claims of any hope of recovery. The Court accordingly held that a clear case of reckless, if not fraudulent, conduct within the meaning of section 424(1) of the Companies Act had been made out against Myburgh, and it issued a declaration that he bear personal liability for Transport's debts.

The Court then turned to the position of the trustees of the trust, whose authorisation, *qua* shareholders of Transport, was a prerequisite to the company's ability to dispose of all of its operational assets. The Court held that the disposal of the company's assets may be characterised as carrying on its business. The conduct of a company's business is ordinarily undertaken by its directors and employees, not by its shareholders. However, section 115 of the Companies Act 71 of 2008 introduces an exception to the ordinary position by taking control of the disposition of the greater part of a company's assets out of the hands of the directors and to put it in the hands of the shareholders. When shareholders exercise the control reserved to them in terms of section 115 over the alienation of a company's assets or undertaking they are obliged to have regard not only to their own interests, but also to the effect of their decision on the company's ability to meet its obligations to third parties. The seventh and eighth respondents, in blindly endorsing whatever Myburgh, as their co-trustee, put before them for signature implied that they abdicated their responsibilities as trustees. While that supported the conclusion that the trustees should be exposed to being declared personally liable in terms of section 424(1) of the 1973 Companies Act, the sixth to eighth respondents were joined in their capacity as co-trustees of the trust, not personally. The claim against the trustees in their personal capacity could succeed only if it were shown that the trust was a sham. That was not shown in this case. The claim against the sixth, seventh and eighth respondents thus could not succeed.

Montic Dairy (Pty) Ltd and Others v Mazars Recovery and Structuring (Pty) Ltd and Others (7523/19) [2021] ZAWCHC 20 (10 February 2021) (Leave to appeal on 12 April 2021)

Business rescue-BRP remuneration- BRP's caused two payments totalling R1,5m to be made to them- payments made by the BRP's after their application for an order of liquidation had been lodged on 16 May 2016 is hit by the provisions of s341(2) of the old Act and fall to be repaid. Montic Dairy (Pty) Ltd and Others v Mazars Recovery and Structuring (Pty) Ltd and Others (7523/19) [2021] ZAWCHC 20 (10 February 2021) LEAVE TO APPEAL GRANTED

Impeachable transactions- Business rescue-BRP remuneration- BRP's caused two payments totalling R1,5m to be made to them-iquidators claim that these payments are void in terms of s341(2) of the Companies Act, 1973 ("the old Act") and seek repayment of the amount of R1,5m to the company in liquidation-: after presentation of the application for winding-up to the court (*in casu* 16 May 2016) the company was precluded from making any payments to third parties Montic Dairy (Pty) Ltd and Others v Mazars Recovery and Structuring (Pty) Ltd and Others (7523/19) [2021] ZAWCHC 20 (10 February 2021) LEAVE TO APPEAL GRANTED

END-FOR NOW