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Malgas v Onega Investment CC and Others (1003/2020) [2021] ZAECGHC 15 (18 February 2021)

Winding up application-final order-section 81 (1)(d) of the Companies Act, No 71 of 2008- deadlock has arisen or it would be just and equitable to do so.

The applicant seeks confirmation of an order provisionally winding up the first respondent, granted by Roberson J on 29 September 2020. The applicant is a businessman residing at Cathcart. The first respondent is a duly registered close corporation, whose main business is the "owning of farming property and farming". The second and third respondents are also businessmen who reside at Msobomvu Location, Butterworth and Nqxaba Village, Dutywa, respectively. The parties are

related to each other, the applicant and third respondent being half-brothers and the latter and second respondent being cousins. The applicant, second and third respondents each have a one third interest in the first respondent. The matter is opposed by the third respondent only.

Factual background

[3] The parties' business association commenced during 1999 when they sub-leased agricultural land in Seymour on which to graze their cattle. When the lease terminated towards the end of 1999, they relocated to Cathcart where they again leased land for this purpose.

[4] They eventually founded the first respondent in 2000, each of them holding a one third member's interest. Soon after its establishment, the first respondent purchased a farm in the Cathcart district for R180 000 and thereafter purchased another adjacent piece of land for R130 000. Both properties were purchased with loans obtained from the Land Bank. The properties were consolidated during February 2006 and is the first respondent's only significant asset. The applicant asserts that they had an informal agreement to the effect that each of them would contribute equally to the servicing of the Land Bank loans.

[5] The applicant avers that the causes for the breakdown of the relationship between the members of the first respondent hark back to 2008. He alleges that during 2009, he had purchased seven herd of cattle and delivered them to the farm for grazing. At the time the first respondent had employed two casual labourers as herders. When he went to the farm to inspect his cattle, he found that the cattle had wandered onto municipal land. He enquired from the casual employees why his cattle were not grazing on the farm and was told that they had been instructed by the second and third respondents to remove them from the farm.

[6] During 2010 or 2011 a meeting took place at the offices of the first respondent's accountants, namely Charteris & Barnes, to discuss the fact that employees were only tending the cattle of the second and third respondents. It was then decided that more herders should be employed to look after the cattle of all three members. That resolution was, however, never implemented.

[7] The relationship between the parties further deteriorated thereafter. As a result the applicant removed his cattle from the farm, being of the view that he could no longer risk keeping them there since (on instructions from the second and third respondents) they were clearly not being looked after. After he had removed his cattle from the farm, the second and third respondents caused locks to be installed on the gates, thereby denying him access to the farm.

[8] During 2013 he called an informal meeting of the members, to discuss, *inter alia*, how the balance of the mortgage bond would be paid and to address the fact that the working relationship between them had broken down completely.

[9] At that stage there was effectively no communication between them, he had no access to the farm, and was not kept abreast of the affairs of the first respondent. The meeting, however, ended inconclusively.

[10] He did not pursue these matters again until 2015, when Charteris & Barnes wrote to his attorneys stating, *inter alia*, that: since the members were unable to work together constructively, they proposed that the second and third respondents must be allowed either to subdivide the land, purchase his membership, or sell the farm and divide the proceeds thereof. They also mentioned the fact that he did not receive any rental income from the farm and was thus financially prejudiced.

[11] Thereafter, during early 2016, he was summoned to the Charteris & Barnes offices where he was presented with a document purporting to be his resignation from the first respondent and an undated minute of a meeting reflecting his resignation and recording that the second and third respondents would have 50% interest each in the first respondent. He was shocked at the brazenness of this attempt to get rid of him and thus refused to sign the documents.

[39] It is also manifest that even though they may well have been able initially to conduct the business successfully in this manner, the subsequent disagreements compromised their ability to continue on this basis.

[40] It is also significant that the first respondent's only real asset of value is the consolidated farm, which had been purchased for the sole purpose of grazing for the cattle owned by the members. As is evident from the papers, that operation

required continuous co-operation and effective communication between the members. It is therefore extremely unlikely that an outsider would purchase the applicant's member interest. He is effectively therefore stuck in an arrangement where his rights as a member are being ignored and without the ability to take his stake and go elsewhere.

[41] I am accordingly satisfied that the applicant has established that the members are deadlocked in the management of the first respondent, which is resulting in irreparable harm to that business and that it cannot be operated to the benefit of all the members. For the reasons stated above, I am accordingly of the view that it is just and equitable for the first respondent to be wound up.

Costs

[42] Regarding the issue of costs, I take into account that the second and third respondents were cited only as interested parties and given notice that costs orders would be sought against them in the event that they unsuccessfully oppose the application. The third respondent decided to oppose the relief and although he purported to act on behalf of the second respondent, there was no evidence that the latter had in fact become a party to the proceedings. For these reasons, I am of the view that it would be proper for the third respondent to bear the costs of the application.

Order

[43] In the result the following order issues:

(1) The first respondent be and is hereby placed under final winding up in the hands of the Master of the High Court of South Africa.

(2) The costs incurred and occasioned by the opposition of the application shall be paid by the third respondent, including the reserved costs of 3 November 2020.

(3) Any costs not included in paragraph 2 above shall be costs in the winding up of the first respondent.

Mfazwe v A N Gadi Property Investments (Pty) Ltd and Others (EL 604/2020) [2021] ZAECELLC 2 (23 February 2021)

Enquiry- sections 417 and 418 of the Companies Act 61 of 1973- view held by the liquidators that, on the available evidence, no such funds exist in any attorney's trust account

The applicant, Benjamin Mzuvukile Mfazwe, seeks an order that an enquiry relating to two entities namely, Mnandi Fast Foods and Mpeto Attorneys be conducted in terms of sections 417 and 418 of the Companies Act 61 of 1973. He has alleged that they have received or are holding funds in the sum of R4 200 935, which sum is due to AN Gadi Property Investments (Pty) Ltd (in liquidation), the first respondent.

[2] Mr Mfazwe believes that the funds were in the trust account of Mpeto Attorneys at the instance of the two entities. His contentions are that once this court has authorised an enquiry, the entities would account for the funds and also disclose their whereabouts. According to him, the enquiry would result in the recovery of the funds. He rejects the view held by the liquidators that, on the available evidence, no such funds exist in any attorney's trust account.

[3] In opposing the application, the respondents have challenged Mr Mfazwe's *locus standi* to institute these proceedings. They also contended that the proposed enquiry would serve no purpose as the alleged funds had, in previous litigation involving the first respondent , the applicant or his wife, Nontende Stella Mfazwe, been found by this court, to be non-existent. The liquidators contended that they have also investigated the allegations of funds being held in the trust accounts of the entities, and found no evidence supporting the allegations. According to the respondents, the proposed enquiry would be an abuse of the process of this Court and there is no valid ground for this application.

[4] The respondents have also been aggrieved by some allegations made in the applicant's replying affidavit. They have accordingly made an application for the striking out of the impugned allegations. There are accordingly two applications before this Court, the application to strike out and the main application.

The Parties

[5] For the sake of convenience, the protagonists in these proceedings are referred to simply as *"Mr Mfazwe" , "Mr Voigf'* and *N Gadi Property Investments (Pty) Ltd'.* Mr Mfazwe is the applicant. Mr Voigt, the second respondent, is cited in his capacity as one of the liquidators of A N Gadi Property Investments (Pty) Ltd and a director of IDEC Financial Services (Pty) Ltd, the third respondent.

I interpose here to mention that, although the issue in paragraph 6(b) is dispositive of the application, the remaining issues will nevertheless be dealt with so as to do justice to the submissions made by the parties, respectively. The issues for determination are-

(a) whether or not the applicant has the necessary *locus standi* to institute these proceedings;

(b) whether or not the courts have previously pronounced on the funds alleged to be either held or received into the trust accounts of Mpeto Attorneys and Mnandi Fast Foods totaling to R4 200 935;

(c) whether or not reasonable grounds exist for the authorization of an enquiry in terms of sections 417 and 418 of the Companies Act;

(d) whether or not the application is an abuse of the process of court;

(e) the application to strike in terms of rule 6(15); and

(f) the appropriate costs order.

Engelbrecht v Master of the High Court, Free State Division, Bloemfontein and Others (5148/2019) [2021] ZAFSHC 26 (5 February 2021)

Enquiry-section 417-review application to set aside-decision of the Master on 21 October 2019 to have continued with the enquiry in terms of section 417 of the Companies Act, 61 of 1973, in circumstances where it was allowed that counsel for the respondents conducted the enquiry, is hereby reviewed and set aside.

This is a review application in which the applicant is seeking the following relief:

"1. That the decision of the First Respondent to allow the Section 417 of the Companies Act enquiry to be conducted by anyone else than the Master, in the insolvent estate of BZM Transport (Pty) Ltd [in liquidation], be reviewed and set aside.

2. In the alternative, that the First Respondent `s decision be reviewed and set aside in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

3. That the proceedings and record of such enquiry be struck (out) for not complying with the statutory provisions, as well as being procedurally irregular.

4. That the costs of this application be costs in the administration of the company in liquidation."

[2] The application is opposed by the second to fourth respondents ("the respondents") in their capacity as duly appointed liquidators of BZM Transport (Pty) Ltd [in liquidation] ("the liquidated company").

Summarised Background:

[3] The respondents applied to the Master to authorise an enquiry in in relation to the liquidated company in terms of section 417 of the Companies Act, 61 of 1973 ("the Act"), read with paragraph [9] of schedule 5 of **section 224** (3) of the **Companies Act, 71 of 2008**.

[4] The Master issued subpoenas to the different witnesses, as proposed by the respondents. The subpoenas, which form part of the record of the relevant

proceedings, are titled "*Subpoena in terms of section 417(1) of the Previous* **Companies Act" and** further stipulates that the Master has ordered that an examination in terms of section 417 of the Act was due to take place on the specified date and at the specified venue.

[5] The Assistant-Master presided over the enquiry and in her reasons for her decision she indicated that "*the enquiry was conducted"* by counsel on instructions of an attorney and that the said counsel "*appeared on behalf of the liquidators".*

[6] It is the applicant`s case that the examination at such enquiry convened in terms of section 417 of the Act may only be conducted by the Master or the court. Therefore the decision of the Master to have allowed the examination to have been conducted by someone other than the Master or the court and the subsequent proceedings, are to be reviewed and set aside.

[7] The crux of the application therefore lies in the interpretation of section 417 of the Act.

[7] The argument that s 417 only empowers the court or the Master to examine persons summoned before it and that only the court can allow any person to examine and not the Master cannot be sustained. This aspect is fully covered in our judgment delivered on 08 August 2014 with regards to the case of SWART, supra and R v HERHOLDT AND OTHERS **1957 (3) SA 236** (A). I do not intend to repeat same here. S 417 (2) (a) of the Companies Act provides as follows:

> 'The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may

reduce his answers to writing and require him to sign them.' (My underlining).

The use of the word 'may' above is obviously directory and not peremptory…."

[15] Mr Tsangarakis consequently submitted that the **Swart**-judgment is wrong in law and that we are therefore not bound by it.

[16] I do not agree. In my view the contention by Mr Hendriks that the **Garcao**-judgment is clearly distinguishable from the present application, is correct. In that matter the court actually found that the relevant enquiry was convened in terms of sections 417 **and** 418:

"[3] The order granted by Olivier J on 10 June 2011 was by agreement between the parties. Para 2.1.2 of the said order reads thus:

'The applicants' powers as Provincial Liquidators are extended to empower them to convene an investigation in terms of Section 417 and/or Section 418 of the Companies Act 61 of 1973 (read with Section 9 of Schedule 5 of the **Companies Act, 71 of 2008**) ["the Act"] pertaining to the transactions recorded in the said Annexures "B1" and "B2' (My emphasis).

The heading in the subpoena addressed to the applicant clearly describes the type of enquiry that was to be held. It reads as follows:

'THE ENQUIRY IN TERMS OF SECTION 417 read with SECTION 418 OF THE COMPANIES ACT, NO 29 of 1985, AS AMENDED (the Act).'

[4] The argument that the content of the subpoena refers to the enquiry in terms of s 417 cannot be sustained. The heading of the subpoena and the order by Olivier J are express and clear and need no further clarification. The assistant Master, Mr WK Van Rensburg, presided as the Commissioner in terms of s 418 (1) (a) of the Act and filed a Report dated 07 September 2012. It stated in no uncertain terms that the enquiry was convened in terms of s 417 and 418 of the Companies Act. S 418 (1) (a), (b) and (c) of the Act sets out the powers of the Master and the prescribed procedure as follows…

…

[7] The enquiry was convened by the Liquidators in terms of the order granted by Olivier J on 10 June 2011. The Assistant Master therefore conducted the proceedings as a Commissioner appointed by the Master in compliance with s 418 (a) of the Act and the powers stipulated in s 418 (c)."

(Own emphasis)

Conclusion:

[17] I consequently respectfully agree with the **Swart**-judgment and I consider this court to be bound by it.

[18] The application therefore stand to be granted.

Costs:

[19] The applicant sought in his notice of motion for an order that the costs of the application be costs in the liquidation.

Order:

[20] The following order is made:

1. The decision of the Master on 21 October 2019 to have continued with the enquiry in terms of section 417 of the Companies Act, 61 of 1973, in circumstances where it was allowed that counsel for the respondents conducted the enquiry, is hereby reviewed and set aside.

2. The proceedings and the record of the said enquiry are to be struck out and considered to be null and void *ab initio.*

3. The costs of this application are to be costs in the liquidation.

Matjhabeng Local Municipality v McDonald and Others (4075/2020; 4077/2020; 4078/2020) [2021] ZAFSHC 34 (19 February 2021)

Company law- deregistration of the three companies. The properties automatically became vested in the State upon deregistration of the three companies. Nothing prohibits National Treasury to decide on how the properties should be liquidated and what to do with the proceeds thereof.

Company law- deregistration of the three companies. The properties automatically became vested in the State upon deregistration of the three companies. Nothing prohibits National Treasury to decide on how the properties should be liquidated and what to do with the proceeds thereof. The liabilities of the deregistered companies have not been extinguished upon deregistration, but only rendered unenforceable as long as deregistration subsists.No doubt, the applicant's claims in respect of rates and taxes need to be paid as a first charge against the properties. The bondholders remain preferent and secured creditors. The application papers have not been served on the bondholders, but they are not prejudiced, bearing in mind my

conclusions.The applicant is not entitled to any relief. I am not prepared to grant the first prayer contained in the notice of motion, *ie* a declaratory order in terms whereof it is declared that the applicant is the owner of the *bona vacantia*, to wit the properties presently registered in the names of the three deregistered companies. Ownership in the immovable properties has automatically passed to the State, being the government of the Republic of South Africa. Even if the applicant was successful in respect of its first prayer, the second prayer, *ie* directing the Registrar to transfer the properties to applicant, would be superfluous for the reasons advanced herein.

Umbane Technology CC v Master of the High Court of SA Pretoria Division and Others (14471/18) [2021] ZAGPPHC 50 (9 February 2021)

Claims- rejected-review application- The decision of the first respondent to reject the claim of the applicant against the estate of the second respondent;set aside. The decision of the first respondent to disallow the applicant the opportunity to present further evidence, as applicant is entitled to do in terms of **Section 44(7)** of the **Insolvency Act. 1936** and to postpone the meeting of creditors for that purpose; The decision refusing a postponement of the meeting for purposes of 35.1.2 above.35.3 That the reviewed decisions be **substituted** with the following order:The first respondent is directed to reconvene a Special Meeting of Creditors for the purpose of allowing the applicant an opportunity to present further evidence in accordance with **Section 44(7)** of the **Insolvency Act, 1936**.Costs to be costs in the administration of the estate of the second respondent.

[1] This is a review application wherein the applicant seeks to review and set aside:

1.1 The decision of the first respondent to reject the claim of the applicant against the estate of the second respondent;

1.2 The decision of the first respondent to disallow the applicant the opportunity to present further evidence, as the applicant is entitled to do in terms of section 44(7) of the Insolvency Act, 1936, and to postpone the meeting of creditors for that purpose;

1.3 The decision refusing a postponement of the meeting for the purposes of 1.2 above.

[9] On 8 February 2018, a special meeting of creditors was convened in terms of the second respondent. At the said meeting the applicant was represented by his attorneys of record.

[10] It is to be noted that at this meeting the sixth respondent being a natural person, was not present. He was likewise represented by his attorney and counsel.

APPLICANTS CONTENTIONS

[11] As per the founding affidavit, the applicant sets out that at the meeting of creditors so convened, that since the inception of the meeting, the sixth respondent had taken the stance that the claim of the applicant will be objected to.

[12] Furthermore, that the applicant's claim was never disputed prior to the liquidation of the second respondent or even during the first meeting of creditors.

[13] That it was at this Special Meeting of Creditors, where the Master rejected the applicant's claim, after the sixth respondent had raised technical objections against the claim of the applicant, which included the following:

13.1 The power of attorney was filed out of time and that the co-member of the applicant was unable to appoint a further person.

13.2 That there were no invoices submitted for an amount of R 191 862.00 out of a total amount of R 2 115 987.08 against the second respondent for work in progress.

13.3 As to the remainder of the claim, it was averred that the claim was lacking in particulars as there were no source documents attached.

13.4 The agreement entered into between the applicant and the sixth respondent was only signed by the applicant and not the sixth respondent.

[14] In support of its claim, the applicant had confirmed by means of a statement made under oath, which was not disputed by the sixth respondent. The statement contains a date of entry, a reference of purchase order and invoice reference.

[15] The sixth respondent has also not disputed that invoices were issued for services/work rendered by it to the second respondent.

SIXTH RESPONDENTS CONTENTIONS

[16] On behalf of the sixth respondent the following objections/defences were raised.

16.1 The sixth respondent is a proved creditor of the second respondent and as such it had the necessary *locus standi* to object to the attempts made by the applicant to prove the claim. In proving its claim before the Master, the applicant carried the *onus* to prove its claim and no *onus* rests on the sixth respondent.

16.2 The sixth respondent denied that it only raised defences of a ‘technical nature’ against the applicant’s claim and that the real foundation for its opposition related to the merits proper of the matter, i.e. whether the applicant was really a creditor of the second respondent.

16.3 The sixth respondent explained that the applicant had failed to supplement its claim form by attaching to the claim form a proper motivation on affidavit in order to properly explain, motivate and prove the claim.

16.4 The applicant further avers that in circumstances where a claim is rejected by the Master, the applicant would not be without remedy. The applicant would be at liberty to institute action proceedings against the second respondent to establish its claim.

16.5 In addition the sixth respondent places reliance on certain clauses contained in the governing agreement between the parties, which regulated the contractual agreement between them and which clauses, the sixth respondent avers, the applicant had failed to comply with.

16.6 Furthermore, upon receipt of Bundle X the sixth respondent was unable to find any quotation as is required by the agreement and there was also no completion certificate.**[15]** It is on this basis therefore that it contended that the Master was correct in rejecting the applicants' claim.

APPLICABLE LAW

[17] It is trite that a presiding officer must examine a claim, carefully but that such presiding officer is not required to adjudicate upon a claim, as if it were a court of law.

[18] Such presiding officer should examine the proof of claim documents for the purpose of deciding whether they disclose *prima facie* the existence of an enforceable claim.

[19] A claimant further need not attach source documents for its claim, but is required to confirm such claim under oath in compliance in a form corresponding substantially with Form C or D of the First Schedule of the **Insolvency Act.[18**]

[20] The admission of a claim by the presiding officer, is only provisional, as under **s 45(3)** the trustee may dispute the claim notwithstanding its admission by the presiding officer. Furthermore, that a presiding officer does not adjudicate upon the claim as if he were a court of law, he is not required to examine a claim too critically or to require more, than prima facie proof.**[19]**

[21] Thus, unless the claim is on the face of it bad - for example, it may ex facie be prescribed - the presiding officer, in my opinion, should not reject it without hearing the creditors evidence 44(7).

[22] Apparent from the above, it is thus clear, that the test for a claim, to be admitted by a presiding officer, is not *onerous*. The **Insolvency Act as** well as the Companies Act, has provided sufficient safeguards where claims have to be investigated by the appointed liquidators in terms of section 45(3).

ANAYSIS

[23] At the said meeting the Master of the High Court initially indicated that the applicant had proven a claim against the second respondent, prima facie, at least to the extent of R 1 924 125.06. The Master later however in the same meeting had a change of heart and rejected the claim *in toto.***[20]**

[24] This reversal of the decision of the Master was not denied by the sixth respondent, save to allege that the claim of the applicant is bogus and hatched between a husband and wife.

[25] Having regard to the authorities referred to above, it is clear, that the claim as submitted by the applicant was sufficient for its approval, and if the Master was not inclined to approve the entire claim, then he ought to adjourn the proceedings and afford the applicant an opportunity to present evidence either oral or through documents in support of its claim. This request was indeed made to the Master and simply rejected without being given any due consideration.

[26] In the present application, the Master was invited to present this Court with his report, which would ordinarily give the Court guidance as to what informed his reasoning and motivation.

[27] In his report so filed**[21]** the Master merely stipulated that the supporting vouchers to the claim for approval were insufficient and that he is not aware of any facts which would be of relevance to this application.

[28] By merely stating that the supporting vouchers were insufficient (*thus drawing a conclusion*) and failing to explain the reasons that informed the conclusion so reached by him, this court is not placed in a position to determine whether his reasons were in fact cogent.

[29] The reasoning employed by the Master is paramount to this Court, as this Court has to review his decision and is not called upon to usurp his administrative function.

[30] *In casu*, as already mentioned, no additional explanation was furnished by the Master setting out to what extent the supporting vouchers presented by the applicant was unsatisfactory or what other documentation ought to have been provided by the applicant in order for him to properly assess its claim. In terms of the enabling legislation this obligation rested on the Master as the presiding officer of the creditors meeting.

[31] The applicant, as mentioned, alleges that initially the Master held the view that a claim amount if R 1 924 125.06 was proven against the second respondent, but during the same meeting he later held a different view.

[32] What informed this different view, this Court is none the wiser and in the absence thereof, is left to speculate as to what informed his reasoning.

[33] In the alternative to the relief sought in the Notion of Motion, the applicant seeks that the Special Meeting of Creditors be re-opened and that the decision of the Master be set aside and that the Special Meeting of Creditors be postponed to allow the Applicant an opportunity to supplement its claim in terms of section 44(7) of the Act. In the circumstances, I am of the opinion that this will be the most appropriate order to give under he prevailing circumstances.

COSTS

[34] As to the appropriate costs order to be awarded, section 151*bis* of the Act, specifically provides that where a Court confirms a decision of a Master on review that such costs of an applicant shall not be paid out of the assets of the estate concerned unless the Court otherwise directs. In the present instance, the decision of the Master is hereby set aside and accordingly the appropriate order of the Court is to order the costs to be, costs in the administration of the estate of the second respondent.

ORDER

[35] Consequently, the following order is made:

35.1 The following decisions of the first respondent taken on 8 February 2018 at a meeting of creditors of second respondent held at the Master Pretoria are reviewed and set aside:

35.1.1 The decision of the first respondent to reject the claim of the applicant against the estate of the second respondent;

35.1.2 The decision of the first respondent to disallow the applicant the opportunity to present further evidence, as applicant is entitled to do in

terms of **Section 44(7)** of the **Insolvency Act. 1936** and to postpone the meeting of creditors for that purpose;

35.2 The decision refusing a postponement of the meeting for purposes of 35.1.2 above.

35.3 That the reviewed decisions be **substituted** with the following order:

35.3.1 The first respondent is directed to reconvene a Special Meeting of Creditors for the purpose of allowing the applicant an opportunity to present further evidence in accordance with **Section 44(7)** of the **Insolvency Act, 1936**.

35.3.2 Costs to be costs in the administration of the estate of the second respondent.

Bravura Capital (Pty) Limited v Drive Path Trade & Invest (Pty) Limited t/a South Energy (29755/2019) [2021] ZAGPJHC 3 (1 February 2021)

Winding up application-

The applicant seeks the winding-up of the respondent in terms of section 344(f) as read with section 345(1)(a) of the Companies Act, 1973.[1] The applicant contends that it is a creditor of the respondent and that the respondent is deemed to be unable to pay its debts.

2. The applicant provides corporate finance advisory services. The respondent's business is described as identifying, developing, financing and operating clean energy generation projects utilising technology such as solar, wind, gas and hydro.

3. The respondent was looking to raise capital for its energy projects and approached the applicant to render corporate finance advisory services. To this end, the parties concluded a written agreement with extensive terms regulating their relationship. They describe their relationship as a 'mandate', although not one of agency. The terms included the payment of two upfront or retainer amounts, on 28 September 2017 and 31 October 2017. The applicant invoiced the respondent for these two amounts, totalling R456,000.

4. The respondent has refused to pay. The respondent asserts that the applicant did not perform in terms of the mandate and that, in any event, the mandate was suspended.

5. The applicant seeks as primary relief that the respondent be placed under final winding-up. Stripped of its nuances, the threshold that the applicant would have to cross to persuade the court to grant a final winding-up order (in contrast to a provisional winding-up order) is that of the usual *Plascon-Evans* approach[2] where the respondent's version is effectively to be preferred over that of the applicant[3] unless the respondent's version can be rejected as far-fetched and fanciful.[4]

6. It is unnecessary for me to consider whether the applicant has achieved this threshold in the present instance because the applicant has failed to comply with section 346(4A)(a)(ii) of the Companies Act, 1973 as the employees have not been properly furnished with a copy of the application. This means that a final order cannot be granted.

7. Section 346(4A)(a) provides, in relevant part:

> "*(4A)(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –*
>
> *(ii) to the employees themselves -*
>
> (aa) *by affixing a copy of the application to any notice board to which the applicant and the*

employees have access inside the premises of the company; or

(bb) *if there is no access to the premises by the applicant and the employees, by the affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the presentation of the application.*"

8. Section 346(4A)(b) provides that:

"*(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with".*

9. Wallis JA in *EB Steam Company (Pty) Limited v Eskom Holdings SOC Limited* **2015 (2) SA 526** (SCA) at paras 16, 17 and 23 held that although it was peremptory that the employees be furnished a copy of the application, the modes of doing so as set out in subsections (aa) and (bb) are directory such that the effective furnishing of the application can be achieved by other means. The court must be satisfied that the method adopted was reasonably likely to make the application papers accessible to the employees (*EB Steam* para 17).

10. The applicant relies upon a return of service that reflects that a copy of the application and other papers was "*served … upon the employees of [the respondent] and the registered address at 73 Beyers Naude Drive, Cnr Preller Drive, Roosevelt Park, JHB by affixing a copy of the abovementioned process to the principal door as registered address (Rule 4(1)(a)(v))*".

11. The return of service continues, in capitalised font, that "*PLEASE NOTE I WAS INFORMED BY MS MOUTON THAT NO EMPLOYEES OF THE RESPONDENT BELONGED TO A TRADE UNION*".

12. The applicant did not file an affidavit by the person who furnished the affidavit to employees (which in this instance would be the deputy sheriff), as required in terms of section 346(4A)(b) and instead relied upon the deputy sheriff's return of service.

13. Often both attorneys and sheriffs fail to see the distinction between service of process, which is regulated by Uniform Rule 4, and the effective furnishing of the application to the specified persons as required by section 346(4A) of the Companies Act, 1973. Section 346(4A) does not require service of the application, but that the application be "furnished" to the particular person. "Service" ordinarily and in the context of court process, refers to the delivery of the document by the sheriff or deputy sheriff, in terms of the rules of court. In contrast, "furnish" does not require formal service by the sheriff but, in the context of section 346(4A), that a copy of the application be furnished to the particular person in a manner

    that is reasonably likely to bring that application to the attention of the person, or, in the context of employees, reasonably likely to make the application accessible to those employees.

14. Section 346(4A), relating to the furnishing of the application, can be contrasted to section 346A of the Companies Act, 1973 relating to the service of the winding-up order, once granted. The latter section expressly refers to "service" of the order, and so requires service of the order by sheriff. And in effecting such service, the sheriff is required to have regard not only to the relevant rules of court, such as Uniform Rule 4, but also the specific requirements of section 346A.[5]

15. When a provisional order is sought, the court is not concerned with the service of the order (as there is no order), but instead whether there has been effective furnishing of the application to employees (and the other parties listed in section 346(4A)).

16. I do not have a difficulty that a sheriff or deputy sheriff is the person that attends to furnish the application under section 346(4A)(a). I also have no difficulty that the sheriff or deputy sheriff does not provide a

formal affidavit in terms of section 346(4A)(b), as the contents of the return of service are *prima facie* evidence of the matters therein stated **(section 43(2)** of the **Superior Courts Act, 2013**). In many instances though, it may be practically easier to achieve effective furnishing of the application under **section s346(4A)** if a properly informed candidate attorney or messenger furnishes the application. That person can then depose to the required affidavit in terms of **section 346(4A)(b)** instead of seeking to persuade a sheriff or deputy sheriff to depart from what he or she may have become accustomed to during years of effecting service of process in terms of the rules of court.

17. The difficulty that I have is whether in the present instance there has been effective furnishing of the application to employees by the deputy sheriff as evidenced by the return of service. Without further explanation from the deputy sheriff who attended to furnish the application, I can only consider what is contained in the return of service as read with the papers filed in the application. It is not at all clear that the deputy sheriff or the applicant's attorneys were aware of what was expected of them, namely, to furnish the application in such a way that it was reasonably likely to make the application papers accessible to the employees. Both the deputy sheriff and the applicant's attorneys appear to have lapsed into a mind-set of service of process under the Uniform Rules, rather than seeking to comply with section 346(4A) of the Insolvency Act.

18. The return of service expressly refers to service having been effected under Uniform Rule 4(1)(a)(v), which applies in respect of service of process in the case of a corporation or company, by delivering a copy to the responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if no such employee is willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law.

19. What is immediately notable is that service in terms of Uniform Rule 4(1)(a)(v) has nothing to do with service of a document on an employee – it is a form of service upon of a corporation or company, albeit that a

responsible employee may be the natural person who receives the document on behalf of the corporation or company.

20. The seeds of doubt having been sown in the present instance, the concern grows that reasonable steps have not been taken to make the application accessible to the employees. The deputy sheriff states that he affixed a copy of the papers to the principal door of the registered address. But it appears neither from the return of service nor any of the affidavits that the registered address is the respondent's business address or that any employees were to be found at the registered address. During argument, the respondent's counsel upon instructions volunteered what would appear to be the respondent's local business address. That address is not the registered address, as reflected in the return of service. The respondent's counsel also directed me to the answering affidavit stating that the respondent's projects are located in the Northern Cape and Free State, the inference being that employees are to be found at those projects.

21. In any event, if there were employees at the registered address, then section 346(4A)(a)(ii)(aa) requires that the application be affixed to a notice board to which the applicant and employees have access inside those premises. This was not the case, as appears from the return of service. Although section 346(4A)(a)(ii)(bb) provides that if there is no access to the premises, a copy can be affixed to the front gate of the premises, failing which to the front door of the premises from which the company conducted any business at the time of the application, this presupposes that the relevant address was a business address or an address from which the company conducted business. As stated, there is no evidence that this was so.

22. The recordal in the return of service that a certain Ms Mouton informed the sheriff that there were no employees of the respondent that belonged to a trade union raises further questions. Who is Ms Mouton and why would she be giving information as to whether the employees belong to a trade union? This then calls into doubt whether there has been compliance with sections 346(4A)(a)(i) which requires a copy of the

application to be furnished to every registered trade union that represents the employees.

23. In the circumstances, I am not satisfied that the application was furnished in such a way that it was reasonably likely to make the application papers accessible to the employees. The question that arises is the consequence of non-compliance with section 346(4A).

24. Wallis JA in *EB Steam* furnished the answer - in those circumstances the court may still grant a provisional order. In *EB Steam* a final liquidation order was sought and granted by the court *a quo*. On appeal, Wallis JA found in paragraph 26 that the court *a quo* should instead have granted a provisional winding-up order, giving directions if necessary, on how the employees are to be served with the papers.

25. In the circumstances, it is not open to me to grant a final winding-up order and therefore it is unnecessary for me to consider whether the applicant has achieved the threshold for the granting of a final winding-up order.

26. Has the applicant crossed the threshold for a provisional winding-up order?

27. It is not altogether a simple exercise in delineating precisely what threshold needs to be satisfied to enable a provisional liquidation order to be granted. A consideration of the various decisions that traverse the standard, such as the oft-cited *Badenhorst v Northern Construction Enterprises (Pty) Ltd*,[6] and *Kalil v Decotex (Pty) Limited,*[7] and the more recent pronouncements, reveals that they are not entirely reconcilable.

Nonetheless, particularly useful is the judgment of Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading 55 CC*,[8] from which the following can be extracted:

27.1. If there are factual disputes relating to the requirements for a winding-up other than respondent's liability to the applicant, has the applicant established those requirements on a *prima*

facie basis, i.e. on a balance of probabilities with reference to all the affidavits (without employing *Plascon-Evans*).[9]

27.2. If there are factual disputes concerning the respondent's liability to the applicant and the applicant shows *prima facie* its claim on a balance of probabilities with reference to all the affidavits,[10] then the onus is on the respondent to show that the debt is *bona fide* disputed on reasonable grounds, i.e. the *Badenhorst* rule comes into play. If the respondent does demonstrate this, then the application should (rather than necessarily must)[11] be dismissed.[12] This means that even if the applicant can demonstrate its claim on a balance of probabilities, a provisional winding-up order can be refused if the respondent nevertheless demonstrates that the debt is *bona fide* disputed on reasonable grounds.[13]

27.3. *Bona fides* and reasonableness are two distinct requirements.[14]

27.4. As to whether the indebtedness is *bona fide* disputed, the court must look to the respondent's subjective state of mind. Bald allegations lacking particularity are unlikely to persuade a court that the respondent is *bona fide*.[15]

27.5. As to whether indebtedness is disputed on reasonable grounds, the court looks to whether there are facts, if proven at trial, that would constitute a defence. This requires more than bald allegations lacking in particularity.[16]

28. Generally, a referral to oral evidence has more of a role to play at the final stage than at the provisional stage.[17]

29. If at the provisional stage a *prima facie* case is not made out on a balance of probabilities with reference to all the affidavits, the application should be dismissed, unless the applicant seeks a referral to oral evidence. In that event, the more the balance on the probabilities is tipped in favour of the applicant, the more likely the referral and vice versa. It would only be in rare cases that a court would order oral evidence where

the preponderance of probabilities on the affidavits favours the respondent.[18]

30. At the provisional stage, the court is not likely to refer the matter to oral evidence where the probabilities favour the applicant, and a *prima facie* case is made out (as it is only necessary at the provisional stage to make out a *prima facie* case with reference to all the affidavits). The court may grant a provisional order as the matter can be referred to oral evidence at the final stage if so requested by the respondent.**[18]**

31. At the final stage, although the cases do refer to the court being required to be satisfied on a balance of probabilities before granting a final order, the *Plascon-Evans* approach remains applicable.**[19]** It is not about assessing whether on all the affidavits the applicant has established its claim (as was the assessment at the provisional stage), but on the application of the *Plascon-Evans* approach where the respondent's

version is effectively preferred.

32. It nonetheless remains open for the parties to seek a referral to oral evidence at the final stage,**[20]** and that is where a referral would be more commonplace than at the provisional stage. If at the final stage the probabilities favour the applicant, a referral to oral evidence is particularly apposite where *viva voce* evidence has reasonable prospects of disturbing the probabilities already in favour of the applicant. If at the final stage the probabilities favour the respondent, the court should dismiss the application rather than refer to oral evidence, particularly as liquidation proceedings are not the forum to determine *bona fide* disputed claims and where the *Plascon-Evans* approach effectively prefers the respondent's version.

33. Applying these principles to the present matter, the first step in considering whether a provisional order may be granted is to consider whether the applicant has shown *prima facie* its claim on a balance of probabilities with reference to all the affidavits.

34. In my view, the applicant has done so. As stated earlier, the respondent asserts that the applicant did not perform in terms of the mandate and that in any event the mandate was suspended.

35. The applicant relies upon two invoiced retainer amounts, which are expressly provided for in the written agreement to be invoiced at the end of each of September and October 2017. By their nature as retainers, such performance as can be expected from the applicant may be rendered after the retainers have been paid. This is reinforced by the express terms of the agreement. The respondent cannot expect performance from the applicant before being liable to pay these invoiced retainers.

36. This is not to say that the applicant can simply invoice for the retainers and then not perform. The applicant must perform to earn, and retain, the retainers. But that performance does not equate to successfully bringing about a successful debt or equity capital raise for the respondent. The respondent is entitled to expect the applicant to perform in return for the retainer by rendering the corporate finance advisory services. But if the rendering of those services does not result in a successful capital raising, this does not mean that the retainer was not earned. Although the agreement provides for additional fees to be paid to the applicant in the event of a successful capital raise, the retainer fees are not dependent on this.

37. In the circumstances, the respondent's grounds of opposition based upon non-performance are not sufficiently cogent to enable me to find that the applicant has not *prima facie* established its claim on a balance of probabilities with reference to all the affidavits. This is particularly so having regard to the respondent's answering affidavit in which it raises such non-performance (under the heading "*Bravura cannot deliver*") and the applicant's response in its replying affidavit providing a detailed exposition of that which it did in performing under the agreement, supported by various contemporaneous documents.

38. The applicant having so *prima facie* established its claim on a balance of probabilities with reference to all the affidavits, it is for the respondent to show that the debt is nonetheless *bona fide* disputed on reasonable grounds.[21]

39. That the applicant has established its claim *prima facie* on a balance of probabilities will often inform, perhaps definitively in many cases, the enquiry as to whether the debt is nevertheless *bona fide* disputed by the respondent on reasonable grounds. For example, the greater force with which the applicant can demonstrate its claim on a balance of probabilities, the more difficult it would be for the respondent to demonstrate that it *bona fide* disputes the debt on reasonable grounds. Nonetheless, as appears from *Payslip Holdings*,[22] it is possible that the respondent can nevertheless show that it bona fide disputes the debt on reasonable grounds even where the applicant's claim is made out on a balance of probabilities.

40. As pointed out in *Gap Merchant*, *bona fides* and reasonableness are two distinct requirements.

41. The respondent contends that the applicant has not performed in relation to the retainer amounts. The respondent asserts that a key deliverable under the mandate is a binding term sheet from a *bona fide* investor. In looking at the reasonableness of these grounds, which is an objective enquiry to ascertain whether certain facts, if proven at trial, would constitute a defence, in my view the applicant has sufficiently demonstrated in its replying affidavit, with reference to contemporaneous documents, how it performed in the discharge of its mandate. The respondent expects the performance to translate into a successful raising of capital, or a binding term sheet, but, as discussed above, this is not what is required of the applicant in terms of the mandate, at least as a *quid pro quo* for the retainer amounts. Even should the respondent demonstrate at trial that there is no binding term sheet, which is in any event common cause on the papers, that will not constitute a defence to the respondent's non-payment of the invoiced retainer amounts.

42. The respondent's reliance upon a suspension of the mandate at some point in 2017, and so presumably a suspension of its obligations to pay the invoiced retainer amounts, also, in my view, does not constitute reasonable grounds for disputing the indebtedness. I assume in favour of the respondent that there is sufficient evidence that the parties may have agreed on some or other "*suspension"* of the mandate. For example, the gap in correspondence from October 2017 to March 2018 between the parties supports the respondent's assertion that there was such a suspension. Further, the respondent in its email of 9 April 2018 to the applicant, in response to the applicant making enquiries as to it continuing to render services under the agreement, refers to a suspension of the 'original mandate'. The applicant's response shortly thereafter that day per email does not take issue with the respondent's recordal of a suspension of the mandate.

43. The respondent's difficulty does not lie so much in there being no evidence to support a possible suspension of the mandate, but rather the express terms of the agreement.

44. Clause 23.3 of the written "*Terms of Business*" that form part of the written agreement expressly provides:

> "*23.3 No agreement varying, amending or cancelling the Mandate or these Terms, and no suspension of any right under the Mandate or these Terms is effective unless reduced to writing and signed by or on behalf of the Parties by a person duly authorised thereto.*"

45. A suspension by the applicant of its right to payment of the retainer amounts, assuming that there was such a suspension, falls foul of clause 23.3.

46. Clause 23.2 of the Terms of Business provides:

> "*23.2 No extension of time or other indulgence which either party may allow the other constitutes a waiver by the first mentioned Party of its rights to require the other to comply*

with its obligations strictly in accordance with the Mandate and these Terms".

47. The suspension contended for by the respondent would be such an extension of time or indulgence, at least concerning payment of the retainer amounts, and too would fall foul of clause 23.2.

48. I enquired of the respondent's counsel how, in the light of these exclusionary clauses, reliance can be placed by the respondent upon a suspension of the mandate, and the payment obligations. The submission was that in the exercise of my discretion in liquidation proceedings I could go beyond the written terms of the agreement and look to the parties' conduct. In my view, the precise purpose of exclusionary clauses is to preclude a court from looking at such conduct of the parties, at least in the absence of an adequate jurisprudential basis to do so, such as by an assertion of fraud. I am unaware of any jurisprudential basis arising from such discretion as the court may have in deciding whether to grant a winding-up order that would justify the exclusionary clauses from being disregarded.

49. In the circumstances, I am unable to find that the respondent has disputed the indebtedness on reasonable grounds.

50. But, more telling, in my view, and even should I have erred in finding that the debt is not disputed on reasonable grounds, the respondent has not demonstrated that its dispute is *bona fide*. As stated in *Gap Merchant*, *bona fides* is a separate enquiry and is to be assessed with reference to the respondent's subjective state of mind, i.e. is the respondent *bona fide* in raising the dispute that it now does?

51. On 25 May 2018, the applicant terminated the mandate on thirty days' notice and reminded the respondent that the first and second retainers remained payable. The response that was forthcoming from the respondent in a brief email on 20 June 2018 is to record a belief that "*Bravura still has a role to play on this matter*" which is inconsistent with

an assertion that the applicant's performance was so lacking it could not be said to have earned its retainer. That email further continues as follows:

> "*After our meeting at your offices, where we discussed the revised mandate, it remained clear to us that your expertise is more in pure corporate finance advisory, rather than infrastructure projects and equity financing. This, of course, initially became evidence in the early phase of our engagement where you could not grasp the proposed concept, and therefore the appropriate approach and audience. We then suspended the mandate, and engaged PWC to assist with putting together a project document which would form the basis of a new capital raising plan.*"

52. Whilst this does to some extent question the applicant's expertise and refers to a suspension of the mandate, the respondent does not squarely dispute its indebtedness to the applicant on the retainer amounts that had already been invoiced and which the applicant was pressing be paid.

53. Perhaps if the applicant's correspondence ended there, a finding of *bona fides* could have been made in favour of the respondent. But the correspondence did not end there.

54. On 9 July 2018, the applicant addressed a formal demand to the respondent demanding payment. No response was received.

55. On 3 December 2018, the applicant addressed a further demand seeking payment. Again, no response was received.

56. The applicant approached its present attorneys, and on 4 March 2019 the applicant's attorneys addressed a formal letter of demand to the respondent. Again, there was no response forthcoming.

57. On 20 September 2019, the formal statutory demand was made in terms of section 345(1)(a) of the Companies Act, 1973 and it was served upon the respondent at its registered address. There is no denial of receipt of this letter. Notwithstanding the obvious seriousness of the

statutory demand, threatening liquidation proceedings, still no response was forthcoming from the respondent.

58. On 30 October 2019, the present application was served upon the respondent[23] but still no response was forthcoming.

59. It was only after the enrolment of this liquidation application for the unopposed roll for hearing on 11 December 2019 that the respondent, to use the phraseology of the applicant's counsel, came out the woodwork on 9 December 2019 in belatedly delivering an answering affidavit in which the respondent disputes its indebtedness to the applicant. Such communications as had emanated from the respondent preceded formal demand, and had then only in vague terms suggested a suspension of mandate and a lack of expertise on the part of the applicant. Had the respondent been *bona fide,* it would have responded to the several demands, raising its grounds of opposition.

60. To the extent that the respondent did have some or other reasonable grounds for disputing the indebtedness, it cannot be said to now be raising that dispute in good faith in circumstances where over a protracted period it had the opportunity to do so, but failed to do so.

61. In the circumstances, the respondent has failed to demonstrate that it *bona fide* disputes the indebtedness on reasonable grounds.

62. Neither party sought any referral to oral evidence and therefore I need not consider whether there should be such a referral. In any event, it remains open for either party to seek a referral to oral evidence when the court is called upon to decide whether to grant a final order.

63. Such other defences as have been raised by the respondent can be shortly disposed of. Although the agreement provides for a dispute resolution mechanism by way of *inter alia* arbitration, the respondent's counsel conceded, justifiably, that the mere presence of an arbitration clause in and of itself does not constitute a bar to granting a winding-up order. This is especially so where the respondent cannot demonstrate

that there is a *bona fide* dispute that would be worthy of consideration by way of the dispute resolution mechanism.

64. Respondent's counsel's belated reliance in his heads of argument on one of the two invoiced retainer amounts having prescribed cannot be considered as it falls foul of **section 17(2)** of the **Prescription Act, 1969** which requires a party to litigation who invokes prescription to do so in the relevant document filed of record in the proceedings. Nothing is said about prescription in the answering affidavit and it cannot be raised for the first time in heads of argument.

65. The respondent's complaint that the applicant seeks to make out a case for an inability to pay debts in the replying affidavit overlooks that the case made out by the applicant in its founding affidavit is that the respondent is deemed to be unable to pay its debts in terms of section 345(1)(a) of the Companies Act, 1973. Once the respondent is unable to demonstrate that it *bona fide* disputes the indebtedness on reasonable grounds and so did not have a justifiable basis for failing to respond to that letter, the deeming provision is sufficient to demonstrate that the respondent is unable to pay its debts.

66. In the circumstances, the applicant has demonstrated that it is entitled to a provisional order of winding-up.

67. Section 346A of the Companies Act, 1973 regulates the service of the provisional order, including on employees and trade unions, if any. Undoubtedly, the applicant's attorneys will take heed of what is stated in this judgment to ensure effective and compliant service of the provisional order, including upon employees and any registered trade unions.

68. In the circumstances, the following order is made:

68.1. The respondent is placed under provisional winding-up in the hands of the Master of the High Court, Johannesburg.

68.2. All persons who have a legitimate interest are called upon to put forward on a date to be obtained from the Registrar at 10h00 or so soon thereafter as counsel may be heard the reasons why this

court should not order the final winding-up of the respondent and that the costs of this application be costs in the winding-up of the respondent.

68.3. A copy of this order is to be served on the various persons as provided for in section 346A of the Companies Act, 1973 and is to be published once in the Government Gazette and once in a newspaper circulating in Gauteng.

68.4. A copy of this order is to be furnished to each known creditor and shareholder, either per email or per telefax or per registered post.

OMV Proprietary Limited v Alleyroads Construction Proprietary Limited (2019/7213) [2021] ZAGPJHC 6 (2 February 2021)

The applicant seeks the winding up of the respondent on the basis that the respondent is unable to pay its debts. The applicant asserts that the respondent is indebted to it for a balance of R46 718.37 for "*goods sold and services rendered by the Applicant to the Respondent"*, and which balance remains unpaid notwithstanding the delivery of a letter of demand in terms of section 345(1)(a) of the Companies Act, 1973.

2. The applicant's founding affidavit is terse. The applicant does not specify what goods were sold and what services were rendered. Although a statement of account is attached which reflects how the outstanding balance is calculated, after deducting payments made by the respondent over a period from invoiced amounts over a period, that statement does not set out what goods were sold and delivered and what services were rendered. Notably, no invoices are attached to the founding affidavit which presumably would have described the goods that were sold and delivered and the services that were rendered. This omission by the applicant, as will appear below, is significant.

3. But what is clear on the applicant's own version is that it both sold goods and rendered services. This appears from paragraphs 7 and 8.5 of the founding affidavit.

4. The respondent, faced with this terse founding affidavit, reciprocates with a similarly terse answering affidavit. The respondent asserts that "*[i]t was a material term of the agreement concluded between the applicant and the respondent that on conclusion of the installing of the concrete slabs, the applicant would supply the respondent with the relevant certificates and specifications*".

5. The respondent continues that the applicant failed to provide the respondent with the relevant certificates and specifications.

The following order is made:

30.1. The application is dismissed.

30.2. The applicant is to pay the costs of the application, on a party and party scale until 10 May 2019 and thereafter on an attorney and client scale.

First National Nominees (Pty) Limited and Others v Capital Appreciation Limited and Another (19/41679) [2021] ZAGPJHC 17 (5 February 2021)

This is an application wherein the first applicant, a private company by the name of First National Nominees (Pty) Ltd ("Nominees"), seeks to exercise appraisal rights afforded to dissenting shareholders in terms of section 164 of the Companies Act, 71 of 2008 ("the Act").**[1]** It asks for a determination by the court of the fair value of the shares it holds in the first respondent, Capital Appreciation Limited ("Capprec"), a public company listed on the Main Board of the Johannesburg Stock Exchange.

[2] It is common cause that, on or about 29 July 2019, Capprec issued a circular to its shareholders ("the Circular"). The shareholders were advised that Capprec would be repurchasing 245 000 000 of its shares held by specific shareholders, (defined as "Relevant Persons" in the Circular) for the amount of R196

000 000. The Circular further advised the shareholders that the proposed buy-back was subject to the provisions of sections 48, 114 and 164 of the Act in that it would "*. result in Capprec acquiring in excess of 5% of (its own) issued share capital..."* The mention of Capprec acquiring in excess of 5% of its own issued share capital, is a direct reference to section 48(8)(b) of the Act that provides that a decision by the board of a company to acquire a number of its own shares "*is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares*." The Circular informed the shareholders that the transaction required their specific authority and would be tabled at a general meeting of the company to be held on 27 August 2019 at 14h30, for approval of a special resolution in 6terms of section 115 of the Act.

Aerontec (Pty) Limited v South Harbour Tankfarm CC (18712/2019) [2021] ZAWCHC 21 (9 February 2021)

The applicant seeks the final winding up of respondent on the grounds that it is unable to pay its debts as and when they have fallen due for payment in the ordinary course of its business as contemplated in terms of s 344 (f) read with s 345 (1) (a) alternatively s 345 (1) (c) of the Companies Act 61 of 1973 ('the 1973 Companies Act') together with Item 9 and Schedule 5 of the Companies Act 71 of 2008 ('the 2008 **Companies Act&rsquo**;).

[2] The dispute between the parties is relatively narrow. While the applicant's contention that the respondent was commercially insolvent is denied in the vaguest terms by the respondent, the latter insists that it is not factually insolvent and that its assets exceed its liabilities. It is not disputed that respondent is indebted to the applicant. Respondent seeks to resist the granting of a final order of liquidation on the basis of the existence of an unliquidated counterclaim sourced in s 61 of the Consumer Protection Act 68 of 2008 (CPA) which, respondent contends, is a serious and genuine claim and which, if determined, would extinguish applicant's claim against it. It is for this reason that respondent contends that this court should exercise its discretion against the granting of a final order of liquidation,

notwithstanding the provisional order which was granted on 19 August 2020. The provisional order of liquidation was granted on the basis that the respondent continued to owe applicant an amount of R 414 522, 55 together with interest and costs, which amounts had not been paid, applicant's consistent demands for payment notwithstanding.

Background

[3] Applicant is a retailer which supplied goods to the respondent. The circumstances under which it supplied these goods included recommendations and advice by the applicant relating to the suitability and application of those goods; in particular in the construction of milk tankers. According to Mr Peter Blyth, who deposed to affidavit on behalf of the applicant:

'The applicant carries on business as a supplier and distributor of various composite materials and technology throughout South Africa. The applicant's claim against the respondent is based on the supply of goods to the respondent. It is clear from the terms and conditions of sale attached to the credit agreement which governs the relationship between the parties, that the transactions between them relate to the supply of goods.

The applicant was not involved in any manner with the design or specification of the tankers manufactured by the respondent…

Of this, only a fraction (R29 411.25, after taking into account the credit note issued for the 40 units returned by the respondent in February 2019) relates to the Eposhield product which forms the core of the respondent's complaints. The following table illustrates this (all amounts include VAT):

Mr Fergus, who appeared on behalf of the applicant, referred to two clauses in the agreement entered into between the parties which, in his view, were dispositive of the present dispute. Clause 4.4 provides:

‘Payments of all amounts due shall be made at such place or into such account, free of deduction or set off, free of exchange or other such address as we may nominate.’

In addition clause 8.1 provides:

> ‘All goods and materials as supplied to and shall be accepted by the Buyer voetstoots without warrantee express or implied against patent or latent defects and on the particular understanding that we do not expressly or impliedly warrant or represent that such goods or material are suitable for any particular purpose.’

[8] Mr Fergus submitted that, pursuant to these clauses, the respondent had agreed contractually that it was precluded from relying on a counterclaim as a defence to its liability to pay amounts owing in terms of the credit facility agreement. In support of this submission he referred to the judgment of Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading* 55 CC 2016 (1) SA 261 (WCC). In similar fashion to the present dispute, the applicant in *Gap Merchant Recycling CC* had applied for the provisional liquidation of the respondent. The basis of this application was a claim for R 668 000.00 for goods sold and delivered. Respondent disputed the claim and invoked the rule that winding up proceedings are precluded where the debt, which forms the basis of the application, is *bona fide* disputed on reasonable grounds. In particular, respondent had taken the view that certain products supplied by applicant were ‘contaminated and/or unsuitable for use.’ Accordingly respondent argued that it had a claim for damages against the applicant. In this case the relevant clause provided that the customer had ‘no right to withhold payment for any reason whatsoever and was ‘not entitled to set off any amounts due to the Customer by the Supplier against its indebtedness to the Supplier.’

[9] Rogers J carefully discussed the different approaches to the question of a disputed counterclaim for damages as reflected in *Ter Beek v United Resources CC and another* 1997 (3) SA 314 (C) and *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd* [2012] ZAWCHC. Without deciding what the proper approach was to a

respondent asserting the existence of an unliquidated claim as the basis by which a court should not grant an order of liquidation, Rogers J said:

'I shall assume in favour of the respondent without deciding that the application in the present case should be dismissed. I find on an assessment of all the affidavits that the respondent is *bona fide* asserting on reasonable grounds that counterclaim for damages which exceeds the amount of the applicants claim.'

[10] Turning to the relevant clauses of the contract, Rogers J noted at para 47 that the 'respondent has no right to withhold payment on the basis of an alleged counterclaim. Naturally a counterclaim for damages even if it had prima facie merit would not constitute a defence as such to the claim for payment because an illiquid claim for damages cannot be set off against a liquidated claim… In such a case the court in action proceedings might nevertheless in terms of rule 22 (4) postpone the giving of judgment on the main claim until the determination of the counterclaim. However a court would be unlikely to adopt this course in the face of contractual provisions such as clauses 37 and 38.'

[11] For this reason, Rogers J concluded at para 48:

'It is thus not strictly necessary to comment on the prima facie merits of the alleged counterclaim because the counterclaim is not, in the light of the contract between the parties, an objectively reasonable ground for resisting payment of the applicants claim.'

[12] On the basis of this judgment, Mr Fergus contended that the contractual relationship between the parties was dispositive of the dispute, in that, as in *Gap Merchant Recycling*, it could not be concluded that the applicant's claim had been disputed either *bona fide* or on reasonable grounds.

Rule 22 (4)

[13] Mr Studti, on behalf of the respondent, noted, notwithstanding *dicta* in *Gap Merchant Recycling,* that the critical question was whether Rule 22 (4) had

application to the present dispute, given the nature of the contractual provisions which governed the relationship between the parties. To the extent relevant, Rule 22 (4) provides thus:

'If by person of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the clam or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention.'

[14] This rule was canvassed extensively in *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) where the question before the court was whether a clause in an agreement relating to set off, similar to clause 4.4 in the present dispute, justified a conclusion that the first respondent had either waived or agreed to the exclusion of the procedural benefits of Rule 22 (4). The relevant clause in the contract read thus:

'The purchase price shall be paid by the customer to the company without set-off or deduction for any reason whatsoever and the customer shall pay all amounts to the company upon the terms notified by the company to the customer from time to time.'

[15] In dealing with the question as to whether Rule 22 (4) was applicable, Van Zyl J referred to the contractual arrangements between the parties and concluded at para 25:

'I have certain difficulties with this submission. Nowhere in the set-off clause or, for that matter, elsewhere in the agreement is any express reference made to the provisions of Rule 22 (4). By the same token there is no basis on which it can be suggested that there was a reference thereto tacitly or by implication. The parties clearly did not, at the time of conclusion of the agreement, give the slightest consideration to such Rule or to any matter remotely pertaining thereto or connected therewith. There is no indication whatever that they intended to exclude the operation of Rule 22 (4) or to exclude any of its procedural benefits. It cannot be inferred from any from any express term or terms on which the parties achieved

consensus, nor can it be inferred from any relevant facts or surrounding circumstances'.

[16] Applying this *dictum* to the present dispute, nowhere in the contract between applicant and respondent is any express reference to be found to Rule 22 (4). It would, given the wording of the contract, be difficult to conclude, even tacitly or by implication, that Rule 22 (4) was contemplated when the contract was entered into between the parties. For this reason, there is no basis to suggest that the parties intended to exclude the implications of Rule 22 (4) or deny one of the parties any of its procedural benefits. It is clear that respondent's counterclaim, which is unliquidated, cannot be set off against the liquidated claim of the applicant. By contrast, as stated in Consol 'set off will come into operation only if and when judgment on the counterclaim is given in favour of the defendant.' It follows therefore that the clauses referred to by applicant as dispositive of this case do not justify such a conclusion.

The counterclaim

[17] It follows that the nature of the counterclaim now requires analysis. In describing its counterclaim, the respondent relies exclusively for its cause of action on s 61 of the Consumer Protection Act 68 of 2008 ('CPA'). Section 61 (1) of the CPA provides thus:

'Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of-

…

(b) a product failure, defect or hazard in any goods;

…

irrespective of where the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.'

'Defect', as employed in s 51, is defined in s 53 (1) (a) (ii) as follows:

'any characteristic of the goods … that renders the goods … less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.'

'Failure' is defined in s 53 (1) (b) as follows:

'the inability of the goods to perform in the intended manner or to the intended effect.'

[18] In essence, respondent contends, that in terms of s 61 (1) (b) of the CPA, it suffered harm as a result of defects and/or failures in three of the goods supplied by the applicant, being the Eposhield, the KTA 313 hardener which was applied to the two dairy road tankers of the respondent and which appeared to be unsuitable and had to be removed and the supply of PU foam. According to the answering affidavit of Mr Bennetto 'two tanks built by the respondent using KTA 313 hardener / SR 12 resin had to be finally scrapped in September 2019 after 8 months of repairs having been done.' The third claim based on the value the PU (Polyurethane) foam product, which was applied to the two dairy road tankers, proved unsuitable and had to be removed and replaced with a denser micro balloon and resin mix. Mr Bennetto stated that 'the PU … foam was recommended by the applicant as the filler in the corners of the tanks, where milk, 'butter fat' and 'milk stone' and wash water would not build up has a low density and a high air content… Under the weight of 15 00 kilogram of milk per square meter on the floor of the tanks PU foam compressed and collapsed.'

[19] It is appropriate to note at this stage that the litigation in this application appeared to be a legal version of a moving feast, in subsequent to the initial papers, two supplementary answering affidavits and two supplementary replying affidavits were filed. The point made by applicant concerning the shifting case of respondent was that, other than the claim based on the Eposhield, the balance of the claims

were never raised in the initial papers. I shall return presently to the implications of this argument.

[20] This observation by applicant is coupled with a number of further issues raised about the manner in which the respondent conducted its case. It appears that the respondent first raised the alleged counterclaims after receipt of the applicant's letter of demand in terms of s 345 (1) (a) of the 1973 **Companies Act. Prior** thereto, the issue of a counterclaim was not raised. Furthermore, the first time a reference to a possible counter claim appears is to be found in an email on 24 April 2019, in which Mr Bennetto wrote to Mr Blyth:

'We would like to discuss payment arrangements to Aerontec account in the light of the three material setbacks which we have experienced'. At this point, he referred to the use of Eposhield, in what he referred to as 'the delamination / dry jointing we are now experiencing …' and 'the processes recommended and monitored in making the 'in house per- preg material (resins and imported KTA 313 hardener.'

[21] By 30 December 2018, respondent had breached its obligations in terms of the agreement, by failing to make payment of R 299 842.52, when such payment was due owing and payable to the applicant. This is admitted by respondent in the answering affidavit of Mr Bennetto in which the following appears:

'I admit that the respondent did not pay the amount of R 299 842.52 by 30 December 2018, but I do however deny that the respondent was in fact indebted to the applicant at that juncture for the amount claimed. I also deny that the respondent was in breach of its obligations to any extent. I aver that the respondent was fully within its rights to withhold payment to the applicant, given the counterclaims which the respondent had against the applicant which had already arisen at the juncture.'

[22] The sharp point of this evidence is that, as at December 2018, there was no suggestion of a counterclaim which the respondent might bring against applicant. The answering affidavit does not provide a credible explanation about the silence of a counter claim as at the end of December 2018. Indeed, the possible existence of a counterclaim was indicated for the first time on the record when, on 24 April 2019, an allegation was made by the respondent that, for example, Eposhield

was an unsuitable material for the purpose envisaged by respondent. In that email Mr Bennetto says: 'By losing three months on our first delivery we had a "loss of profits" of at least R 1.4 million.' There is no direct averment at this stage that the applicant is liable therefore.

[23] There can be no doubt that the case developed around the counter claim transmogrified from these vague assertions contained in the email of 24 April 2019 to a full blown reliance on **s 61** of CPA, by way of the filing of the supplementary answering affidavits. This chronology also needs to be evaluated in terms of the material evidence as it appears on the record. Of particular significance is an email of 8 March 2019, in which Mr Bennetto sent to Mr Malan Conradie, who was the composites expert that Mr Bennetto had approached to be the technical partner in the project, and who was required to advise and assist him with composite tank options for a tanker. So much is clear from an email from Mr Conradie of 14 August 2019 to Mr Deon Perold, who was then acting on behalf of the applicant. In that email Mr Conradie says the following:

'I have looked at the letter from Bennetto and believe that the information is not a true reflection of the events.

Please see my summary of the project.

1. Peter Bennetto approach me to advise and assist him with the composite tank options for a ReturnHauler road tanker. No payment were offered for design, advice, introductions and connections that I had built up in the industry since 1992. He did offer a 15% share in ReturnHauler projects that included patents in various countries as well as a long term benefit with this project. I did not know Mr Bennetto's personal financial position at the time.

2. I did designs based on some guidelines, dimensions and details provided by Bennetto and Dawid Pepler from Parmalat. My initial design were based on a hull (tank bottom) and deck (tank top) to be bonded together with tank special joining flange similar to a boat and high up were there were low pressure and minimum change of leaking.'

[24] This version is supported by email from Mr Bennetto to Mr Conradie on 8 March 2019. The following passages are particularly relevant:

'As the "Responsible Person" in the project, I was not ever consulted on this decision.

With road tanker background – which you do not have – I would have warned against weakening the tank ends.

Tank ends are critical components.

Even though I carry commercial responsibility of the project – I was not consulted.

Nor was Simera ever consulted on this design change – as the FEA engineers.

Third Road Test (Sun. 24 Feb)

After the 10 days of repairs / modifications the semi was transferred to Truck Craft.

I did invite you to witness this third road test.

But received no response from you on this.

And you did not attend this road test.

Disappointing – you have your reasons, not that I understand them.

Probably like your reasons not to attend other road tests.

You were responsible for the detailed composite design.

But at no stage did you raise the alarm that his detailed design was not being adhered to in the build

We now sit with the embarrassment of failure, and are carrying some of the costs of repairs/modifications.'

[25] I shall deal now with the significance of this correspondence within the context of an overall evaluation of the available evidence set out in the papers including the supplementary affidavits.

Conclusion

[26] While there is considerable dispute on the papers as to the various allegations and counter allegations concerning the counter claim, the email exchange between Mr Conradie and Mr Bennetto is instructive. In particular, the email on 8 March 2019 from Mr Bennetto to Mr Conradie and the other correspondence, to which I have referred from Mr Conradie, makes it clear, on the probabilities, that the tankers had failed and then underwent numerous weeks of expensive repair which was neither due to the Eposhield nor the KTA 313 hardener but rather due to poor design, deviations from the design and possible manufacturing problems. The least one could have expected was a version from the respondent to significantly gainsay the implications of this correspondence. Instead in the email of 8 March 2019 the following appears:

'We faced two broad options – to abandon the project and be sued by Parmalat for performance.

Or work to remedy the failures.

Very fortunately John Oehley has stood his ground on the product, and not 'run for the hills' as lesser people would have done in the circumstances.

We of course were totally financially committed as the spreadsheet attached indicates by the time the failures / omissions came home to roost.

It is in our interest to see the product work to avoid being sued by Parmalat.

We also believe in the future of the product – if we can get past the very clear omissions in manufacture.'

[27] This brings me back to the instructive judgment of Binns-Ward J in *Absa Bank Ltd, supra*. In my view, Binns-Ward J correctly distinguished the so called Badenhorst Rule (*Badenhorst v Northern Construction Enterprises (Pty) Ltd* **1956 (2) SA 346** (T) at 347-348) which articulates the idea that winding up is not an appropriate procedure to be availed of by a creditor whose claim against a respondent is *bona fide* disputed on reasonable grounds. However, in a case where there is opposition to an application for a liquidation order on the basis of an unliquidated counterclaim, a court is entitled and indeed justified to exercise its discretion against the granting of a winding up order, where it appears that there is a reasonable possibility that a counterclaim by the debtor company will, upon its determination, extinguish the debt relied upon by the applicant which forms the basis of the application for the winding up. See *Absa Bank, supra* at 26.

[28] A court should follow this distinction made by Binns-Ward J in his judgment. The present case thus triggers a decision as to whether to exercise a discretion in favour of respondent which has raised a counterclaim as a basis for an exercise of the court's discretion in its favour. But as Binns-Ward J said at para 27:

'It is for the respondent to persuade the court to exercise the discretion in its favour by showing on the papers that its counterclaim is what the English judges would call a 'genuine and serious' one. This requires more of a respondent than is needed if its basis for opposition is the existence of a disputed indebtedness. If the respondent fails in this respect the court is unlikely to exercise the discretion in terms of **s 347** (1) of the **Companies Act in** its favour.'

[29] In the present case the counter claim was not raised as a defence to the demand for payment in December 2018, which respondent concedes was in fact due. Thereafter, for a considerable period during 2019, as the evidence reveals, there was a startling lack of particularity in respect of alleged breaches of **s 61** of the CPA. Finally, this provision became the central pillar of respondent's opposition to the application for the winding up order.

[30] There has, on the evidence, been insufficient particularity provided by respondent to show that the applicant was in any way responsible for the alleged defects in the Eposhield products supplied by it to respondent, including that the

product did not perform in the manner intended by respondent. The evidence reveals further that applicant had very little, if any, control over the quality of the process which was employed in the use of the KTA 313 product. In the email of 9 December 2018, which Mr Bennetto addressed to Mr Parsons, he referred to work done by Mr John Oehley of AFF, a composite engineering firm and said:

'Johan has done an extensive trial now the SR 1280 / KTA 313 resin combination using Saertex Triax 820g Glass … Comparative test done … yielded slightly better results on the AFF prepreg so we have no cause to not use the KTA 313'.

[31] In summary, the evidence on the papers is indicative of a conclusion that the overall difficulties encountered by respondent in the manufacturing of tankers was structural in nature, stemmed from design and/or manufacturing defects, a point which had been made clearly by Mr Parsons, applicant's director to Mr Bennetto in February 2019 as follows:

'Thank you for inviting me to the meeting today reviewing the structural issues with the tanker. I'm confident that the tanker can be repaired. One of the key advantages of composite products over metals, is they can typically always be repaired by bonding on more material , but typically at the expense of additional weight and thickness. I'm concerned though that the build seems to have deviated from design in many areas, which could produce further nasty surprises in service.' (my emphasis)

[32] As noted in *Tiador 126 CC v Rock Construction CC (Earthworks Drilling and Exploration CC and Jeff Drill and Blast (Pty) Ltd* Intervening Parties) 2015 JDR 0234 WCC), the key question in the determination of an exercise of a courts discretion is how genuine is the counterclaim. The answer must emerge from the papers, for as was stated in *Tiador*:

'In a case where a provisional order was granted and the Court rejected the respondent's version because of a lack of particularity and the respondent arrived at court to oppose the final order on the same papers as at 3 September 2014, a newly developed counterclaim which emerges thereafter needs to be carefully scrutinised with forensic precision.'

[33] In the present dispute, the counterclaim was considered by De Villiers AJ to possess insufficient weight to resist the granting of an order of provisional liquidation. Subsequent thereto, the respondent sought to amplify its arguments in justification of its counterclaim. The problem was that much of the amplification should, if it was to reach the standard of a counterclaim which justified the exercise of a court's discretion in its favour, have added significantly to the case which had have been raised in the initial papers. This was not done. By contrast, the need for amplification was replaced by a repackaging of the initial case. Any amplification, to the extent viable, was met by evidence which cast severe doubt on any merits which the counterclaim may have possessed. In addition, the entire basis of the counterclaim was not raised until, at the very least, 5 April 2019, more than three months after respondent had clearly breached its obligations in terms of the relevant agreement by failing to make payment of R 299 842.52. Equally significantly, no plausible explanation was given for the contents of the email of 8 March 2019 which Mr Bennetto sent to Mr Conradie and which gainsaid much of respondent's case that structural decision issues were not the cause of any loss which it may have suffered.

[34] In summary, there is no evidence to gainsay applicant's argument that the respondent is commercially insolvent and has been unable to pay the amount due to the applicant. That amount is undisputed. There is no plausible basis to exercise a discretion and stay a grant of a final order. It must therefore follow that the respondent is found to have been unable to pay its debts as and when they fall due for payment in the ordinary course of business as envisaged in **s 344** (f) read with s 345 (1)(c) of the 1973 **Companies Act.**

[35] In the result, the respondent is placed under final liquidation in the hands of the Master of the High Court Cape Town. The costs of the application shall be costs in the liquidation.

Montic Dairy (Pty) Ltd and Others v Mazars Recovery and Structuring (Pty) Ltd and Others (7523/19) [2021] ZAWCHC 20 (10 February 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.

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-

This application concerns the remuneration of business rescue practitioners ("BRP's") in circumstances where the company that was in business rescue is subsequently placed into liquidation. The facts are relatively uncontroversial but the law is the subject of some debate between the parties.

2. The applicant company, Montic Diary (Pty) Ltd ("Montic" or "the company"), owned a dairy business at Heidelberg in Gauteng. It ran into financial difficulty and commenced business rescue proceedings on 2 November 2015 pursuant to an application by the company itself under s132(1)(a) of the Companies Act. 3. The second and third respondents, who are employed by the first respondent, Mazars Recovery and Restructuring (Pty) Ltd, ("Mazars") were the duly appointed BRP's along with the fourth respondent who was previously employed by Mazars: on 1 January 2016, the fourth respondent took up employment with Deloitte and Touche S.A. but remained a BRP of Montic. At all material times, however, Mazars was responsible for the day-to-day administration of the business recue proceedings and for the rendering of invoices on behalf of the BRP's in respect of their remuneration and expenses.

4. The BRP's drew up a business plan for Montic which contemplated the sale of the business to a certain Cesare Cremona. However, although duly adopted, the plan came to nought when Mr. Cremona defaulted on his obligations thereunder. Thereafter, and on 14 April 2016, Creighton Dairies (Pty) Ltd and eleven other creditors of Montic commenced proceedings ("the Creighton application") in the North Gauteng High Court in Pretoria to place Montic into liquidation. The Creighton

application was enrolled for hearing on the unopposed motion roll in Pretoria on 31 May 2016.

5. On 26 April 2016, the BRP's resolved that there was no prospect of rescuing Montic but nevertheless took the somewhat cynical step of filing a notice to oppose the Creighton application on 29 April 2016. Then, on 13 May 2016, the BRP's withdrew their opposition to the Creighton application and 3 days later (16 May 2016) launched their own proceedings ("the BRP's application") in the same court for the discontinuation of the business rescue proceedings and the final winding up of Montic under **s141(2)(a)** of the new **Companies Act, on** the ground that there was no reasonable prospect of the company being rescued. On 18 May 2016, the BRP's reinstated their opposition to the Creighton liquidation application.

6. On 14 June 2016 the BRP's application to wind up the company was granted and Montic was finally liquidated. Subsequent thereto the second to fourth applicants were appointed as liquidators to wind up the company.

7. During May 2016, Mazars claimed to have unpaid bills for disbursements and services allegedly rendered by the BRP's to the distressed company. Accordingly, and while they were still in control of Montic, the BRP's caused two payments totalling R1,5m to be made to Mazars: on 23 May 2016 an initial amount of R500 000 was paid to it and on 2 June 2016 a further payment of R1m was made.
8. The liquidators claim that these payments to Mazars 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. Mazars and the BRP's, on the other hand, contend that the payments were validly made. The matter is before this Court because Mazar's principle place of business is in Cape Town.

THE SATUTORY FRAMEWORK

10. In terms of Items 9(1) and (2) of Schedule 5 to the new Companies Act, the relevant provisions of the old Act are preserved, and apply to the winding up of commercially insolvent companies such as Montic. This preserves the provisions of s341(2) of the old Act which reads as follows:

"341(2) Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after **the commencement** of the winding up, shall be void unless the court otherwise orders." (Emphasis added)

11. The commencement of winding up proceedings is still governed by s348 of the old Act which is to the following effect:

"348. A winding up of a company by the Court shall be deemed to commence at the **time of the presentation** to the Court of the application for the winding up." (Emphasis added)

12. The case thus presented on behalf of the liquidators is, at first blush, relatively straightforward. On 16 May 2016, the BRP's presented their application to wind up Montic (then still under their stewardship in business rescue). The two payments by the BRP's to Mazars were made after that date (23 May and 2 June 2016) and the company was finally wound up on 14 June 2016. There is no counter-application by the BRP's for the Court to exercise its discretion under the proviso in s342 and thus it is argued by the liquidators that the payments fall to be set aside without more.

13. Not so fast, say the BRP's. The payments can only be set aside if they were dispositions of Montic's property and, they confidently assert, they were not dispositions as contemplated under s342(1). The BRP's argument seeks to rely on the following contentions.

13.1 A purposive interpretation of s341(2) requires that payments made by the company to the BRP's during the relevant period do not constitute dispositions of its property within the meaning of the section.

13.2 The interpretation of the section, and more particularly as to what would constitute a disposition by the company of its property, must be informed by the subsequent (and therefore more recent) provisions of chapter 6 of the new Companies Act relating to business rescue, and more particularly the

BRP's preferential entitlement to be paid their remuneration and expenses during the business rescue proceedings.

13.3 The interpretation accords with s5(4)(a) of the new Companies Act which expressly provides that if there is an inconsistency between the provisions of that Act and a provision of any other national legislation (which perforce would include the continuing operative provisions of the old Act), the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second, failing which the new Companies Act is to apply.

13.4 There is both South African and foreign judicial precedent in support of the BRP's argument that dispositions by the company of its property during the relevant period do not invariably constitute a disposition of the company's property falling within the ambit of s341(2) even where effectively there was a disposition by the company of its property during the relevant period.

13.5 Lastly, a finding that the payments by the company to the BRP's, even though made during the relevant period, do not constitute dispositions by the company of its property, is a desirable, sensible, business-like and principled outcome supported by judicial precedent.

THE BRP'S ARGUMENT IN JUSTIFYING THE PAYMENTS

14. Mr. Gilbert pointed out in argument that the conundrum which confronted the BRP's in this matter is one which BRP's in general will face in the proper discharge of their statutory function when it is established that there is no reasonable prospect of saving the company. What is the BRP to do in relation to disbursements and fees already incurred under business rescue but not paid, and such further fees and disbursements as may be incurred in the discharge of the obligation to place the distressed company under final liquidation?

15. The primary statutory duty of the BRP in this regard is regulated by s141(2) of the new Companies Act.

"141(2) If, at any time during business rescue proceedings, the practitioner concludes that:

(a) there is no reasonable prospect for the company to be rescued, the practitioner must:

(i) so inform the court, the company and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;"

16. But, the BRP's counsel observed, those responsibilities do not end when the BRP's statutory duty to place the company into liquidation arises. Given that there may, for instance, be opposition by an affected party to the liquidation application with the resultant delays, it is argued that the overall statutory duty of the BRP to manage the company continues.

"140(1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter [6] –

(a) has full management control of the company in substitution for its board and pre-existing management;"

17. This duty ends, so it is said, only when the company is finally placed into liquidation, as s132(2) of the new Companies Act provides.

"132(2) Business rescue proceedings end when –

(a) the Court –

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings;"

18. In the interim, it is said, the BRP's will continue to apply their time and resources in managing the company and are thus entitled to remuneration in that regard in addition to such expenses as may be incurred in finalizing the winding-up application itself. It is inconceivable, counsel suggested, that the Legislature could have contemplated that any payments made to the BRP's in that period were to be considered void under s341(2).

19. Should this proposition be upheld, said Mr. Gilbert, it would be a significant disincentive to BRP's to conclude that there were no reasonable prospects of rescuing the company and this in turn would result in an unnecessary protraction of the business rescue proceedings where those proceedings ought already to have been brought to an end. In such event, it was suggested, the integrity and legitimacy of the entire business rescue process would be seriously undermined.

20. Counsel stressed that it is precisely in circumstances such as these - where the BRP is bound to conclude that there are no reasonable prospects for rescuing the company - that the affected parties' best interests are served by the BRP launching the requisite liquidation application without fear that any such payments as are made in the interim will become voided.

THE LIQUIDATORS' REPLY

21. Mr Butler submitted that there was no conundrum because the provisions of s341(2), read with s348, was clear: 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. The fact that the BRP's sought to pay themselves what they claimed was due pursuant to the business rescue provisions of the new Companies Act did not change the clear wording of the old Act in relation to the

applicable procedure for winding up the company. The rationale for the limitation of the disposal of the assets of a company that is facing liquidation is obvious. Once the application to wind up is lodged with the court, the public at large is informed of the true state of affairs in the company – essentially that it is unable to pay its debts and/or that its liabilities may exceed its assets. The lodging of the application then results in a *concursus creditorum* and the hand of the court is thus placed on the insolvent company to preclude the dissipation of its remaining assets otherwise than in accordance with the scheme of payments sanctioned under the old Act.

23. Most certainly, the managers of the company are not be entitled to demand payment of loans and/or emoluments due to them at that stage. They must wait their turn with the rest of the creditors and may then only be paid in accordance with the ranking of claims which the old Act sanctions. How then can it be said that the BRP's, who are charged with the management of the same entity, are entitled to receive preference in respect of monies which they claim are due as a consequence of services rendered to the company in an endeavour to save it from financial collapse?

24. Mr. Butler noted that in advancing that argument, the BRP's seek to rely on s143 of the new Companies Act which provides for their remuneration in accordance with the stipulated circumstances, as the case may be**[2]**. Of importance in that regard is s143(5) which provides that –

"143(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."

In this case the BRP's seek to push the envelope, as it were, and interpret that subsection as entitling them to avoid the strictures of s341(2).

25. However, the liquidators argue that such an interpretation would afford the BRP's a preference not contemplated under the winding up provisions of both the old Act and the new Companies Act. Mr. Butler submitted that the BRP's only have a preference under s135(4) to payment of their remuneration from the free

residue after deduction of the costs of liquidation but before the claims of employees for post-commencement wages and other claims for post commencement finance, whether those claims are secured or not. This much was confirmed by the Supreme Court of Appeal in Diener**[3]**

26. Further, Mr. Butler stressed that the impact of the *ratio* in Diener was to grant BRP's some form of preference for their claims arising from the business rescue process but certainly not the so-called "super preference" that was contended for on behalf of the BRP's in that matter. The Supreme Court of Appeal ("SCA") put it thus.

"[42] The two sections upon which Diener's argument is largely based are cases in point. Section 135 concerns itself with post-commencement finance and it is in this context, i.e. while business rescue proceedings are in place, that it creates a set of preferences for the payment by the company of certain of its unpaid debts. It does so as part of the regulation of the affairs of the financially distressed company. It is only s 135(4) that is concerned with the consequences of a failed business rescue, retaining the preferences created in respect of post-commencement finance on liquidation, subject only to the costs of liquidation. This section, to the limited extent that it has to do with liquidation, says nothing of the 'super-preference' contended for over secured assets. To the contrary, it creates in favour of those claims listed in the section, a preference over unsecured claims."

[43] Section 143 is also not concerned with liquidation. Instead, it regulates the BRP's right to remuneration during business rescue proceedings: it concerns the tariff in terms of which BRP's are remunerated; the additional contingency-based remuneration that the BRP may negotiate, and safeguards in that respect; and the BRP's claim for unpaid remuneration, which ranks 'in priority before the claims of all other secured and unsecured creditors'. The reference to secured and unsecured creditors in the section must, in my view, be understood to be a reference back to s 135: to those persons who have, or have been deemed to have, provided the company with post-commencement finance, both secured and unsecured, and not to the company's pre-business rescue creditors. Simply put, the preference operates within this limited context. Henochsberg's commentary, referred to in [37] above,

seen in proper perspective is consonant with that conclusion." (Internal references omitted)

DISCUSSION

27. I consider that, while the facts in Diener are not on all fours with the present matter, the *ratio* therein certainly is applicable here. The SCA has confirmed that s143 of the new Companies Act does not relate to liquidation proceedings while s341(2) and 348 of the old Act (and, for that matter s81**[4]** of the new Companies Act) do. There is thus no inconsistency or clash between the various provisions of the two statutes.

28. It has been established law for more than a century that the effect of s348 is to establish the *concursus creditorum* at the time that the application for winding up is lodged.**[5]** The retention of that provision from the old Act as part of the overall matrix of the law relating to the winding up of companies means that the Legislature intended it to apply both to insolvent companies wound up under the old statutory dispensation and to companies wound up under the new Companies Act where business rescue proceedings have not achieved the desired result and s141(2)(ii) is implemented.

29. It therefore follows that s341(2) proscribes the disposition of a company's assets after the lodging of an application to wind up (whether that application is at the behest of an ordinary unpaid creditor or a BRP who concludes that the company cannot be rescued) while s143 only affords the BRP a limited measure of priority when his/her claim for remuneration is considered by the liquidator in the winding up process.

30. To grant the BRP's the relief that they seek in this case would require the Court to find that it is implicit in s143 that they have the right to be paid after the commencement of the winding up process, before a final order is granted and before the liquidators have done their work to liquidate and distribute the assets in the insolvent company. To import such an interpretation into s143 would be destructive of the whole basis of the winding up process which recognises defined

classes of creditors and affords them priority in respect of their claims according to such classes.

31. Put differently, the BRP's demand that they are entitled to be paid after the establishment of the *concursus creditorum* and ahead of secured creditors might conceivably result in the free residue in the company being wiped out to the detriment of, for example, the holder of a first mortgage bond over the insolvent company's immovable property. The purpose and context of business recue is obviously not intended to destroy the rights of a secured creditor.**[6]**

32. In my considered view, such a situation would not only undermine the very basis of the law of insolvency but is to be regarded as unconscionable, particularly if the BRP's were to pay out excessive and/or unsubstantiated amounts. In this regard, it must be noted that at an enquiry already held in this matter in terms of s417 of the old Act, the commissioner (a retired judge) expressed concern about the extent of the payments which the BRP's made to Mazars, as well as the basis upon which the expenses were allegedly incurred.

33. Counsel for the BRP's cautioned against an interpretation of the new Companies Act which might scare off BRP's from taking appointments as such lest they are not remunerated for their services. The flip side of that coin is that BRP's are to be discouraged from embarking on business rescue exercises where there is little prospect of salvaging the ailing company and where their involvement becomes no more than an exercise in self-enrichment.

34. In Diener the SCA remarked as follows regarding the purpose of business rescue.

"[1]…Section 7(k) of the 2008 Act provides that one of its purposes is 'to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'…

[28] Business rescue is not an open-ended process. Its very rationale is that it must end, either when its aim has been attained, or when the realisation arises that rescue

is not attainable. To this end, s132(3) provides that if business rescue proceedings have not ended within three months of commencement or a longer period sanctioned by a court, the BRP must prepare a progress report which he or she must update monthly until the end of the business rescue proceedings…

[40]… (T)he starting point is the context and purpose of ch 6 [of the new Companies Act]. It is apparent, when regarded is had to the central provisions of ch 6, as I have done above, that it is intended to create an efficient, regulated and effective mechanism to facilitate the rescue of companies in financial distress – as long as they are capable of rescue – in a way that balances the rights and interests of the stakeholders.

[41] Although the chapter makes provision for business rescue failing in some instances, and hence allows for conversion of business risk proceedings into liquidation proceedings, its overwhelming focus is on business rescue and the mechanics of business rescue, rather than on liquidation."

35. To that must be added that embarking on business rescue is not intended to be utilised by the management of a company in financial distress to obtain the respite afforded by the general moratorium on legal proceedings in terms of s133 of the new Companies Act in order to rearrange the proverbial deck chairs on the Titanic.

36. Responsible BRP's, mindful of these parameters discussed by the SCA, will thus not be encouraged to chase up unnecessary costs in a company that has little prospect of being rescued if they are aware of the fact that they do not enjoy a privilege to be remunerated ahead of all other interested parties.

CONCLUSION

37. In the light of the aforegoing, I conclude that the payments made by the BRP's herein to Mazars 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 by Mazars.

ORDER OF COURT

Accordingly, the following orders are made:

1. It is declared that the payments by the first applicant to the first respondent on 23 May 2016 in the amount of R500 000.00 (Five Hundred Thousand Rand) and on 2 June 2016 in the amount of R1 000 000,00 (One Million Rand) are void in terms of section 341(2) of the Companies Act, 1973;

2. The first respondent, alternatively the second, third and fourth respondents, the one paying the others to be absolved, are hereby directed to pay to the first applicant:

    2.1 R1 500 000,00 (One Million Five Hundred Thousand Rand);

    2.2 Interest on R500 000,00 (Five Hundred Thousand Rand) at the rate of 9,5% per annum calculated from 23 May 2016 to date of payment

    2.3 Interest on R1 000 000,00 (One Million Rand) at the rate of 9,5% per annum calculated from 2 June 2016 to date of payment;

3. The first, second, third and fourth respondents are declared to be jointly and severally liable for payment of the first applicant's costs of suit herein, including the costs of two counsel where so employed, and are directed to pay such costs, the one paying, the others to be absolved.

GAMBLE, J

[1] Henochsberg on the Companies Act, APPI -20(1); Herrigel NO v Bon Roads Construction Co (Pty) Ltd **1980 (4) SA 669** (SWA); Lane NO v Olivier Transport 1997 (!) SA 383 (C)

[2] S143(1) read with s143(6) provides for a tariff in accordance with which BRP's may charge, while ss143(2) and (3) provide for BRP's to agree with the company to charge an additional contingency fee.

[3] Diener NO v Minister of Justice and others **2018 (2) SA 399** (SCA) at [42] *et seq.*

[4] S81 provides for the winding up of a solvent company, inter alia, on the application of its directors, shareholders, creditors or a BRP who has concluded that it is incapable of being rescued.

[5] Walker v Syfret N.O. **1911 AD 141** at 160;166; Adminstrator, Natal v Magill, Grant and Nell (Pty) Ltd (in liquidation) **1969 (1) SA 660** (A) at 671G-H

[6] Diener [44]

Drakenstein Municipality v Castle Ultra 300 (Pty) Ltd ; Drakenstein Municipality v De Oude Paarl Trading (Pty) Ltd (9530/2020; 9531/2020) [2021] ZAWCHC 26 (16 February 2021)

Winding up applications-municipality applicant- Section 345 of the 1973 Companies Act provides as follows in relevant part: When company deemed unable to pay its debts- the respondents have not shown that the companies are able to pay their debts

These two applications came up for hearing together. The applicant in both matters is the Drakenstein Municipality, which has its council offices in Paarl. The Municipality applies in each application for the provisional winding up of the respondent company.

[2] The respondent companies are interrelated in the sense that their respective sole shareholder and director is one Gerhard Meyer. De Oude Paarl Trading (Pty) Ltd, which is the respondent in case no. 9531/2020, is the registered owner of certain immovable property in Paarl, and the other company, Castle Ultra 300 (Pty) Ltd, rents the property and sublets it to a commercial tenant at a rental of just over R107 000 per month, excluding VAT.

[3] As these applications are for provisional orders, it is therefore at this stage only necessary for the Municipality to make out a prima facie case in the sense explained in *Kalil v Decotex* **1988 (1) SA 943** (A). The applicant is entitled to the relief it seeks if it shows on a balance of the probabilities as they appear from the papers that it is a creditor of the companies and that they are unable to pay their debts. I therefore do not intend in this judgment to traverse the facts in the detail that might be appropriate in support of a decision granting final relief. It is not in dispute that the Municipality is a creditor of the respondent companies. It relies on the deeming provisions of s 345 of the Companies Act 61 of 1973 to establish that the companies are unable to pay their debts.

[4] The Municipality has a claim for unpaid property rates and service charges against the property-owning respondent and a claim for unpaid electricity accounts against the tenant company. A number of actions for payment of the amounts claimed by the Municipality have been instituted in the magistrates' court. Apart from one case, in which default judgment was obtained against Castle Ultra 300 (Pty) Ltd for just over R180 000 in February 2015, none of these actions has been brought to trial.

[5] A *nulla bona* return was rendered when the Municipality endeavoured to obtain execution of its judgment. The Municipality abandoned any reliance on the judgment and the *nulla bona* return in its counsel's argument in support of the winding up application. That was a sensible decision because there do appear to

have been questions pertaining to the efficacy of the service of the process in that action. The applicant's counsel did stress, however, that the respondent in that matter had failed to apply for the rescission of the judgment. Any rescission application would, of course, require the judgment debtor to show that it had a defence to the claim and, in order to demonstrate its bona fides, also disclose the nature thereof in sufficient detail to persuade a court of the genuineness thereof.

[18] Section 345 of the 1973 Companies Act provides as follows in relevant part:

When company deemed unable to pay its debts

[26] In my judgment the respondents have not shown that the companies are able to pay their debts. On the contrary, it appears from the papers on a balance of probabilities that they are indebted to the Municipality in a sum considerably greater than R104 079,78. Mr Meyer has been dogged in his resistance to the local authority's claims against the companies and I consider it extremely unlikely in the circumstances that an offer of settlement would have been made to the Municipality in the sum of nearly R670 000 if there had been any belief on his part that the local authority's claim in at least that amount had not been substantiated. It is striking that the respondents have not taken the court (and the Municipality) into their confidence by setting forth in detail the basis upon which they have conceded a limited liability to the Municipality. They should have been able to state the amounts in which they admitted liability to the local authority and set out how such amounts were determined, and they should have paid the admitted amounts unconditionally. Furthermore, the indications that the companies would need to settle the determined amounts of their indebtedness in instalments over an extended period of time is suggestive of their inability to pay the debts as and when they were due. It has not been explained why deferred payment terms should be necessary or appropriate. Municipalities are obliged by legislation to recover rates either monthly or annually**[1]** and members of local communities have the duty to pay *promptly* service fees, rates on property and other taxes, levies and duties imposed by the municipality.**[2]** These shortcomings in the respondents' answers to the applications suggest that the Municipality's claims are not bona fide disputed, at least not to their full extent. The answers also fall short of affording any basis upon which the court's discretion might be judicially exercised in the respondents' favour.

[27] In the result, provisional winding-up orders, returnable on 15 April 2021, will issue in respect of each of the respondent companies in accordance with the draft orders handed up by the Municipality's counsel, which I have signed and marked 'X'.

New Approach Trading 73 CC v Precision Rigging Pty Ltd (15059/2020) [2021] ZAWCHC 29 (19 February 2021)

Winding up application- unable to pay its debts-respondent has shown that it is bona fide in disputing the applicant's claim and that the grounds upon which it does so are reasonable, by all of which expressions I understand is meant that the claim is genuinely disputed on apparently cogent grounds

The applicant alleges that it is a creditor of the respondent in the amount of R173 896,71 being in respect of certain services and repairs rendered to equipment that had been subject of 'sale and service' agreements concluded between the respondent and a third party, Portland Hollowcore Slabs (Pty) Ltd on 14 March 2019. The equipment included a Liebherr crane. Those agreements were subsequently consensually terminated in terms of a 'Surrender and Termination Agreement' concluded on 23 January 2020.

[2] The respondent alleged that at the time of the conclusion of the sale and service agreements the Liebherr crane was 'broken'. It alleged that the crane was taken directly from Portland's premises to the applicant's premises to be repaired on the common understanding that the repairs to the crane were to be for Portland's account. It needs to be understood that in terms of the service agreement the purchased equipment was to be used by the respondent exclusively for the purpose of undertaking installation work for Portland in respect of 'Hollowcore Slabs' and 'other products to be installed such as stairs, steel/concrete beams or lintels'.

[3] The respondent has identified 15 invoices that it alleges are the subject matter of the applicant's alleged claim against it. Four of those invoices relate to the Liebherr crane. They are invoices 4898 (R1863,00), dated 31 May 2019, 5368 (R8320,20), dated 11 November 2019, 5369 (R57 375,35), dated 11 November

2019, and 5371 (R2906,94), dated 12 November 2019. The total amount charged in terms of the unpaid Liebherr crane-related invoices was therefore R70 465,49.

[12] In my view, the respondent has shown that it is bona fide in disputing the applicant's claim and that the grounds upon which it does so are reasonable, by all of which expressions I understand is meant that the claim is genuinely disputed on apparently cogent grounds. There are a number of factors that support such a conclusion. Firstly, there is the uncontroverted averment in the respondent's answering affidavit that the applicant initially requested payment for the repairs from Portland, and turned to the respondent for payment only when Portland refused to make payment. Secondly, there is a demonstrated pattern of behaviour in which the respondent has paid those of the applicants invoices that it says were not subject to the aforementioned payment arrangements incidental to the surrender and termination agreement. And thirdly, the respondent has shown, at least prima facie, that it is able to pay the amount claimed by the applicant, and furthermore tendered to pay into its attorneys' trust account prior to the hearing of the application the full amount claimed by the applicant, to be held in trust pending the determination of the disputed claim in appropriate proceedings. (The tender was not accepted.)

[16] The application is dismissed with costs.

KHAMMISSA AND OTHERS v MASTER, GAUTENG HIGH COURT, AND OTHERS 2021 (1) SA 421 (GJ)

Company — Winding-up — Liquidator — Appointment — Master appointing liquidators whom another Master had refused to appoint — Master functus officio after first decision and second appointment ultra vires — Companies Act 61 of 1973, s 370(1).

Company — Winding-up — Liquidator — Appointment — 'Person aggrieved' by appointment of liquidator — Not to be narrowly construed — Companies Act 61 of 1973, s 371.

The applicants, the joint liquidators of a company, sought the review and setting-aside of the appointment of the second and third respondents as liquidators. An

Assistant Deputy Master made a decision on 31 August 2017 to refuse to appoint the respondents as liquidators under s 370(1) of the Companies Act 61 of 1973 (the old Companies Act), but despite this, another assistant deputy Master on 25 October 2017 appointed the second and third respondents as liquidators.

The applicants argued that the decision to appoint the respondents was ultra vires since the Master was functus officio when the second decision was made. In turn, the respondents argued that the applicants lacked locus standi since they were not 'aggrieved persons' as intended in s 371 of the old Companies Act; that s 151 of the Insolvency Act 24 of 1936 did not apply; and that the applicants had disregarded the provisions of s 371, which was the only gateway for relief available to the applicants.

Held

The category 'person aggrieved' should not be narrowly construed. Here the essence of the grievance was an allegation of unlawful, arbitrary or capricious appointment and decision in an estate that the applicants were charged with. They were not busy bystanders or strangers to the issue and the applicants accordingly had locus standi to review and set aside the unlawful appointment alleged. (See [24] – [26].)

Section 371 was not the only provision dealing with a complaint about appointment and non-appointment of a liquidator. The dispute was not about a nomination or failure to appoint a liquidator but about the legal validity of the second appointment after a decision had been made on the same issue. In the circumstances recourse to the Insolvency Act remained available to the applicants. (See [30].)

The decisions of the Master were administrative action and the power to revoke or amend administrative decisions, once communicated, was limited. No power was given to the Master in terms of the Administration of Estates Act to revoke or amend decisions. Hence the Master was functus officio and not empowered to issue a second decision once the decision not to appoint the second and third respondents had been made. (See [33].)

De Beer NO and others v Magistrate of Dundee NO and others
[2021] 1 All SA 405 (KZP)

Insolvency – Provisional liquidation – Appointment of provisional liquidators – Validity of acts by liquidators prior to formal appointment – Court having no power to declare valid any acts performed by provisional liquidator before appointment.

Insolvency – Provisional liquidation – Search and seizure operation – Search warrant – Execution of operation contrary to terms of warrant rendering operation unlawful.

The first applicant ("De Beer") was the sole director of the second and third applicants and the chairperson of sixth applicant. All the applicants were at the material time either employed at or operating from premises which were subject to a search and seizure operation.

In February 2020, a company ("Coinit"), whose sole shareholder was De Beer, was placed under provisional liquidation. Coinit had conducted business by enticing members of the public to participate in what turned out to be an unlawful Ponzi scheme. De Beer managed the scheme and he dealt with the money circulating in the scheme as his own money. Upon the provisional liquidation of Coinit, the fourth, fifth and sixth respondents were appointed joint liquidators on 5 March 2020.

On learning of the appointments, the fourth respondent ("Nel") proceeded to act in furtherance of his duties as joint provisional liquidator. He contacted various financial institutions advising them that he had been appointed joint provisional liquidator of Coinit and issued directions relating to financial affairs and records of Coinit. He proceeded to Coinit's premises, presented himself as a joint provisional liquidator and made enquiries relating the affairs, assets and documents belonging to Coinit. He then applied for a warrant to search and seize articles, books and documents belonging to Coinit. The magistrate authorised the issue of the warrant, which resulted in the seizure and removal of articles and documents from the premises. Nel directed the execution of the warrant.

The applicants contended that the above actions taken by Nel before 5 March when his appointment was certified, were unauthorised. They also contended that the warrant was invalid for vagueness and was overbroad; that it directed that it be executed by the sheriff and police officers not Nel or his agents; and that only articles and documents belonging to Coinit were covered by the warrant not the articles and documents that were indiscriminately removed and retained. Finally, it was submitted

that the manner in which the warrant was executed resulted in the search, seizure removal and retention of the articles and documents being unlawful.

Held – The warrant was addressed to the sheriff of the relevant court, authorising and instructing him to enter and search the specified premises. The sheriff and police officers were to execute the warrant by themselves. That did not happen. Instead, the persons who entered the premises and conducted the actual search and seizure were not authorised by the warrant. Furthermore, the warrant was vague in failing to cite the name of the sheriff and the names of the police officers to execute the warrant, and in failing to identify the other premises it purported to authorise a search of.

On the issue of the validity of Nel's actions, the court held that Nel was not entitled to act as provisional liquidator before his appointment on 5 March 2020. The Court had no power to declare valid any acts performed by Nel as a provisional liquidator before he was appointed a provisional liquidator.

The application for the setting aside of the warrant was granted and the items seized from the applicants' premises were to be returned.