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[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

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The Land and Agricultural Development Bank v PP Pretorius (3621/2020) [2021] ZAFSHC 58 (12 March 2021)

Application for sequestration- respondent's evidence is meagre and throws faint light on his financial state

[5] It is common cause that the respondent was an active member of Eco Grain CC (hereinafter referred to as the principal debtor). The respondent's indebtedness to the land bank arose from various agreements concluded with the principal debtor. The facilities and loans were secured by, amongst others, a deed of suretyship entered into by the respondent and Grocapital Financial Services (Pty) Ltd, the latter having sold, ceded and delegated the rights, title and interest in and to its existing corporate debtors' book to the applicant in terms of a sale of book debts agreement during October 2011. The principal debtor successfully applied for voluntary liquidation during May 2020. A certificate of balance issued by Grocapital**[1]** indicated that as of 30 June 2020, the balance outstanding in respect of the working capital facility and the term loan account amounted to R 24 921 532.92. A letter of demand**[2]** was issued at the instance of the applicant on 7 August 2020 for the payment of the sum of R 24 921 532.92. The letter of demand was served by the sheriff on 12 August 2020

16] The respondent's evidence is meagre and throws faint light on his financial state. Not much light has been shed about the activities surrounding the business and the farms and the nature of the transactions which resulted in the respondent's indebtedness to the other creditors. In *Stratford v Investec Bank Limited and Others*,**[27]**the court said: "*The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment, except through sequestration; or that some pecuniary benefit will redound to the creditors."*

[17] Once the applicant for a provisional order of sequestration has established on a prima facie basis the requisites for an order, the court has a discretion whether to grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.**[28]** There are no such exceptional circumstances in this case to warrant the court to exercise its discretion in favour of the respondent. Besides, what weighs heavily against the respondent is that he has not been forthright and transparent in his disclosures of his income and expenditure or assets and liabilities. *In Amod v Khan***[29]** the following was said: *"A debtor knows all about his own affairs and can easily prove the advantage of the creditors. On the other hand, the creditor has normally little knowledge of the exact position of the debtor; he probably does not know what creditors he has, nor the amounts he owes, nor the assets he possesses."*

[18] In the premises, the applicant has discharged the burden of proof for the provisional sequestration of the respondent. I therefore make the following order:

Order

1. The respondent is placed under provisional sequestration in the hands of the Master;

FirstRand Bank Ltd ta First National Bank v Global Connect Trading (Pty) Ltd (4487/2020) [2021] ZAFSHC 68 (18 March 2021)

Winding up application ;-commercial insolvency- certificate of balance constitutes conclusive proof of the indebtedness of the debtor

[1] The applicant is seeking an order for the provisional liquidation of the respondent. The application is predicated on the contentious claim that the respondent is commercially insolvent and unable to pay its debts as they became due in the normal course of business. Therefore, the respondent must be deemed unable to pay its debts as stipulated in section 345 of Act 61 of 1973 read with Schedule 5, Item 9 of Act 71 of 2008.

Facts

[2] On 6 June 2019 the parties entered into an overdraft facility agreement in terms of which the sum of R7 500 000.00 was loaned and advanced to the respondent subject to the terms and conditions (referred to as transaction

documents) and general terms and conditions set forth in Annexure “A” of the facility agreement. According to the signed document the facility agreement, transaction documents and Annexure A shall be read together and apply to all facilities. The disputed amount due and payable appearing on the certificate of balance dated 29 July 2020 is R8 136 325.04. As a form of security covering bonds were registered over several immovable properties and cession of loan accounts. The total value of the immovable properties as per the valuation provided by the applicant is R9 950 000.00.

[3] The liquidation proceedings were triggered by the respondent defaulting on payments as provided in clause 4.3 of the facility agreement. The respondent failed to make payments of R25 000.00 per month for the period June till August 2019 and R45 000.00 per month for the period September until December 2019. On 4 March 2020 the applicant caused a letter calling up the facility to be sent to the respondent in respect of the loan amount. The respondent through its attorneys of record, requested a certificate of balance and an extension to remedy the breach. The applicant through its attorneys of record insisted on the payment of the outstanding balance. An exchange of several letters laced with uncollegial undertones and intransigent posture could not solve the impasse. On 19 November 2020, the applicant instituted the legal proceedings before me.

Submissions

[4] Counsel for the applicant argued quiet correctly, that the test was whether the respondent is capable to pay its debts in the normal course of business. He pointed out that the facility agreement was anchored on special conditions as well as general terms and conditions. The monitoring conditions refers to those conditions that the respondent must comply with to ensure ongoing availability of the approved facilities. He submitted that the respondent did not comply with any of the conditions contained in clause 4.3, 3.7, 4.8 and 4.9. This aspect is common cause. Given these set of circumstances the applicant was justified to withdraw the facilities and demand payment of the outstanding amount. He also referred to clause 4.11 of the general conditions that the respondent committed a breach by failing to make a scheduled payment within two (2) business days of such being due.

[5] In response, counsel for the respondent submitted that the respondent does not deny the existence of the agreement and the breach. He pointed out that such breach was limited to the amount of R255 000.00 as per clause 4.3 of the monitoring conditions. He argued that the respondent was not afforded the opportunity to remedy the breach by paying the aforementioned amount. In a rather heavy handed manner, as alleged in the answering affidavit and orally submitted, the applicant claimed the repayment of the accelerated amount. The applicant demanded the payment within five (5) days alternatively six (6) months which was impossible given the existence of the national state of disaster regulations. The cornerstone of the defence raised on behalf of the respondent is that the amount claimed is not due and payable.

[10] The respondent took issue with the certificate of balance that the agreement contains a clause that certificate of balance constitutes conclusive proof of the indebtedness of the debtor. Both counsel relied on the decision in **Ex parte Minister of Justice: In RE Nedbank Ltd v Abstein Distributor**. The court stated the principle as follows:

> "**The interpretation of the Court in *Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others* 1989 (3) SA 750 (T) of the decision of the Appellate Division of the Supreme Court of South Africa in the matter of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) relating to the validity of a so-called 'conclusive proof clause' in favour of a creditor in an agreement in terms whereof the creditor is to be the author of the certificate of balance issued under such a clause, correctly reflects the D law, namely, that such a clause is in itself *contra bonos mores* and therefore void regardless of the context of the agreement in which it finds itself."[1]**

[11] This decision does not come to the aid of the respondent. Clause 6.1 provides that the certificate of balance shall be *prima facie* proof of the amount owed under the facility. There is no mention whatsoever of the conclusive proof. Therefore, there can be no talk of the clause being *void ab initio* because of the fact that it is *contra bonus mores*. On this point also, the opposition to the application cannot be sustained.

Order

[12] In the circumstances, I make the following order:-

12.1. The estate of the respondent is hereby placed under provisional liquidation order and handed over to the Master of the High Court, Bloemfontein.

Commissioner for the South African Revenue Service v Louis Pasteur Investments (Pty) Ltd and Others (12194/17) [2021] ZAGPPHC 89 (4 March 2021):

Business rescue- conversion of the business rescue proceedings- to liquidation proceedings- Business rescue practitioner should have not resigned-ordered to pay punitive costs

Business rescue-Business rescue practitioner should have not resigned-ordered to pay punitive costs

[1] This is an application for orders that concern the relief sought in Part B of the notice of motion. First, the applicant seeks an order in terms of section 132(2) (ii) of the Companies Act, 71 of 2008 ("the Act") for the conversion of the business rescue proceedings relating to the first respondent, Louis Pasteur Investments (Pty) Ltd ("LPI") to liquidation proceedings and for the final liquidation of LPI. In the alternative, that this court remove the second respondent as the business rescue practitioner ("BRP") of LPI in terms of section 139 of the Act. Alternatively, that this court grant the applicant leave in terms of section 133 of the Act to enforce its cause of action against LPI by proceeding with summons, judgment and execution. Second, the applicant seeks an order of costs of this application *de bonis propriis* against the erstwhile BRP cited here as the fourth respondent, in his personal capacity.

[2] Judgment relating to the relief claimed in Part A of the Notice of Motion was delivered on 4 May 2018. The Court (per Pienaar AJ) ordered that the

moratorium on legal proceedings against LPI be lifted and, that leave be granted to the applicant to proceed with Part B of its application against the respondents, including the order to serve the application by substituted service in terms of Rule 4 (2) of the Uniform Rules of Court..

The Parties

[3] The applicant is the Commissioner for the South African Revenue Service, appointed in terms of **section 6** of the **South African Revenue Service Act, 34 of 1997** ("the SARS Act"). SARS is stablished in terms of section 2 of the SARS Act.

[4] The first respondent is LPI, a company with limited liability. It is an investment and property-owning company duly registered as such in terms of the laws of the Republic of South Africa and was placed under business rescue on 20 August 2012. The second respondent is A.E. Prakke N.O., who substituted Etienne Jacques Naude N.O. as BRP of LPI and is cited in his representative capacity.

[5] The third respondent is all Affected Persons as described in section 128(1) (a) of the Act, reflected in a list annexed to the founding affidavit as Annexure "A3". Pienaar AJ granted leave to the applicant to cite the affected parties collectively as the "third respondent" and allowed service of the application to the third respondent ("affected persons") by means of substituted service as provided for in Rule 4(2) of the Uniform Rules of Court and by means of publication in the Government Gazette and several newspapers. The learned AJ reasoned that the citation of the 246 Affected Persons as one respondent was convenient and practical and that the court, by virtue of its inherent powers to regulate its processes, remains vested with a discretion to authorise a method of service it deems appropriate in the circumstances. In so doing, Pienaar AJ was however, mindful of an SCA decision in which it was held that should affected persons not be joined as parties to the proceedings that would constitute in each instance a non-joinder of an affected person who has a real and substantial interest in the outcome of the proceedings . Louis Pasteur Group (Pty) Ltd ('LPG''), the affected person and only intervening party.

It is of concern to this court that during the period 16 October 2018 to 4 May 2019 LPI existed under business rescue, with no BRP appointed after the fourth respondent abandoned ship. The fourth respondent, in his official capacity had a duty to advise that the business rescue proceedings were not bearing any fruits and that liquidation was the more viable process. He failed to do so. No trace of any formal management of LPI could be found as Mr Prakke pointed out.

[53] On his version, he resigned because he was appointed as BRP of Louis Pasteur Hospital Holdings, which required his fulltime attention. The effect of the fourth respondent's resignation is that he no longer has the capacity to act as a representative of LPI when he deposed to the answering affidavit at the commencement of these proceedings in relation to Part A. In addition, by his resignation he terminated his official position of as BRP of LPI. The law is clear. If it transpires at any stage of the process that the company cannot be rescued, the BRP is obliged to give notice of this and approach the court for a liquidation order.**[25]** The language of the legislature stipulated in Section 141(2) (a) of the Act is clear in that regard as it is couched in peremptory terms. Mr Naude failed

to do this. That LPI cannot be rescued at that point can reasonably be inferred from Mr Naude's resignation.

[54] In *Knoop and another NNO v Gupta* (*Tayob Intervening*)**[26]** Willis JA aptly stated: "…*Whilst in a voluntary business rescue the BRP owes their appointment to the directors of the company, they must not allow themselves to be dictated to by the directors or shareholders or any third party. They must at all times exercise an independent judgment taking into account the potentially conflicting interests of different affected parties*".**[27]** To abandon ship as Mr Naude did without terminating business rescue proceedings was a serious dereliction of duty that cannot be condoned.

[55] In terms of section 141 (2) (c) of the Act, at any stage of the business rescue process, in case of evidence in the dealings of the company related to fraud or other contravention of any law relating to the company, he was duty-bound to for the evidence to be referred to the appropriate authority for further investigations and possible prosecution. These he failed to do in relation to tax related allegations by SARS against LPI in his investigation of the company's affairs, business, property, and financial situation as contemplated in section 141 (2) of the Act. Mr Prakke confirms the tax evasion allegations, which Mr.Naude was duty-bound to investigate and or bring to the attention of the relevant authorities.

[56] Against this background, I conclude that Mr Naude was the material cause of the disaster that ensued and after his resignation without closing the business of rescuing LPI, and on his version, to take up a full-time position as a BRP in another entity within the Louis Pasteur group of companies. With no one at the helm of LPI, Dr Adams continued to pilfer the monetary resources of LPI, which Mr Naude should have anticipated. The applicant has firmly established the case for a cost order *de bonis propriis.*

Order

1. The business rescue proceedings in respect of the first respondent is converted into liquidation proceedings in terms of **section 132(2)** (ii) of the **Companies Act, 71 of 2008**.

2. The estate of the first respondent is placed under provisional liquidation in the hands of the Master of the High Court.

3. A rule *nisi* is issued calling upon all interested parties to furnish reasons, if any, to this court on Friday, 30 July 2021 at 10am or as soon thereafter as the matter may be heard, why the Court should not order the final winding- up of the respondent company (the first respondent).

4. This order is to be served by the Sheriff or his or her duly authorised deputy at the first respondent's registered office and principal place of business at Louis Pasteur Medical Centre, Room 842, 374 Schoeman Street, Pretoria.

5. A copy of this order must be served on:

    5.1. any registered trade union that, as far as the sheriff can reasonably ascertain, represents any of the employees of the first respondent; and

5.2. the first respondent's employees, if any, by affixing a copy of the order to any notice board to which the employees have access inside the first respondent's premises, alternatively by affixing a copy thereof to the front gate, where applicable, alternatively the front door of the premises from which the first respondent conducts any business at the address given in 4 above, and

5.3. The Master.

6. This order is to be published in:

6.1. the Government Gazette;

6.2. in the Sunday Times newspaper;

6.3. in the Rapport newspaper;

6.4. in the Star newspaper; and

6.5. in the Business Day newspaper.

7. The third respondent (Louis Pasteur Group (Pty) Ltd) and the fourth respondent (ETIENNE JACQUES NAUDE from his own pocket) are ordered to pay the costs of the application jointly and severally, on an attorney and client scale, including costs of two counsel from the date of notice of opposition to this application to the date of judgment. Any outstanding costs shall be costs in the liquidation.

Surface Preparations , Equipment & Coatings (Pty) Ltd v SwanSA (Pty) Ltd t/a Swan's Water Treatment and Others (51113/20) [2021] ZAGPPHC 132 (10 March 2021)

Liquidation- arbitration-continues

[1] This matter came before me as an urgent application. The Applicant seeks:

"*1. That this application be heard as an urgent application in accordance with the provisions of Rule 6(12) and that the requirements pertaining to service and time periods be dispensed with;*

2. that the special resolution that was adopted by the Third and Fourth Respondents at a special meeting on 27 August 2020, in terms of which the First Respondent was voluntarily wound-up in accordance with the provisions of s 349 of the Companies Act, No. 61 of 1973, as amended, be rescinded and set aside;

3. that the Second Respondent be directed to restore the First Respondent's status to "in the business";

4. that the Third and Fourth Respondents be interdicted and prohibited from adopting a resolution or a decision to voluntarily wind-up the First Respondent, as provided for and envisaged in s 349 of the Companies Act, No. 61 of 1973, as amended, pending the finalisation of the arbitration proceedings, which were initiated by the Applicant against the First Respondent, Coram Adv Graham Girdwood SC;

5. in the alternative to paragraphs 2, 3 and 4 supra:

5.1 that the liquidation in respect of the First Respondent be stayed pending the arbitration proceedings which were initiated by the Applicant against the First Respondent, Coram Adv Graham Girdwood SC, alternatively that the liquidation of the First Respondent be set aside, as provided for in s 345 of the Companies Act, No. 61 of 1973, as amended;

6. that the Third and Fourth Respondents be ordered to pay the costs of this application jointly and severally, the one to pay, the other to be absolved pro tando on the scale as between attorney and client, including the costs consequent upon the employment of two counsel; and

7. that such further and/or alternative relief be granted to the Applicant which this Court deems reasonable and appropriate under the prevailing circumstances."

[2] This application is opposed.

[3] THE PARTIES

3.1 The Applicant is a private company with limited liability, duly registered in accordance with the provisions of the company statutes of this country with its principal place of business situated at 19 Kurland Road, Perseverance, Port Elizabeth, in the Eastern Cape Province.

3.2 The Applicant is represented in this application by its Manager and Director, Mr Arnold Petrus Avenant ("Mr Avenant").

3.3 The First Respondent is a private company with limited liability, duly registered in accordance with the company laws of this country with its principal place of business situated at Plot 91, Bartlett Road, Honingklip, Krugersdorp, Gauteng.

3.4 The Second Respondent is the Companies and Intellectual Property Commission with its principal place of business and head office situated at 77 Meintjies Street, Sunnypark, Pretoria, Gauteng.

3.5 The Third Respondent is Brett Peter Swan, Identity No. 810729 5095 082, an adult businessman residing at 298 Villa Conesa, Furrow Road, Homeshaven Extension 6, Krugersdorp, Gauteng.

3.6 The Fourth Respondent is Yvonne Marisa Swan, Identity No. 591010 0268 080, an adult business woman residing at Plot 91, Bartlett Road, Hongingklip, Krugersdorp, Gauteng.

3.7 The Fifth Respondent is the Master of the High Court, Pretoria, SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.

No relief is sought against the Fifth Respondent.

THE BACKGROUND

[4] In his capacity as the Applicant's director and managing director, Mr Avenant initiated arbitration proceedings against the First Respondent in which the Applicant claimed damages against the First Respondent in the sum of R7,987,845.19 together with interest and costs. This referral of the Applicant's claim against the First Respondent was made in terms of Clause 12.2(c) of the Sub-Contract Work Agreement.

[23] In the meantime, s 5 of the Arbitration Act deals with the insolvency or wounding up of a party to an arbitration agreement. It provides as follows:

"*5 Unless the agreement otherwise provides, an arbitration agreement or any appointment of an arbitrator or umpire thereunder shall not be terminated by the sequestration of the estate of any party thereto or if such party be a corporate body by the wounding up of the corporate body or the placing of the corporate body under judicial management."*

In other words, the appointment of the Arbitrator in the suspended arbitration proceedings continues. It does not end simply because the First Respondent has been judicially wound-up.

Section 5(2) provides as follows:

"*If the estate of any party to an arbitration agreement is sequestrated or if, in the case of a corporate body which is a party to such an agreement, a petition for the winding up of the corporate body or for placing the corporate body under judicial management is presented or an order for winding up the corporate body or for placing the corporate body under judicial management is made, the provisions of any law relating to the sequestration of insolvent estates or, as the case may be, any law relating to the winding up or judicial management of a corporate body concerned, shall apply in the same manner as if a reference of a dispute to arbitration under the arbitration agreement were an action or proceedings or civil proceedings or legal proceedings or civil legal proceedings within the meaning of any such law."*

Section 5(3) provides that:

"*For the purpose of the application of the laws referred to in subsection (2) –*

(a) a reference of a dispute to arbitration shall be deemed to be an action or civil proceedings or legal proceedings or civil legal proceedings by or against any person or corporate body instituted or pending in any court of law having jurisdiction if any party to the dispute has served on the other party or parties thereto a written notice requiring him or them to appoint or to agree to the appointment of an arbitrator, or,

where the Arbitrator is named or designated in the arbitration agreement, requiring the dispute to be referred to the arbitrator so named or designated; and

(b) a reference of a dispute to arbitration shall be deemed to be an action or proceeding which is being or is about to be instituted against a corporate body, if any party to the dispute is taking steps to serve or is about to serve on the corporate body a written notice such as is referred to in paragraph (a).”

Section 5(4) provides that:

“*Any period of time fixed by or under this Act which is interrupted by any stay, suspension or restrain resulting from the application of any law referred to in subsection (2), shall be extended by a period equal to the period of such interruption.”*

[24] On the other hand, counsel for the Third and Fourth Respondents contends that the Arbitration Act has no impact on the rights created by the Companies Act. The Arbitration Act does not prevent a director or directors of a company from proceeding in terms of the Companies Act, as in this instant matter. According to counsel for the Third and Fourth Respondents, s 3 of the Arbitration Act relates to the fact that the agreement between the parties is binding between them. According to him, s 5(1) and (3) of the Arbitration Act specifically provides for the proceedings, that is arbitration proceedings, to continue after an order of liquidation of the company. In this current matter, the liquidator has been appointed.

[25] This Court is disinclined to come to the assistance of the Applicant in respect of prayers 2, 3 and 4 for the reasons set out in paragraph [12] herein *supra*. In my view, there was no need for the Applicant to launch this application. The application can therefore not succeed.

It is accordingly dismissed, with costs.

Mashaba and Others v Muller and Others (22900/2020) [2021] ZAGPPHC 143 (10 March 2021)

Liquidators-attorney and director brings application said to threaten and intimidate them-dismissed –attorney and director to pay the punitive costs

[1] Swifambo Rail Leasing (Pty) Ltd (“*the company in liquidation*” or “*Swifambo*”) has been in liquidation since December 2018. The second to fourth respondents, collectively referred to as “*the respondents*” or “*the liquidators*”, are the final co-liquidators of Swifambo having been appointed by the fifth respondent (“*the Master*”) as such on 18 March 2019. The fifth respondent will be referred to as the “*Master*”.

[2] The first applicant, Auswell Mashaba ("*Mr Mashaba*") was a director of Swifambo. He was also the director of the latter's shareholder, Railpro Holdings (Pty) Ltd ("*Railpro*"). As such he controlled the shareholding in Swifambo. He also has interests in other entities related to Swifambo. Railpro, too, is in winding-up.

[3] The second applicant, Wolfram Carl Helmuth Langrebe ("*Langrebe*"), is a partner in the partnership WKH Langrebe & Co, the third applicant, ("*WKH*"). The applicants allege that WKH proved a claim at the second meeting of creditors. The respondents admit that WKH proved a claim at the second meeting of creditors. They however aver that subsequent thereto they discovered facts from which it is clear that WKH has no claim against Swifambo. I need say no more about this.

Orders sought by the applicants

[4] The applicants seek a *mandamus* in the following terms:

> "*2. Ordering the first and second respondents, within 24 (twenty-four) hours of the grant of this order, to depose to and thereafter to furnish an affidavit (by e-mail) to attorney John Joseph Finlay Cameron, email address* […] *in which affidavit he will:-*
>
> *2.1 identify that person or those persons who directed threats and/or acted in a manner designed to intimidate him (as recorded by him in paragraph 46 of an affidavit dated 8th May 2020 under case no. 20975/2020); and*
>
> *2.2 indicate the times, dates and places during which the threats and acts of intimidation were received by him; and*
>
> *2.2 indicate the exact nature of the threats and acts of intimidation and in the event that the threats were in writing, to indicate same and to attach same to the affidavit (including copies of the screenshots of his cellular telephone); and*
>
> *3. that the second respondent shall not be entitled to recover any of his costs incurred in opposing the applicants' application from the insolvent estate of Swifambo Rail Leasing (Pty) Ltd; and*
>
> *4. that the costs of this application be paid by the first respondent on the scale as between attorney and client."*

The application for intervention by the applicants' attorney

[5] The applicants' attorney, Mr John Joseph Finlay Cameron ("*Cameron*" or " *the intervening applicant*), applied to intervene in the application. I was informed at the commencement of the hearing that the respondents accede to the application for Mr Cameron's intervention. I issued such an order. The intervening applicant, Mr Cameron, and the applicants are collectively referred to as "*the applicants".*

he relevant historical facts

[8] It is clear from the papers that there is deep-seated acrimony between at least the first applicant and the first respondent, Mr Muller. The acrimony stems from the conflict between Mr Mahaba and the liquidators appointed by the Master to wind up the company.

[9] During 2013 Swifambo was awarded a tender for the supply of locomotives to the Passenger Rail Agency of South Africa ("*PRASA").* On the application of PRASA, Francis J on 3 July 2017 set aside PRASA's decision to award the tender to *Swifambo.* In December 2018, Swifambo and its holding company Railpro were voluntarily wound up by a special resolution adopted in terms of section 351 (1) of the Companies Act, Act No 61 of 1973 ("*the Act"*) and registered on 18 December 2018.

[10] The respondents were authorised to hold an enquiry in terms of section 417 and 418 of the Act. They aver that they conclusively established that the affairs of the company in winding up had been mismanaged and hundreds of millions of rands had been dissipated. They also aver that evidence of *prima facie* criminal conduct on the part of amongst others Mr Mashaba has been uncovered.

[11] In addition to this application, the parties are entangled in a number of matters pending in this court and/or in the Gauteng Division, Johannesburg. Mr Mashaba as a co-applicant has brought three applications against, among others, the respondents.

(i) under case number 88912/19 ("*the first application")* launched on 26 November 2019 he seeks amongst others the setting aside of the appointment of the respondents as provisional liquidators as well as final liquidators;

(ii) under case number 12450/20 (*the second application")* launched on 25 February 2020 he seeks amongst others the setting aside of the shareholders' meeting at which the shareholders resolved to wind up Swifambo;

(iii) under case number 20975/20 ("*the third application*") launched on 25 March 2020 he seeks relief which overlaps with the relief claimed in the other applications.

The basis for the application and the opposition thereto

[12] Mr Mashaba, or entities associated with him, amongst others, are defendants in four pending actions by the liquidators of Swifambo and Railpro instituted in the Gauteng Division of the High Court in Johannesburg for the repayment of astronomical sums of money.

[13] The genesis of this application is paragraph 46.1 of the affidavit deposed to by Mr Muller in opposition to the third application which reads:

> "*During the time when my previous affidavits were being prepared, signed and thereafter delivered, several threats and acts which I perceived were calculated to intimidate me, were received.*"

[14] The applicants consider the threats to be aimed at compelling Muller to abandon, the actions brought by the liquidators and/or, the opposition to the

applications refered to in paragraph 11 above. The applicants contend that the alleged threats constitute an offence contemplated in section 1 (1) (a)(ii) and/or section 1 (1)(b) of the Intimidation Act, Act No 72 of 1982.

[15] The applicants interpret (or as Mr Mashaba describes it 'accurately speculate') the statement in paragraph 46.1 of the opposing affidavit in the third application as an accusation by Mr Muller that the threats were made at their behest to persuade him not to persist with the actions brought by the liquidators and to withdraw the opposition to the applications referred to in paragraph 11 above. The applicants claim in this regard that:

(i) they have "*a fundamental right to protect [themselves] against any suggestion or possible finding, (by a Court in the Main Application), that [they] have employed a 'heavy'or 'heavies'to intimidate and to harass Mr Muller so that he is 'persuaded' from carrying out his legal obligations and, ... to withdraw the legal actions against [them](and third parties in which [they] have an interest) and to withdraw the opposition by the liquidators of [Swifambo] to at least two pending applications and possibly as regards the opposition by the liquidators of another insolvent estate (Railpro Holdings (Pty) Ltd), one of the liquidators being Ndyamara [the third respondent]".*

(ii) "[*by] virtue of... the serious nature of the unlawful misconduct of the intimidator/s [the applicants] are compelled to protect [themselves] (including [their] dignity and professional images)"* by pursuing two courses of action. Firstly, lodge criminal complaints against the intimidator/s because they have a " *fundamental interest*" in the unlawful misconduct and have not only a right but a duty to lodge a complaint with the South African Police Service. Secondly, demand that the intimidator/s "*suspend*" the intimidate treat tactics against Mr Muller and in the event the demand is not met, to bring an urgent application interdicting further intimidation of Mr Muller.

(iii) they have " *every right to fear that the intimidator/s will continue with [the] threats against [Mr] Muller as [they have] no doubt that Muller has not 'given into' the threats i.e. the consequence of this is that the intimidator/s will cause further prejudice to [the second applicant] and [Mr Mashaba] and more particularly [they] would 'face' additional criminal complaints from [Mr] Muller i.e. [they] obviously need to 'stop intimidator/s' in his tracks*".

(iv) without the name/s of the intimidator/s and the nature of the threats the intimidator/s could continue "*the campaign*" to intimidate Mr Muller. The intimidation of Mr Muller will be prejudicial to the applicants' professional image "*and no doubt, the possibility exists that the Presiding Judge at the main application**[1]**, may question the conduct of the intimidator/s and whether [the applicants] 'played a part' in the intimidation process*". They also fear a complaint to the professional bodies to which they belong and are concerned that criminal conduct imputed to them will be professionally detrimental.

[16] The applicants submit that they have the right (i) to preserve their professional status and dignity; and (ii) to take steps against the intimidator/s. To this end, they require Mr Muller's cooperation which has not been forthcoming. They aver that Mr Muller has "*resisted [Mr Mashaba's] attempts to obtain the demanded information*".

[17] In the replying affidavit, the applicants call in aid various provisions**[2]** in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). As indicated earlier the applicants did not pursue the application on the constitutional grounds. Mr Hollander argued that the applicants' cause of action is a mandatory interdict; it is not located in the Promotion of Access to Information Act, Act No. 2 of 2000 (this is of course consistent with the abandonment of a course of action located in the Constitution).

Have the applicants made out a case for the relief sought?

[18] The respondents deny that the applicants have made out a case for an interdict. Their case is that the law does not recognise a right to information asserted by the applicants nor a right to information for the purpose for which it is being sought by the applicants. In the notice of motion the applicants seek an order compelling Mr Muller amongst others to identify the person who threatened him. Mr Muller disputes that the applicants have a right to the information sought. In the answering affidavit Mr Muller reveals the identity of the person who intimidated him ("*the intimidator*") . He further discloses that he has preferred a charge of intimidation against the intimidator at the Villieria police station, identifies the date on which this occurred and provides the case number. He mentions that the intimidator "*held out to [him] that he had been mandated by Mr Mashaba and Mr Cameron to approach him".*

[19] The applicants are seeking final interdictory relief. They cannot succeed unless they demonstrate the three requisites for an interdict: (i) a clear right; (ii) an injury has been committed or is reasonably apprehended; and (iii) the only remedy they can invoke to protect the right and avert the injury, is an interdict. The first hurdle the applicants must overcome is to show that they have a clear right. If they cannot do so, then the application must immediately fail.

[20] I am unable to identify the right which the applicants wish to protect by a prohibitory interdict. The right identified in the heads of argument appears to be a right to information. While the Constitution guarantees a broad right to information, the applicants' case does not rest in the Constitution. (I am not required to make a finding whether persons such as the applicants may call the Constitution in aid either directly, or through legislation contemplated in the Constitution to give effect to the broad right to information, for the relief they seek. I therefore refrain from expressing a view on the issue).

[21] At the hearing I invited Mr Hollander to identify the substantive right which the applicants contend they wish to protect. He argued that a party does not have to show that an interdict is required to protect a substantive right and a party may resort to interdictory relief to protect a procedural right. He submitted that the right which the applicants sought to protect stems from, and is the right which Unterhalter J recognised in, Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd and Others***[3]***. He submitted that if the applicants are unable to show that Nampak applies they must fail. He attempted to persuade me that the facts align with those in Nampak.

[22] Mr Terblanche SC, who appeared for the respondents argued that interdictory relief is only available to a party who is able to demonstrate that a substantive right has been infringed (or there exists a reasonable apprehension that this will occur)

and that an interdict is required to prevent the infringement and the resultant harm. He submitted that the decision in Nampak finds no application. I am inclined to agree with Mr Terblanche.

[23] Nampak is distinguishable and is not authority for a right to seek the information which the applicants seek. The first point to be made is that Nampak was not seeking an interdict but an order which Unterhalter J described as " *bear[ing] a certain family resemblance to the Anton Pillar that preserves evidence in advance of the institution of substantive litigation*".

[24] Nampak does not confer a substantive right to information. It confers a procedural right to remedy the harm inflicted upon an injured person.**[4]** It is to assist a person wronged (victim) to identify the perpetrator to give effect to a victim's substantive right which in Nampak was found to be the right of a victim (or the person wronged) to access court to remedy the harm suffered.

[25] The court in Nampak found that Nampak had been wronged; it suffered a robbery and was entitled to pursue an action against the wrongdoers if they could be identified. An order of the sort issued in Nampak is aimed at assisting an injured person. Vodacom possessed information that might have assisted Nampak in identifying the perpertrators for it to approach a court for relief remedying the wrong.

[26] Unterhalter J adopted the decision in Norwich Pharmacal Co and Others v Customs and Excise Commissioners **[1973] UKHL 6**; **1974 AC 133** (HL) ([1973] **2 All ER 943)** and set out the conditions which an applicant must satisfy for a court to exercise the power to issue an order compelling the disclosure of information and in this regard stated as follows:

> " *[16] In English law, the requirements for obtaining Norwich Pharmacal relief have been summarised as follows:*
>
> '*The three conditions to be satisfied for the court to exercise the power to order Norwich Pharmacal relief are:*
>
> *(i) A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;*
>
> *(ii) There must be a need for an order to enable action to be brought against the ultimate wrongdoer; and*
>
> *(iii) The person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.*
>
> *[17] Apart from these requirements, the court enjoys a discretion even if the requirements are met, to determine whether an order should be granted and, if so, on what terms."*

[27] There is a fundamental misunderstanding, of the Nampak decision, on the part of the applicants. Unterhalter J found that the common law should be developed to create procedural mechanisms. However the circumstances under which the mechanisms are available is limited as set out in Norwich Pharmacal.

[28] The relief granted in Nampak is available only to a person who has been injured or wronged and the relief is available against a person who is "*mixed up in so as to have facilitated the wrong*". The applicants have not proven that they have been wronged. Furthermore, they are seeking relief against Mr Muller who (i) is the person wronged (Mr Muller has had a wrong perpetrated on him); and (ii) did not facilitate the wrong. The requirements for the Norwich Pharmacal relief are not met in this case.

[29] I accordingly find that the applicants have not demonstrated a clear right for an interdict; the Nampak decision does not apply to this application. The applicants have not overcome the first hurdle that confronted them; they have not satisfied the requirements for a final interdict. Nor have they satisfied the requirements for the type of relief granted in Nampak (the Norwich Pharmacal relief). This application must therefore fail.

Costs

[30] The respondents seek punitive costs against the applicants, including Mr Cameron, on the scale between attorney and own client. I am not inclined to mulct the applicants with punitive costs. There is however no reason why costs should not follow the result.

Order

[31] Consequently, I make the following order:

(a) The application is dismissed.

(b) The applicants and Mr Cameron, must jointly and severally pay the costs of the application as well as the costs of the application to strike out, which costs include the costs occasioned by the employment of two counsel.

Premier FMCG (Pty) Ltd v Van Zyl (4709/2021) [2021] ZAGPPHC 150 (12 March 2021)

Sequestration application-based on fraudulent conduct of employee-order granted

[1] I heard this matter in the urgent court last week and issued an order for the provisional sequestration of the respondent's estate. I indicated that the reasons for the order would follow. The reasons appear *infra* and due to the fact that the matter is urgent a short summary of the facts and law will suffice.

Reasons

[2] The applicant prayed for the provisional sequestration of the estate of the respondent on the basis that the respondent is factually insolvent.

[3] In a separate application under case number 4712/2021, the applicant also prayed for the provisional liquidation of ABC Fire Projects (Pty) Ltd ("ABC"), a

company of which the respondent is the sole director and shareholder, on the basis that it is factually insolvent.

Facts common cause

[4] The respondent was appointed as a senior credit controller by the applicant on or about 1 April 2002. Specific customer accounts were allocated to the respondent to manage, which management included obtaining proof of payments (remittances) made by the customers, allocating each payment/remittance to that customer's account and ensuring that agreed discounts, rebates, returns or other credit transactions are accurately recorded on each customer's account.

[5] Naturally, the credit-control duties performed by the respondent played an important role in the applicant's business operations and enabled the applicant to have an accurate record of the liabilities of each of its customers towards it

One of the customer's allocated to the respondent was Farhaad Distributors (Pty) Ltd ("FD"), which customer forms the subject matter of the alleged theft perpetrated by the respondent.

[8] According to the applicant's accounting records, the account of FD seemed up to date. Some suspicious behaviour of the respondent, however, prompted the applicant to appoint forensic investigators to investigate the accounts managed by the respondent. The results of the forensic investigation were, as will appear more fully *infra*, astounding.

[9] In conducting the investigation, an analysis of the bank accounts of the respondent and ABC for the period 2017 to date were compiled.

[10] The analysis revealed the following:

10.1 during the period 2017 to date, FD made payments to ABC's bank account referenced either by the customer account number allocated by the applicant to it or by the name of Mr Aboo Baker, the proprietor and director of FD, in an aggregate amount of R 74 137 004, 57;

10.2 the aforesaid amount was disbursed by the respondent by *inter alia* paying an amount of R 39 899 654, 57, directly into her bank account, which amount was disbursed by the respondent.

[11] Notwithstanding the aforesaid payments, the respondent filed a statement of affairs on 1 March 2021 in terms of which her total assets amounted to only R 2 095 000, 00.

[12] The financial statements of ABC similarly reflected a dire picture. The 2019 financial statements reflected total equity and liabilities of R 301 519, 00 and a nett profit of R 19 863. Sales for the year amounted to only R 976 286, 00.

Points *in limine*

[13] Prior to considering the merits of the applicant's application it is necessary to deal with the points *in limine* raised by the respondent.

First point *in limine*

[14] The respondent alleges that the applicant's notice of motion is defective because it does not reflect a date for hearing if the matter is opposed.

[15] The point is ill-conceived. A mere reading of the notice of motion makes short shrift of the point, to wit:

"***TAKE NOTICE FURTHER that****, in the event that a notice of an intention on the part of the respondent to oppose this application is received as aforesaid, the application will be made at* ***10h00*** *on* ***Tuesday 23 February 2021*** *or as soon thereafter as counsel for the applicant may be heard."*

[16] The point is dismissed.

Second point *in limine*

[17] The respondent contends that a supplementary affidavit filed by the applicant on 8 February 2021, should be disregarded because no basis or exceptional circumstances for the filing of the supplementary affidavit exists.

[18] It is trite that an applicant who wishes to file further affidavits may only do so with the permission of the court. The supplementary affidavit contains facts that came to the knowledge of the applicant subsequent to the filing of the founding affidavit.

[19] I am of the view that the facts contained in the supplementary affidavit do not take the matter any further. The respondent has, however, responded to the contents of the supplementary affidavit in her answering affidavit and as a result did not suffer any prejudice by the filing thereof.

[20] In the exercise of my discretion, the supplementary affidavit is admitted into evidence.

Third point *in limine*

[21] The respondent alleges that the applicant's claim underlying the application is one for damages and as such does not fall within the definition of a "*liquidated claim"* as envisaged in section 9 of the Insolvency Act, 24 of 1936 ("the Act").

[22] The point pertains to the merits of the application and will be dealt with *infra*.

Fourth point *in limine*

[23] The respondent contends that the allegations in the supplementary affidavit dispel any notion that she is a debtor of the applicant.

[24] The point, once again, pertains to the merits of the matter and will be dealt with *infra*.

Applicant's case

[25] The applicant reconstructed the account of FD and established that an amount of R 124 941 177, 90 is outstanding on the account. From the aforesaid facts, the applicant contends that the respondent clearly misappropriated the money paid by FD to the benefit of the applicant into ABC's account.

Respondent's case

[26] The respondent explained that FD made payments to ABC for services rendered. In support of the aforesaid, the respondent attached four invoices to her

answering affidavit issued by ABC to FD in respect of the services rendered. The toral amount of the invoices is approximately R 45 000, 00.

[27] Having regard to the amount paid by FD to ABC, the explanation is untenable, to say the least.

Legal principles and discussion

[28] The respondent does not dispute that the applicant has complied with all the formal requirements pertaining to the application for sequestration. The issues in dispute are whether the applicant has a claim against the respondent and if so, whether the claim is liquidated.

[29] **Section 9** of the **Insolvency Act, provides** that a creditor with a liquidated claim of R 100, 00 that has accrued but is not yet due, may, if it alleges that a debtor is in fact insolvent, launch an application for the sequestration of the debtor's estate.

[30] Section 10 of the Act provides for a provisional sequestration order with a return date and section 12 for the issuing of a final sequestration order on the return date.

[31] At this stage the applicant prays for a provisional sequestration order and needs to establish on a *prima facie* basis that it is entitled to a final order for sequestration. [See: *Kalil v Decotex (Pty) Ltd & Another* **1988 (1) SA 942** A]

[32] The applicant's claim against the respondent is based on a debt arising from theft committed by the respondent. The claim is well recognised in our law as a valid claim for purposes of the sequestration of a debtor's estate. [See: *VBS Mutual Bank (in liquidation) v Madzonga* (25057/2018)[2019] ZAGPJHC 273 (23 August 2019)]. The applicant's claim is in the result a liquid claim, that has accrued but is not yet due.

[33] Insofar as the issue of *locus standi* is concerned, the respondent does not deny that she received R 39 899 654, 57 in her bank account. She does not deny that the amount was paid by her from ABC's bank account into her personal bank account.

[34] The respondent does not deny that the payments in the aggravate of R 74 million paid by FD into ABC's bank account was referenced by the customer account number allocated by the applicant to FD or by the name Aboo Baker, the director and proprietor of FD.

[35] The respondent did not provide any facts to dispel the applicant's allegation that FD, after a reconstruction of its account, owes the applicant R 129 million.

[36] In view of the aforesaid facts, the respondent contends that FD still owes the outstanding balance to the applicant. FD is, therefore, the actual debtor and not the respondent. Accordingly, the applicant does not have a claim against the respondent and lacks the necessary *locus standi* to launch this application.

[37] The fact that the applicant might have a claim against FD, does not disentitle it to apply for the sequestration of the respondent's estate.

[38] Once the applicant has established *prima facie* that it would be entitled to a final order of sequestration of the respondent's estate, the applicant is entitled to a provisional sequestration order. In the result, the applicant has the necessary *locus standi* to apply for the provisional sequestration of the respondent.

[39] I was satisfied that it had and the order for the provisional sequestration of the respondent's estate was issued.

Premier FMCG (Pty) Ltd v ABC Fire Projects Proprietary Limited (4712/2021) [2021] ZAGPPHC 151 (12 March 2021)

Winding up application-applicant's claim against the respondent is based on a debt arising from theft perpetrated by the respondent. The claim is for the repayment of stolen monies, which claim is recognised in our law as a liquidated claim.

[1] I heard this matter in the urgent court last week and issued an order for the provisional liquidation of the respondent. I indicated that the reasons for the order would follow. The reasons appear *infra* and due to the urgency of the matter, a short summary of the facts and law will suffice.

Reasons

[2] The applicant prayed for the provisional liquidation of the respondent on the basis that the respondent is factually insolvent.

[3] In a separate application under case number 4709/2021, the applicant also prayed for the provisional sequestration of the estate of Barbara van Zyl, the sole director and shareholder of the respondent, on the basis that she is factually insolvent.

Facts common cause

[4] The respondent was appointed as a senior credit controller by the applicant on or about 1 April 2002. Specific customer accounts were allocated to the respondent to manage, which management included obtaining proof of payments (remittances) made by the customers, allocating each payment/remittance to that customer's account and ensuring that agreed discounts, rebates, returns or other credit transactions are accurately recorded on each customer's account.

[5] Naturally, the credit control duties performed by the respondent played an important role in the applicant's business operations and enabled the applicant to have an accurate record of the liabilities of each of its customers towards it.

[6] The applicant alleges that the respondent had, as a result of her position, become acquainted with all the applicant's internal financial processes including the applicant's internal checks and balances.

[7] One of the customer's allocated to the respondent was a certain Farhaad Distributors ("FD"), which customer forms the subject matter of the alleged fraud/theft perpetrated by the respondent.

8] The sections pertaining to the liquidation of a company in the previous Companies Act, 61 of 1973 ("the Act"), has been retained in the present **Companies Act, 71 of 2008**. Section 344 of the Act lists the circumstances

in which a company may be wound up and subsection (f) read with section 345(2) provides that a company may be wound up if it is proved to the satisfaction of the court that the company is unable to pay its debts.

[29] In terms of section 346(1)(b) an application for the winding-up of a company may be brought by one or more creditors, including contingent or prospective creditors.

[30] The applicant's claim against the respondent is based on a debt arising from theft perpetrated by the respondent. The claim is for the repayment of stolen monies, which claim is recognised in our law as a liquidated claim. [See: *Kleynhans v Van der Westhuizen N.O.* **1970 (2) SA 742** AD] This dispose of the liquidity point.

[31] Insofar as the *locus standi* of the applicant is concerned, the respondent does not deny that R 74 137 004, 57 was paid into its bank account by FD referenced by the customer account number allocated by the applicant to FD or by the name Aboo Baker, the director and proprietor of FD.

[32] In is manifestly clear from the respondent's bank statements that the payments made by FD into the account of FD was in respect of the debt it owes to the applicant. Instead of paying the money to the applicant, ABC appropriated the monies to itself and thereafter utilised the money for its own benefit

[33] The respondent did not provide any facts to dispel the applicant's allegation that FD, after a reconstruction of its account, owes the applicant R 129 million.

[34] On the face of the applicant's claim for repayment of the stolen R 74 137 004, 57, ABC's current financial position according to its financial statements referred to *supra* proves that it is unable to pay its debts and is hopelessly insolvent.

[35] In the result, the applicant has established facts entitling it to an order for the provisional liquidation of ABC and such order was grante

Exotic Fruit Company (Pty) Ltd v Zakharov and Another (14143/2020) [2021] ZAWCHC 60 (30 March 2021)

Winding up application-Impeachable transactions- prescription-sections 29 and 30 of the Insolvency Act, 24 of 1936 read with section 340 of the Companies Act, 61 of 1973.

[1] The applicant is a company in liquidation, duly represented by its liquidators (I shall refer to them as "the applicant" or "the liquidators"), who applies for the estate of the first respondent ("the respondent") to be placed under provisional sequestration in the hands of the Master of the High Court, Western Cape.

[2] The applicant alleges that the respondent was the controlling mind of the applicant before the latter was liquidated.

[3] Within the period of six months prior to its liquidation, the applicant paid the amount of R3 317 188.24 to the respondent. The liquidators claim that such payment was not for value, preferred the respondent over other creditors and was made under circumstances where the liabilities of the applicant exceeded its assets.

[4] The applicant relies on sections 29 and 30 of the Insolvency Act, 24 of 1936) read with section 340 of the Companies Act, 61 of 1973. The latter section provides:

> "*Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and provisions of the law relating to insolvency shall* mutatis mutandis *be applied to any such disposition."*

[5] Section 29(1), on which the liquidators of the applicant rely for the setting aside of the disposition made by the applicant in favour of the respondent, therefore finds application. It provides:

> "*Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor are above another."*

[10] In **Duet and Magnum Financial Services CC (in Liquidation) v Koster** **2010 (4) SA 499** (SCA), the court dealt with the issue of prescription relating to an impeachable disposition. In that matter, the liquidators issued summons against the respondent, Mr Koster, wherein they alleged that certain dispositions had been made which fell within the ambit of either of **sections 26(1)(b)**, **29**(1) or **30**(1) of the **Insolvency Act. A** special plea of prescription was raised against the liquidators' claim. In opposition to the claim of prescription, counsel for the liquidators argued that the respondent (Mr Koster) was not yet liable to repay the moneys claimed as no "debt" was in existence, and they were not entitled to recover the disposition until the court made the order sought by them. In this regard, the court held (at para 10):

> "*It is perfectly correct, as counsel for the liquidators submitted, that Mr Koster has no present obligation to pay the moneys that are claimed. It is also perfectly correct that Mr Koster will become obliged to pay the money only once a court has made a declaration to that effect."*

[11] The court held further (at para 13) that once it is shown that a disposition that falls within the terms of **sections 26** to **31** of the insolvency Act has occurred, "*then s 32(3) entitles the liquidator to ask a court to set aside the disposition and to declare that the liquidator is entitled to recover the property or its value. … [T]he declaration that is made by the court brings into existence debts that did not exist before and simultaneously enables the debts immediately to be enforced through the ordinary process of execution."*

[12] The conclusions reached in **Duet and Magnum** discussed above were confirmed by Cachalia JA in **Off-Beat Holiday Club and Another v Sanbonani**

Holiday Spa Shareblock Ltd and Others **2016 (6) SA 181** (SCA) where the learned judge of appeal opined (at para 45):

> "*The provisions of the* **Insolvency Act (ss** *26 – 31) … referred to in [Duet and Magnum], which the High Court considered comparable to a shareholder's entitlement under* **s 266**, *dealt with declarations that had the effect of bringing into existence a debt that did not previously exist. The liquidator's right to approach the court for such relief arises when certain events occur, for example, a disposition of property under* **ss 26**-**31** *of the* **Insolvency Act. The** *liquidator becomes entitled to approach the court to set the disposition aside and to declare the liquidator entitled to recover the property. And the corresponding 'obligation' or 'liability' of the debtor arises immediately upon the liquidator's is entitlement to recover the property."* (Internal references removed.)

[13] In the present matter, therefore, the liquidators have not shown the existence of a "debt" owing by the respondent to the applicant and they have no standing to apply for the sequestration of the respondent.

[14] In the result, the application is dismissed, with costs.

SOUTH AFRICAN AIRWAYS SOC LTD (IN BUSINESS RESCUE) AND OTHERS v NATIONAL UNION OF METALWORKERS AND OTHERS 2021 (2) SA 260 (LAC)

Labour law — Dismissal — Dismissal for operational requirements — During business rescue — Whether business rescue practitioner may commence retrenchment process under LRA before conclusion of business rescue process — Preservation of jobs among aims of process — Hence no retrenchments before conclusion of process/production of rescue plan — Labour Relations Act 66 of 1995, s 189; Companies Act 71 of 2008, s 136(1)*(b)*.

Company — Business rescue — Business rescue practitioner — Powers — Dismissal — For operational requirements — Whether practitioner may commence retrenchment process under LRA before conclusion of business rescue process — Preservation of jobs among aims of process — Hence no retrenchments before conclusion of process/production of rescue plan — Labour Relations Act 66 of 1995, s 189; Companies Act 71 of 2008, s 136(1)*(b)*.

Business rescue practitioners may not retrench employees in the absence of a business rescue plan.
The appellant, SAA, found itself in dire financial straits and went into business rescue. Before the business rescue practitioners (the second and third appellants) finalised the business rescue plan, they issued notice under s 189(3) of the Labour Relations Act 66 of 1995 (LRA) informing employees that they could be dismissed for operational requirements (retrenched) and that they should enter into consultations with SAA on, inter alia, ways to avoid retrenchment. Under the LRA s 189 retrenchments are prohibited during the 60-day consultation process.
The practitioners also offered voluntary separation packages that were accepted by some employees. The unions argued that the moratorium on retrenchments during business recue proceedings also prevented practitioners from seeking to secure voluntary retrenchments.

The first respondent, Numsa, together with other unions representing SAA's employees (the unions), refused to take part in the consultation process and applied to the Labour Court for a ruling that the LRA s 189 notices were premature and unlawful because they were issued before the production of a business rescue plan. The unions asked that the consultation process be halted pending the execution of the plan. The Labour Court ruled in favour of the unions. The judgment hinged on the interpretation of s 136(1) of the Companies Act 71 of 2008 (CA), which states that employees retained their jobs during business rescue and that any retrenchment 'contemplated in the . . . business rescue plan is subject to [LRA] section 189 and 189A'. The Labour Court ruled that CA s 136 offered complete protection against dismissal during business rescue proceedings. It found, however, that nothing prevented practitioners from offering a voluntary severance package to avoid retrenchment.
SAA appealed to the Labour Appeal Court and the unions counter-appealed, attacking the Labour Court's ruling on voluntary severance.
Held
Companies Act s 136 had to be interpreted in the light of the business rescue procedure's aim to rescue the *whole* company, not just its business or parts of it, and thus to retain jobs (see [29]). The words 'any retrenchment of any such employees contemplated in the . . . business rescue plan' in CA s 136(1)*(b)* signify a plan that would conceptualise the commercial rationale for retrenchments. The *raison d'être* for the enactment of CA s 136(1)*(b)* was to safeguard employees from being subjected to retrenchment without a business rescue plan (see [31]). And CA s 150 made it plain that the rescue plan, which under ss (2) had to explain its effect on the number of employees, had to precede any retrenchment. This put paid to any suggestion that the retrenchment process could begin without one (see [32]). Therefore, the Labour Court's conclusion, that the issuing of the LRA s 189 notice by the practitioners, absent a business rescue plan, was premature and unfair, and had to be withdrawn, was correct (see [40]). Appeal dismissed.
As to the counter-appeal, the Labour Court did not make any appealable order regarding the offer of voluntary retrenchment packages. And in any event, there was no reason why the practitioners could not unilaterally offer voluntary severance packages to the employees. Therefore, the cross-appeal had no merit and would be dismissed. (See [43].)

Knoop NO and another v Gupta (Tayob as Intervening Party) [2021] 1 All SA 726 (SCA)

Corporate and Commercial – Company law – Business rescue – Application for removal of business rescue practitioners – Court having discretion either to grant or to refuse an order for removal of a business rescue practitioner, which discretion is exercisable if one or more of the grounds for removal set out in section 139(2) of the Companies Act 71 of 2008 has been established on a balance of probabilities – Factual findings must be made and considered to determine whether a case for removal was established.

The respondent (“Mrs Gupta”), her husband, and his two brothers (collectively referred to as the “Guptas”) were equal shareholders of two companies (“Islandsite” and “Confident Concept”) which were placed under voluntary business rescue in terms of resolutions taken by their respective boards of directors under section 129(1), read

with section 129(2), of the Companies Act 71 of 2008 (the "Act"). The business affairs of the Guptas came to public attention through media reports – particularly in connection with the State capture commission of enquiry. In consequence of allegations made about the Guptas, a number of companies in the group through which the Guptas conducted their business activities became unable to continue with business operations because the major banks in South Africa were not prepared to afford them banking facilities. That was why Islandsite and Confident Concept were placed under supervision and went into voluntary business rescue. For the same reason, six other companies in the group were placed under business rescue at the same time. All the companies were controlled by the Guptas. And were subsidiaries of Islandsite through another entity ("Oakbay").

The appellants, Mr Knoop and Mr Klopper, were appointed as the business rescue practitioners ("BRPs") of Islandsite and Confident Concept. They also held appointments as BRPs in respect of some of the other companies in the Oakbay Group.

In November 2018, the respondent launched an application in the Gauteng Division of the High Court, for the removal of Messrs Knoop and Klopper as BRPs of the two companies. Various grounds for seeking removal were advanced. The Full Court granted an order for the removal of the BRPs. Leave to appeal to the present Court was subsequently granted.

Held – The judgment under appeal contained no analysis of the factual case made by Mrs Gupta and no factual findings in respect of the alleged conduct of the BRPs. The factual allegations against the BRPs had to be substantiated by evidence. Factual findings needed to be made and considered to determine whether a case for their removal had been established. In order for the BRPs to know what it was they were charged with doing, or omitting to do, and in what respects their conduct of the business rescue was said to be deficient, specific facts needed to be set out in the founding affidavit to which they could respond in order to defend their administration.

Business rescue practitioners can only be removed by a court order under section 130 of the Act, or under the provisions of section 139. The court has a discretion either to grant or to refuse an order for removal of a BRP. The discretion is exercisable if one or more of the grounds for removal set out in section 139(2) has been established on a balance of probabilities. However, proof of a ground for removal alone does not dictate that an order for removal must follow.

Section 140(3)(a) and (b), which were also invoked by the respondents was held to be of no assistance in determining whether in a particular case the court should order the removal of a BRP.

Examining each of the specific complaints against the BRPs, the court found that with one exception, the allegations were not proven, and none of them provided grounds for the removal of the BRPs. The grounds advanced by the Full Court in support of its conclusion that the BRPs should be removed were found to be unfounded.

The appeal was accordingly upheld with costs.

Ardnamurchan Estates (Pty) Limited v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd and others [2021] 1 All SA 829 (ECG)

Civil Procedure – Pleadings – Answering affidavit – Late filing – Filing of replying affidavit in response to late answering affidavit signifying acceptance of the fact that the answering affidavit was not to be treated as a nullity – Where an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of Rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit.

The first respondent, an entity conducting a wind farming operation, erected a wind turbine on a farm owned by the fifth respondent. The applicant, a property-owning company, whose farm was adjacent to the farm owned by the fifth respondent, claimed acquisitive prescription in respect of the land upon which the wind turbine was erected and sought the removal of the wind turbine. The first respondent denied that the applicant had acquired the land through acquisitive prescription and pleaded, in the alternative, that the applicant was estopped from claiming a right of prescription. The first and fifth respondents brought a counter-application for compensation in lieu of removal of the wind turbine and tendered such compensation.

Held – Parties agreed that a preliminary issue relating to the late filing of the first respondent's answering affidavit and the applicant's replying affidavit should be decided separately. A related question was whether, in delivering a replying affidavit, the applicant had effectively abandoned or foregone its right to complain about the late delivery of the answering affidavit. The court was of the view that the delivery of a replying affidavit was an acceptance of the fact that the answering affidavit was not to be treated as a nullity. It held that where, as in this case, an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit. If condonation was going to be an issue, then the applicant was required to have engaged the first respondent on the issue and to have conveyed to it that it regarded its answering affidavit as an irregular step because it had been delivered outside of the time period. As the applicant had already responded to the matter in the answering affidavit, requiring the first respondent to bring an application for condonation would be a waste of time.

The preliminary issue was decided in first respondent's favour and the answering affidavit to the main application was admitted.

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

Creditors-contribution-Insolvency Act 24 of 1936 – interpretation of ss 106, 89 (2) and 14 (3) – liability for costs of sequestration when there is no free residue or free residue is insufficient – whether secured creditors relying solely on their security are liable to contribute – whether petitioning creditor is solely liable. Body Corporate as the petitioning creditor is solely liable to pay the costs of sequestration as the other two creditors (FNB and Nedbank) are secured creditors who relied solely on their security

This appeal concerns the interpretation of **s 106**, read with ss 89(2) and 14(3), of the Insolvency Act 24 of 1936 (the Act) dealing with the liability of creditors to pay a contribution where there is insufficient or no free residue in an insolvent estate to meet expenses, costs and charges connected with the sequestration. Such costs are a charge against the free residue in terms of s 97(2)*(c)* of the Act.

[2] This issue has been a subject of controversy for a while within the insolvency law academic circles.**[1]** The debate centres on the question of which creditors are liable to pay a contribution for costs where there is a shortfall in the free residue. Does the burden to contribute lie with all creditors who have proved claims against the estate? Does that include secured creditors who have proved their claims but relied solely on their security? And what about the petitioning**[2]** creditor who applied for the sequestration of the estate in the first place? These questions engaged Vilakazi AJ in the Gauteng Division of the High Court, Pretoria (the high court). But first, the background that led to the application before Vilakazi AJ.

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

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

[43] The appellant gave examples of where it suffered losses running into millions of rands, in instances where it was called upon by trustees or liquidators in various matters to make contributions for costs of sequestration notwithstanding that it had relied solely on its security. Section 14(3) seeks to avoid a situation where a

creditor would petition for the sequestration of the estate and not prove a claim, only for other creditors 'to pick up the costs'. In a case like the present one, the unfairness is heightened because bodies corporate petition for sequestration, recover outstanding monies in terms of s 15B(3)*(a)*(i)*(aa)* once a unit is sold and, where there is a shortfall in the free residue other creditors, who have proved their claims (including secured creditors who rely solely on their security), bear the costs, including the costs paid by the petitioning creditor to their attorneys.

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

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

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

1 The appeal is upheld.

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

> '3. That the Third and Fourth Respondents are directed to amend the first and final liquidation, distribution and contribution account to reflect that the Second Respondent is solely liable to pay the contribution of R46 663.16.'

3 There is no order as to costs.

END-FOR NOW