INSOLVENCY LAW UPDATES MAY 2021[1]

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Impeachable transactions- voidable preferences in terms of sec 29 of the Insolvency Act, 24 of 1936 as read with sec 339 and 340 of the Companies Act, 61 of 1973.

The plaintiffs are the joint liquidators of Vusela Construction (Pty) Ltd ('Vusela') which was placed into final liquidation on 4 December 2013 after spending less than a month under business rescue.

In this action they claim payment of the sum of R1 287 088.00 from the defendant being the total sum of eight payments made by Vusela to the defendant in the six-month period preceding its liquidation.

The plaintiff's case is that such payments constituted voidable preferences in terms of sec 29 of the Insolvency Act, 24 of 1936 as read with sec 339 and 340 of the Companies Act, 61 of 1973.

The defendant carries on the business of a supplier of building tools, equipment and cement to the construction industry. It was common cause that Vusela was a long-time customer of the defendant, that it enjoyed a credit facility with it and that the eight payments in question formed part of regular payments made by it on account. The first of the disputed payments was made on 5 June 2013 and the last on 9 October 2013, their amounts ranging from R42 108.60 to R514 694.19. This latter payment was made just less than six months before Vusela's liquidation.

The plaintiffs led the evidence of a Mr Andrew Cawdry, a chartered accountant. He analysed Vusela's financial records with particular reference to its solvency during the six-month period in question and its record of payments to tis creditors over this period. In his evidence Mr Cawdry pointed to several instances in the six-month period where payments were made to the defendant whilst no payments were made to several creditors. In particular, SARS was owed amounts of approximately R42.5mil for VAT, R7.6mil for PAYE and R800 000 for UIF and this indebtedness went back to a time well before the six-month period. Thus while payments were being made to the defendant, SARS' indebtedness was outstanding and, Mr Cawdry testified, despite this no payments were made in the six-month period to SARS. Mr Cawdry also gave evidence as to Vusela's indebtedness to a number of creditors who eventually proved claims at the first and second meetings of creditors. In many instances the indebtedness of these creditors increased over the six-month period and this while the defendant was paid regularly and in full. The defendant did not prove a claim because it was owed an amount of only some R14 000.00 at liquidation.

[11] Mr Cawdry expressed the opinion that dispositions in question were not made in the ordinary course of business because many of Vusela's other creditors remained unpaid during this period. The plaintiff's counsel disavowed reliance on his opinion, however, on the basis that the issue was a legal question.

[12] The defendant called two witnesses including its managing director, Mr M Noordien. He testified that Vusela was a long-standing customer whose credit limit and payment terms had been set over the years the by the defendant's credit guarantor. These terms required Vusela to settle its indebtedness in full within 30 days of presentation by defendant of a monthly statement. If full payment was not timeously made the defendant was required to suspend the account failing which Vusela's credit guarantee was placed in jeopardy. The defendant had faithfully complied with these terms over the years until Vusela's credit was suspended by the defendant's credit guarantor temporarily on 13 August 2013.

[32] Whilst a distinction between reason and intent might, in certain situations, be a tool in determining whether a disposition was made with the intention to prefer, its utility should not be overvalued.

[33] Firstly, seen in the correct perspective the act which is accompanied by an intent or intention in the strict sense, is that of making the disposition, usually in the form of a payment. That act is accompanied or impelled by reasons, motive or intent and where this is predominantly to favour the particular creditor over another such a disposition, all other statutory requirements being met, is voidable.

[34] In this sense seeking to make a distinction between intent on the one hand and reasons or motive on the other hand is of limited value, if not potentially misleading. It is noteworthy in this regard that in *Cooper* Zulman JA uses the words intention and motive synonymously.

[35] Secondly, in a civil law context the distinctions between motive, intent and underlying reasons are by no means always clear and to a certain extent exist in the eye of the beholder. Thirdly, making fine distinctions between motive or underlying reasons or intent runs the risk of undermining the settled test of seeking the dominant, operative or effectual intention and of concentrating unduly on the effect of the payment vis-à-vis other creditors rather than the subjective intention of the payer.

[36] In the circumstances of the present matter it seems strained to relegate to a secondary role what appears on the probabilities to have been Vusela's primary concern, to continue trading as a builder, and to view its dominant intent as being to favour one of its suppliers of building materials – with whom it had an entirely regular customer/supplier relationship reaching back many years. Having regard to the evidence as a whole, and notwithstanding the lack of direct evidence, it appears to me that the defendant has succeeded in proving that the most plausible inference is that Vusela's '*dominant, operative or effectual intention in substance or in truth'* for making the eight dispositions was not to prefer the defendant over other creditors but simply to obtain building supplies to keep Vusela's business afloat and with some prospect of surviving its financial activities.

[37] In the result the defendant has succeeded in establishing the second leg of its defence to the plaintiffs' claim viz that the disputed dispositions were not made with the intention to prefer it above any other creditor.

[38] For these reasons the plaintiffs' claim cannot succeed and is dismissed with costs.

Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others (1274/2019) [2021] ZASCA 59 (21 May 2021)

Business rescue-business rescue practitioners (BRPs) – removal under **s 139(2)(***e*) – scope of section – dispute over intercompany loans – whether giving rise to a conflict of interest warranting removal of BRPs

Oakbay sought leave to appeal a High Court decision dismissing their application for the removal of Mr Knoop and Mr Klopper as business rescue practitioners (BRPs) in respect of Tegeta Resources, a subsidiary of Oakbay. The application was based on an alleged conflict of interest on the part of the BRPs in their treatment of an inter-company loan by Tegeta to its wholly-owned subsidiary Optimum Coal Mines. **Wallis JA** discusses the Companies Act 71 of 2008 and the removal business rescue practitioners under s 139(2)(e); and the dispute over the inter-company loans and whether this gave rise to a conflict of interest warranting the removal of the practitioners.

The application for leave to appeal is dismissed with costs.

In February 2018, eight companies in the Oakbay Group were placed in voluntary business rescue after the four major South African banks decided to terminate their banking facilities, rendering them commercially insolvent.[1] Among the companies were the first respondent, Tegeta Exploration and Resources (Pty) Ltd (Tegeta), and its three wholly-owned subsidiaries, Optimum Coal Mine (Pty) Ltd (OCM), Koornfontein Mines (Pty) Ltd (Koornfontein) and Optimum Coal Terminal (Pty) Ltd (OCT). Oakbay Investments (Pty) Ltd (Oakbay), the applicant and the company that controlled the group, was not placed in business rescue. It was represented in these proceedings, which were commenced on 16 November 2018, by Ms Ragavan, the acting Chief Executive Officer (CEO) of the Oakbay Group. She deposed to the founding and replying affidavits and sought the removal from office of Messrs Knoop and Klopper, the second and third respondents and the appointed business rescue practitioners (the BRPs) of Tegeta. The application was dismissed by Potterill J in the Gauteng Division of the High Court, Pretoria and she refused leave to appeal. This court referred Oakbay's application for such leave for argument in terms of s 17(2)(*d*) of the **Superior Courts Act 10 of 2013**.

[2] In addition to their appointment as Tegeta's BRPs, Messrs Knoop and Klopper were appointed, together with two others, as the BRPs of OCM and jointly as the BRPs of Koornfontein. Mr Knoop was appointed as the sole BRP of OCT. These appointments were said by Oakbay to give rise to a conflict of interest between their duties in relation to Tegeta and their duties, principally in relation to OCM, but generally to all three subsidiaries. It based its case for their removal on **s 139(2)(***e*) of the Companies Act 71 of 2008 (the Act). First, however, it is necessary to outline the facts said to give rise to the conflict of interest.

[3] According to Oakbay, when Tegeta purchased the shares in OCM, Koornfontein and OCT, a balance sheet annexed to the sale agreement reflected that all three subsidiaries were substantially indebted to their then holding company in respect of inter-company loans.[2] As a result of the sale, Tegeta was said to have stepped into the shoes of the previous holding company as the party to whom those loans were owed. Thereafter further transactions occurred between the four companies. According to Ms Ragavan the outcome of these was accurately reflected in the audited annual financial statements for the three subsidiary companies that she annexed to the founding affidavit. These showed that all three

companies had substantially reduced their liability to Tegeta and, in the case of Koornfontein, Tegeta had borrowed considerable sums from it by way of inter-company loans.[3]

[4] Ms Ragavan did not deal in any detail with the transactions that originally gave rise to the inter-company loans or those that occurred in the two years and two months that elapsed between Tegeta's acquisition of OCM, Koornfontein and OCT and the four companies entering business rescue. There was thus no explanation for the changes in the amount of these loans. She explained that the companies operated as related entities, with often common shareholders and asserted that the claims based on the inter-company loans were unassailable. She added:

'… there was never any contemplation by [Oakbay] that any party could question the intercompany loans as has now been done by the BRPs.'

Ferrostaal GmbH and Another v Transnet Soc Ltd t/a Transnet National Ports Authority and Another (1194/2019) [2021] ZASCA 62 (25 May 2021)

Business rescue-business rescue proceedings - whether it was just and reasonable to set aside a creditor's vote against the adoption of a proposed business rescue plan on the ground that its result was inappropriate. Held: there is no justification for interfering with the discretion exercised by the high court – appeal dismissed with costs.

This appeal concerns the question whether a court's refusal to set aside a creditor's vote against the adoption of a proposed business rescue plan (on the basis that it did not make provision for that creditor's interests) was correct. The detailed facts which gave rise to the litigation are not in dispute and are set forth in the judgment of Bozalek J sitting in the Western Cape Division of the High Court, Cape Town (the high court). The salient background facts to this appeal are set out in the succeeding paragraphs.

Background facts

[2] On 31 December 2006, the first respondent, Transnet Soc Limited, trading as Transnet National Ports Authority (Transnet) concluded a written lease agreement (head lease) with Ferromarine Africa Proprietary Limited (FMA) over its fixed property located at the port of Saldanha. Although the leased property provided access to the quay apron and quay operational area of that port, the said apron and operational area did not form part of the leased premises. The head lease was for a period of 15 years, terminating on 30 September 2022, with FMA being granted an 'option' to renew the lease but on terms still to be negotiated and agreed upon prior to that date, failing which the option clause would have no effect. FMA's shareholders were Ferrostaal GmbH, the first appellant, and Atlantis Marine Projects Proprietary Limited, the second appellant. FMA had two directors and no employees.

[3] On 2 December 2016, FMA was placed under business rescue. On 7 December 2016, Mr Gore, the duly appointed business rescue practitioner (practitioner), suspended FMA's obligation to pay rental to Transnet. The practitioner

published the first business rescue plan (BRP) on 28 February 2017. Transnet, which happened to be FMA's only independent creditor, did not support the proposed BRP. It appears that Transnet had subsequently initiated arbitration proceedings challenging the lawfulness of the practitioner's decision to suspend FMA's obligation to pay rental. The arbitrator found that the practitioner was entitled to suspend the payment of rental within the contemplation of s 136 (2)*(a)* of the Companies Act 71 of 2008 (the Act). The other aspects canvassed in the arbitration proceedings require no mention in this appeal, as nothing turns on them.

[4] On 23 November 2017, the practitioner published a second BRP. It too, did not find favour with Transnet. During August 2018, Transnet launched an application before the high court, seeking an order setting aside the resolution passed by FMA, in terms of which the business rescue proceedings were commenced. The practitioner opposed the application on behalf of FMA and simultaneously brought a counter-application seeking to review and set aside Transnet's vote against the adoption of the published BRP. It is unnecessary, for present purposes, to traverse the bases upon which the application and counter-application were initiated and resisted by the respective parties. It suffices merely to mention that while those proceedings were pending, FMA, in principle, agreed to a sub-lease with ArcelorMittal, in terms of which it was envisaged that ArcelorMittal would install a spiral welding mill at the premises, which would be used for the production of steel piping required in the marine construction industry.

[5] On 29 July 2019, the practitioner published a final revised BRP. The main elements of that revised BRP entailed (i) Transnet approving the terms of the proposed sub-lease between FMA and ArcelorMittal for a period of three years, (ii) agreeing to receive its full rental under the head lease for the first six months of the proposed sub-lease and, (iii) the repayment of the arrear rentals only if and when an extension of the lease for a further period of 15 years was negotiated between FMA and Transnet upon the expiry of the head lease. On 31 July 2019, Transnet voted against the adoption of the revised BRP at a meeting of creditors and holders of voting rights.

As regards the temporary moratorium on the rights of claimants envisaged in s 128(1)*(b)*(ii) of the Act, the revised BRP was unfortunately not a model of clarity. It stated that '[i]f the [BRP] fails and the Company is not placed in liquidation and instead the Business Rescue continues, then the moratorium will likewise remain in effect.' Given the fact that the payment of arrear rental will only be negotiated at the end of the head lease which would terminate in three years' time, and that the arrears would, in the absence of an agreement on the structuring of the repayments, be amortised over an extended 15-year period, the vague arrangement set out in the revised BRP cannot be described as "temporary" within the contemplation of s 128(1*)(b)*(ii) of the Act. This non-compliance with the provisions of s 128(1)*(b)*(ii) constitutes an additional reason why the high court's refusal to set aside Transnet's vote rejecting the proposed BRP is unassailable.

[37] I am satisfied that all the circumstances alluded to in the foregoing paragraphs militate against finding that Transnet's vote against the adoption of the revised BRP was inappropriate and thus constitute sufficient factual bases for dismissing the appeal. It is therefore not necessary for this Court to examine the rest of the reasoning that informed the high court's decision.

Firstrand Bank Limited t/a First National Bank v Venter (242/2021) [2021] ZAFSHC 113 (10 May 2021)

Sequestration application- advantage to creditors-challenged- the applicant is merely required to show that there is reason to believe that creditors will be advantaged

[1] This is an opposed application for the provisional sequestration of the respondent's estate.

[2] On 22 October 2013 the parties concluded two written credit agreements in terms of which the applicant lent and advanced monies to the respondent. The credit agreements were secured by a notarial general covering bond over the respondent's immovable property number **532 Pentzplaas Farm** situated in Bultfontein ("the farm").

[3] The respondent failed to repay the amounts due to the applicant as a result the applicant instituted summons against the respondent and was later granted a default judgment on 19 December 2019 for the sum of R5 646 705.49 and R465 129.79 together with interest and costs.

[4] In terms of ***s 10*** of the ***Insolvency Act 24 of 1936*** ("The Act'') a creditor who seeks to sequestrate the estate of a debtor must satisfy the court *prima facie* that it has an established a claim of not less than R100 which entitles it**[1]** to apply for the sequestration of the debtor who has committed an act of insolvency or is in fact insolvent and there is reason to believe that it would be to the advantage of the respondent's creditors if his estate is sequestrated.

[5] The applicant relies on the unsatisfied judgment to establish that it has a liquidated claim against the respondent. The application is premised on the provisions of **s 8** of the Act. The applicant submits that the respondent has committed acts of insolvency in terms of:

5.1. section 8(b) by failing to satisfy a judgment obtained against him or point out any disposable assets sufficient to satisfy the debt and that the Sheriff could also not find any disposable assets at the respondent's farm;

5.2. sections 8(c) and 8(d) by disposing of his movables; and

5.3. section 8(g) by confirming in writing his inability to pay his debts.

Except for a bald denial that the respondent ever owned a Land Rover and to aver that he is still in possession of the Toyota Bakkie, the respondent does not take the court into his confidence to explain why then the Sheriff's return is a Nulla Bona. It is a trite principle that a Sheriff's return of "what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated." **[2]** It thus follows that the onus is on the respondent to rebut such evidence and without an

explanation to the contrary, I'm inclined to accept the applicant's version that the respondent has committed the acts of insolvency as contemplated in **section 8**, **ss (b), (c), (d)** and **(g)**. The respondent is also unable to pay his debts when they become due he is thus insolvent.

[15] As regards whether the sequestration of the respondent's estate will advantage the creditors, the applicant is merely required to show that there is reason to believe that creditors will be advantaged. In *Meskin & Co v Friedman* **1948 (2) SA 555** (W) at 559 the Court held that:

"*there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and enquiry under the relevant provisions of the Act might unearth assets thereby benefiting creditors."*

[16] The respondent is a farmer. In addition to the unexplained whereabouts of his farming equipment there is also no disclosure with regard to the farm's financial profitability or efficacy. I'm persuaded that sequestration of the respondent's estate will be to the advantage of the creditors as the trustee will bring about a convergence of all the assets and liabilities of the trust to ensure a fair distribution to the creditors.

[17] Taking into consideration all facts of this matter I'm satisfied that there is good reason to place the respondent's estate under provisional sequestration.

[18] I make the following order:

(1) The application to refer the matter for oral evidence is dismissed;

(2) A provisional sequestration order returnable at 9h30 on 10 June 2021 is granted as prayed for in the notice of motion dated 20 January 2021

Firstrand Bank Ltd v 39 Indaba Accommodation & Catering (Pty) Ltd (3062/2020) [2021] ZAFSHC 124 (17 May 2021)

Security-general notarial bond-perfecting thereof

[1] The applicant approached this court on motion seeking an order in the following terms:

1. That the applicant be authorized to perfect its security in terms of the general notarial covering bond, BN2265/2017 attached as annexure "**FA2"** to the founding affidavit (hereinafter *the bond*);

2. That the applicant be authorized to take possession, through the relevant sheriff for the district of Kroonstad and/or through any other sheriff in respect of any area of jurisdiction of the High Court of South Africa, of the livestock of the respondent to the maximum value of **R500 000.00** and an additional **R100 000.00** (the value to be determined by the relevant sheriff), situated at the farm Delport's Rust 853, district Kroonstad, Free State Province, or wherever same may be situated (hereinafter *the livestock*) and to retain possession of the livestock as security for so long as the respondent remains indebted to the applicant;

3. That such sheriff/s as provided for in paragraph 2 above, be directed and authorized to take all such steps as may be required in order to give effect to

the provisions contained in paragraphs 1 and 2 above, including without derogating from the generality of the aforegoing, to take the livestock into possession on behalf of applicant in any manner as such Sheriff/s may deem fit and practical;

4. That the taking into possession of the livestock by the sheriff/s, as provided for in paragraphs 2 and 3 above, shall constitute possession by applicant pursuant to the bond and in perfection of applicant's rights under the bond;

5. That the respondent, as well as any other party who opposes the application, be ordered to pay the costs of this application on an attorney and client scale;

6. That this order shall not prejudice the rights of any persons having a real right in and to any of the livestock acquired prior to the granting of this order;

7. Further and/or alternative relief.

The applicant is authorized to perfect its security in terms of the general notarial covering bond, BN2265/2017.

2. The applicant is authorized to take possession, through the relevant sheriff for the district of Kroonstad and/or through any other sheriff in respect of any area of jurisdiction of the High Court of South Africa, of the livestock of the respondent to the maximum value of R500 000.00 and an additional R100 000.00 (the value to be determined by the relevant sheriff), situated at the farm Delport's Rust 853, district Kroonstad, Free State Province, or wherever same may be situated and to retain possession of the livestock as security for so long as the respondent remains indebted to the applicant;

Van Zyl v Boat Lodge Investments CC & others (9417/2019P) [2021] ZAKZPHC 29 (31 May 2021)

Liquidation application – deadlock-shareholders intervening

[1] The applicant instituted proceedings to place the respondent into provisional liquidation on the grounds that it is just and equitable that the respondent be wound- up, and that a liquidator be appointed. The basis for the application is that the applicant alleges the membership of the respondent is in deadlock without any prospect of the deadlock being resolved. The first and second intervening parties opposed the provisional liquidation order, and in addition, sought to intervene in these proceedings.

[2] In addition, the intervening parties also filed a notice to oppose the application on behalf of the respondent.

The relief

[3] The relief which the applicant seeks is premised on s 81 of the Companies Act**[1]** (2008 Companies Act) which finds application by virtue of s 66 of the Close Corporations Act (CC Act), the applicant alleging that it is just and equitable to wind-

up the respondent as there is a deadlock between the management of the respondent, being himself and the first and second intervening parties.

Issues for determination

[4] The applicant submits that the following issues require determination:

(a) Whether the intervening parties have established a case for their intervention in the liquidation application, and whether they have established a *prima facie* defence to the liquidation application; and

(b) Whether the applicant has established, on a balance of probabilities, that *prima facie,* the members are in deadlock and their partnership has terminated, and that it is therefore just and equitable to wind-up the respondent.

6] From the CK2A form, it is clear that the applicant has a 75% member's interest in the respondent, and the first and second intervening parties together hold a 25% member's interest. It is common cause that the applicant initially held a 65% member's interest in the respondent and subsequently acquired a further 10% member's interest from Mr Jan Abraham Van Niekerk. Such interest has not been formally registered with the CIPC. In his founding affidavit, the applicant concedes that of his initial 65% member's interest in the respondent, 24% of such member's interest is held on behalf of the second intervening party although that too has not been registered with the CIPC. However, having regard to the content of the founding affidavit, the applicant holds a majority member's interest in the respondent of 51% and therefore has locus to institute these proceedings.

The factual matrix

[7] To appreciate the nature of the alleged deadlock, it is appropriate at this juncture to set out how and why the respondent was established, and the nature of the business relationship between the applicant and the intervening parties.

[8] It is common cause that the business of the respondent was that of a property development corporation specifically created to develop land situated in Sodwana Bay, by building and selling units in the development named Jesser Point Boat Lodge (Jesser Point).

[9] The respondent obtained the right to develop the property from Repo Wild 1088 CC (Repo Wild), which entity holds the lease from the Ingonyama Trust, the owner of the land on which the development is situated. The shareholding in Repo Wild is the following: the applicant holds a 51% member's interest, the first intervening party a 25% member's interest and the second intervening party a 24% member's interest. Luxury boat lodge units together with luxury accommodation were constructed. The income of the development consisted of rental income and the sale of units in Jesser Point. Initially, the development was profitable until approximately mid-2017 when there was a slump in market sales. Currently the respondent owns units in the development which are rented out as holiday accommodation.

The following order is granted:

1. The application for leave to intervene is dismissed.

2. The respondent is hereby placed into provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg, KwaZulu-Natal.

3. A *rule nisi* is hereby issued calling upon the respondent and all other interested persons to appear and show cause, if any, to this court on the 19 day of July 2021 at 09h30 or so soon thereafter as the matter may be heard, why the respondent should not finally be wound up.

4. This order is to be served forthwith on the respondent, and the intervening parties, and published on or before the 2nd day of July 2021 once in the Government Gazette and once in a daily newspaper published and circulating in KwaZulu Natal .

5. The costs of the liquidation application be costs in the liquidation of the respondent.

6. The costs of the application to intervene are to be paid by the first and second intervening parties.

Strydom N.O and Others v Brandt (4579/2019) [2021] ZALMPPHC 24 (6 May 2021)

Impeachable transactions-section 26 of the Insolvency Act 24 of 1936- defendant received a significant amount of money over a period of time, which included repayment of the deposits or “capital payment” he had made and so-called “dividends”-scheme established

[1] The First, Second and Third Plaintiffs are the joint liquidators of Free Agape Enterprises (Pty) Ltd (in liquidation) (“Free Agape”), duly appointed as such on 7 March 2019. Free Agape was finally liquidated on 12 June 2018, the effective date of liquidation being 22 March 2018.

The Plaintiff have instituted an action against the Defendant, based on section 26 of the Insolvency Act 24 of 1936, claiming an order that the disposition in terms of which Free Agape paid an amount of R 304 300.00 to the Defendant be set aside and the Defendant be ordered to repay the said amount to Plaintiffs.

[2] On the 13 August 2018 the High Court, Western Cape Division in Case No.11938/2019 granted an order as follows:

2.1. declaring the investment scheme conducted by the directors thereof under the name and style of Free Agape Enterprise (Pty) Ltd (in liquidation) and the respective trading names under which the scheme was conducted, propagated and marketed, namely Choice Lifestyle Change, CLC, Beleggingstrust Free Agape, Choice Beleggingstrust and lnduna Holdings, are declared to be illegal, unlawful and void;

2..2.. declaring all investment agreements and related agreements entered into between members of the public or entities as investors with Free Agape Enterprises (Pty) Ltd (in liquidation) null and void.

[3] The case that was made out by the applicants (the Plaintiffs in this case) in their application for the aforesaid declarators, is that Free Agape

conducted an unlawful multiplication or pyramid scheme over an extended period of time, which involved millions of transactions of receiving deposits, styled “investments” and paying out so-called “dividends” to investors. It did so under the various names referred to in the declaratory order. For purposes of the present case, Choice Lifestyle Change, is the most important.

[4] The Defendant is Neil Peter Brandt, a businessman residing in Polokwane. The Defendant was a member of Choice Lifestyle Change, from which he received a significant amount of money over a period of time, which included repayment of the deposits or “capital payment” he had made and so-called “dividends”.

In this action the Plaintiffs claim repayment of the amounts received by the Defendant, and to this end instituted action against him for an order in terms of section 26 of the Insolvency Act, 24 of 1936 and for judgment against the Defendant.

Factual Background

[5] The first witness to testify for the Plaintiffs is Mr Pieter Hendrik Strydom, the liquidator primarily dealing with the litigation arising from the administration of the insolvent estate of Free Agape and also the liquidator who conducted the enquiry under sections 417 and 418 of the Companies Act 61 of 1973 before Retired Judge Eberhardt Bertelsman in April 2019. The evidence of Mr Strydom follows hereunder.

[6] The most important role players in the saga preceding the liquidation of Free Agape, were Mr. Maarten Stapelberg and his associate, Mr. Wouter Botha, residents of Polokwane.

They conceived the idea that became known to the public as “*Choice Lifestyle Change”* and were the incorporators of Free Agape. Choice was described as an affiliate of Free Agape, a division of Free Agape and / or a product of Free Agape.

Members of the public were recruited by Stapelberg and Botha to apply for membership of Choice, which was only available to Christians.

In terms of a recruitment form, a member of Choice was invited to make payments which entitled the member to participate in the business of Choice, whereby Choice, acting through Free Agape, used the funds received from members to make “fixed deposits” with financial institutions. These fixed deposits were purportedly used to issue guarantees in favour of unidentified business entities which required bridging finance for short periods of time and were prepared to pay high rates of interest. The returns were between 14% and 17% per month.

It is trite that in the event that the disposition was made more than two years before the liquidation, the Plaintiff bears the onus of proving that immediately after the disposition was made the insolvent’s liabilities exceeded its assets**[6]**.

[28] In the event that the disposition was made within two years of the liquidation, like in this instance, the Plaintiff need only prove the disposition

without value, and on proof of this alone, the disposition will be set aside unless the Defendant can show that immediately after the disposition was made, the insolvent's assets exceeded its liabilities**[7]**.

That is the only statutory defence available to a defendant facing a claim in terms of section 26 (1)(b), where the Plaitiff has successfully demonstrated that a disposition was made for no value.

In *casu,* the Defendant conceded that Free Agape was insolvent from at least 18 December 201 and has been insolvent at all relevant times. Furthermore, the Defendant conceded that the disposition was made for no value.

Costs

[29] Mr. Dekker is a qualified charted accountant specializing in forensic accounting investigation.

He was mandated by the Plaintiffs to do a forensic analyses and to address the following specific issues:

29.1. to reconstruct the transactions between investors and the scheme;

29.2. to determine the date of insolvency of the scheme; and

29.3. to identify whether specific investors received beneficial treatment over others.

I am of the view that Mr. Dekker's services and in particular his report, were necessary and served the interests of the estate as whole and the creditors and debtors involved. His services were necessary to enable Plaintiffs to identify and recover from those investors who received more than their investments.

[30] The evidence of Mr. Strydom, the liquidator, was that there are approximately 400 - 500 actions that have been instituted or will be instituted and that this matter is the first to go on trial. The legal issues involved in this matter are of significant importance to the liquidators and the creditors, including other investors whose interests they represent.

[31] I am persuaded that the legal issues involved in this matter and the complexity of the matter merit the attention of the High Court and also the employment of senior counsel.

Conclusion

[32] The Plaintiffs have made out a good case for the relief sought. In the result the following order is granted:

32.1. The dispositions made by Free Agape Enterprises (Pty) Ltd to the Defendant during the period 24 November 2016 to 18 December 2017 in the total amount of R304 300-00 are set aside in terms of section

26 (1)(b) of the **Insolvency Act, 24 of 1936**;

32.2. The Defendant is ordered to repay the amount of R 304 300-00 to the Plaintiffs in their capacity as duly appointed liquidators of Free Agape Enterprises (Pty) Ltd (in liquidation);

32.3. The Defendant to pay interest on the amount of R304 300-00 at the rate of 7% per annum from date of judgment to date of final judgment;

32.4. Cost of suit, such costs to include the following:

32.4.1. the qualifying costs of the forensic auditor, Mr Jan Decker, including the costs of his attendance at Court to testify in this action; and

32.4.2. the costs of two Counsel.

Van Rooyen N.O and Another v Mokwena and Others (2064/2021) [2021] ZALMPPHC 23 (18 May 2021)

Interrogation-urgency-parties not heard on merits yet court a quo gave judgment on merits-invalid.

[1] This matter comes before me as a result of an order granted by my brother Phathudi J on the 1st April 2021.

[2] The Applicants seeks an order on an urgent basis setting aside that order on the basis of its unconstitutionality and a contravention of the *Audi Alteram Parterm* Rule Applicants rely in this regard on the SCA decision in **Knoop vs Gupta Case No 115/202 dated the 19th November 2020.**

FACTUAL BACKGROUND

[3] There is a long history of litigation between the first and second Respondents on the one hand and Majola Trust represented in these proceedings by the fourth and fifth Respondents. In order to contextualise the dispute in this matter it is necessary to provide a short chronology of salient events leading up to the present proceedings and what follows is a summary of relevant facts that are either common cause or are not seriously disputed on the papers.

[4] During 2019 Majola Trust obtained judgment for payment of an amount of R1.5 million against the first Respondent on the basis of a suretyship that he had executed in favour of that Trust for the second Respondent's indebtedness to the Trust.

[5] The first Respondent is the sole Director and shareholder of the second Respondent which practices as an Incorporated Law Firm.

[6] On the 19th December 2019 before Kgomo J the second Respondent was placed under Liquidation. What followed thereafter between December 2019 and December 2020 is a series of applications interdicting execution of the liquidation order as well as applications for rescission of that order.

[36] Section 2 read with Section 8 of the Constitution are the starting point in this regard. Section 2 reads as follows:

> "This Constitution is the Supreme Law of the Republic, law and conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled."

Section 8

> "The Bill of Rights applies to all law and binds the legislature the executive the judiciary and all organs of state."

[37] Section 34 of het Constitution guarantees a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum. The court sitting in adjudication of the Main application on the 31st March 2021 was such a court falling within the ambit of Section 34 and its conduct falls to be scrutinised in accordance with the prescripts of Section 2 and 8 of the Constitution.

[38] In **De Lange v Smuts NO [1998] ZACC 6; 1998 (3) SA 785 (CC) at paragraph 131** the principle enshrined in Section 34 was expressed as follows:

> "The time honoured principles that no one shall be the judge in his or her own matter and that the other side should be heard [*Audi alteram partem*] aim towards eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone has the right to state his or her own case, not because his or her version is right and must be accepted but because in evaluating cogency of any argument, the arbiter still a fallible human being must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than a chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest points in the direction of a violation."

[39] The court **in De Beer NO vs North Central Local Council and Another [2001] ZACC 9; 2002 (1) SA 429 (CC)** took the issue further in the following words at page 439 paragraph 11:

"This S34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a pre-requisite to an order being made against one is fundamental to a just and credible legal order."

[40] None of the parties before Phathudi J were called upon to address the court on the merits, they were all directed to deal with the issue of urgency and urgency only. This much is borne out by the record itself. Counsel for the first and second Respondents maintains that all the parties did address the court on the merits that may well be so for it often happens that some aspects of the merits are closely connected with the issue of urgency.

[41] What is strange is that in his judgment Phathudi J made reference to Section 34 of the Constitution and yet proceeded to deliver an order which violated the Constitutional rights of the Applicants and the fourth and fifth Respondents including the third Respondent who was not even before court.

[42] Counsel for the first and second Respondents argue that Phathudi J's judgment cannot be annulled on the basis of the provisions of Section 172 of the Constitution because what we are dealing with in this instance is not "a Constitutional matter nor does it concern any law." That argument is equally unsustainable when I requested counsel to address me on the issue whether the ruling by Phathudi J should not be described as "conduct" in terms of Section 172 (1) (a) of the Constitution I did not get a clear answer. For completion sake Section 172 (1) (a) of the Constitution reads as follows:

"When deciding a Constitutional matter within its power a court

a) Must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency."

[43] The conduct by Phathudi J in directing the parties to deal with urgency only and then give judgment on the merits is conduct that falls foul of the entrenched Constitutional right of a fair hearing. Not only did the court give an order that it was not asked to do there is nowhere in the record where the judge has dealt with issues on the merits. It is that conduct that must be declared invalid.

[44] Applicants as well as the fourth and fifth Respondents referred me to the matter of **Kurt Robert Knoop NO and Johan Louis Klopper NO vs Chetali Gupta and Another Case Number 115/2020**. This case was heard by the

Supreme Court of Appeal on the 6th Novembe 2020 and judgment handed down on the 19th November 2020.

[45] In that matter two aspects were dealt with firstly at paragraph 33 the court says the following:

"It follows that the full courts suspension order purporting to override the suspension of its execution order was invalid. It had no power or authority to make that order. It is inexplicable that it made the order without being asked to do and without having heard argument. The order was void."

[46] Similarly in this matter Phathudi J never heard argument on the merits and he himself prevented the parties from dealing with the merits. His order in respect of the rest of the prayers except the prayer in respect of urgency are void and fall to be declared invalid and of no force and effect.

[47] The second aspect that the Supreme Court of Appeal dealt with in that matter was by reference to the case of **Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others [2011] ZA**. In that matter the trial court in making an order for judicial management of a company had named two individuals to assume the duties of Judicial Managers. This was contrary to the provisions of Section 429 of the Company's Act 61 of 1973 which vests the power to appoint judicial managers on the Master of the High Court. The Master of the High Court in turn chose not to abide by that court order as a result the high court held the master to be in contempt. The SCA in an appeal to it set aside the high court's order appointing certain persons as judicial manager on the grounds that, that order was void from inception because it directly contradicted the statute.

[48] The orders by Phathudi J are in contravention of not only the *Audi alteram partem* rule but in conflict with Section 34 of the Constitution.

[49] In my view the conclusion I have arrived at namely that the order by Phathudi J is invalid is dispositive of all the other issues. The issue in respect of the third Respondent was well taken the third Respondent should never have been joined in the application this explains why the first and second Respondents abandoned the costs orders granted against the third Respondent in the main application.

COSTS

[50] It is trite law that the award of costs is a matter wholly within the discretion of the court. The Applicants (Liquidators) as well as the fourth and fifth Respondents are entitled to costs in this matter. What is left is whether such costs should be on a party and party or on a punitive scale and if so which of the first and second Respondents should be mulcted with such costs.

[51] The main application was launched at the instance of the first Applicant who wanted to avoid appearing in the Insolvency Enquiry hearing set down for the 31st March 2021.

[52] The main application was nothing else but a continuation of the Stalingrad type of tactics that the first Applicant embarked on since the judgment of Kgomo J.

[53] There was no appeal before the Supreme Court of Appeal when the first and second Respondents decided to approach court on an urgent basis.

[54] In my view it is only fair that the first Respondent must pay costs of his application.

[55] In the result the order marked “X” attached herein is made an order court.

SV Trading CC Virtual Production v Suliman and Another (19614/2021) [2021] ZAGPPHC 228 (10 May 2021)

Section 69 application-liquidators ordered to return items so removed

[1] In this application the applicant by way of *rei vindicatio,* claims from the first respondent, who is the duly appointed liquidator of Audio Logic CC, certain assets (listed in annexures VS and V6 to the founding affidavit) , on the basis that it is the owner thereof (the assets). The only issue for my determination is whether the applicant succeeded in proving ownership of the assets, which were attached and removed by the second respondent at the behest of the first respondent (the liquidator), in terms of an order obtained in terms of s 69(3) of the Insolvency Act. The application was found to be urgent and heard in the urgent court on 30 April 2021. On 3 May 2021, a judgment was handed down, in terms of which the matter was referred for hearing of oral evidence on the limited issue of ownership of the assets. Evidence was adduced on behalf of the parties, on Friday 7 May 2021.

[2] As stated in the judgment dated 3 May 2021, the facts of this application are mostly common cause. Both parties agree that an oral agreement of sale was concluded between Audio Logic CC ('Audio Logic') and the applicant during 2018. The applicant's case as set out in the founding affidavit, is that the parties agreed in 2018 that the applicant would purchase 'each and every asset' of Audio Logic, for an amount of R13m. The amount would not be paid in a lump sum, the creditors of Audio Logic would be paid and the balance would be paid to Marais, Audio Logic's sole member, by 2023. Pursuant to the conclusion of the agreement, the assets were delivered to the applicant on 6 April 2018 . The applicant contends that since this was not a cash sale, ownership passed to it upon delivery to it. The applicant also planned to convert Audio Logic into a company , as a vehicle to run a sound engineering academy.

[3] Audio Logic's version was set forth by its sole member, Marais. He intended selling Audio Logic and during 2027, met with Van Graan, who is a member of the applicant. In 2018 a meeting was held between Van Graan, Marais and Audio

Logic's accountant, Vorster. According to Marais, they discussed that 'Audio Logic' could be sold as a going concern for an amount of R13m. The applicant intended to integrate Audio Logic's business under the name of 'Virtual Productions'. The proposed terms of the agreement were that (i) the applicant would settle all Audio Logic's creditors before December 2018; (ii) the balance of the purchase price would be paid to Marais over a period of five years; (iii) Marais would remain an employee of Audio Logic for five years at a salary of R50 000.00, until April 2023. He was adamant that ownership of the assets would remain vested in Audio Logic until full payment of the purchase price. The liquidator states in her affidavit: 'No person in his right mind would conclude an oral agreement for the delivery of moveable assets worth R13m without the reservation of ownership'.

[4] The urgent court application was preceded by an application in the Magistrate's Court in terms of s 69(3) of the Insolvency Act. The founding affidavit to that application was attached to the applicant's founding affidavit in the urgent court application. It is noteworthy that the affidavit deposed to by the liquidator in the s 69 application corresponds largely with the answering affidavit. The terms of the proposed agreement are repeated verbatim , save for the fact that it is not stated in the first affidavit that the parties agreed that ownership of the movable assets would remain vested in Audio Logic until the full purchase price was paid. After considering the affidavits filed of record, together with the annexures thereto , I was of the view that a *bona fide* and genuine dispute of fact exists as to the parties' intention on whether ownership would pass, even if a robust approach was followed as required when the Plascon Evans principle is applied in deciding questions of fact in motion proceedings. As stated, I was of the view that a factual dispute existed regarding the question as to whether the parties' oral agreement contained an ownership reservation clause. In the result, the application was referred to oral evidence on this limited aspect.

In the result, the following order is made:

1. The applicant is declared the owner of the assets listed in annexure 'SV5" and 'SV6" to the applicant's founding affidavit;

2. The second respondent is ordered to release the assets from attachment and to return the assets to the applicant;

3. The costs are costs in the liquidation of Audio Logic CC.

Nedbank Limited v Katompa and Others (29675/20) [2021] ZAGPPHC 299 (12 May 2021):

Sequestration application- Security for payment of fees -the Security Bond was not furnished within ten days of the date of the application- The condition precedent, namely, the master’s certificate was furnished- there had been proper compliance with the requirements of Section 9(3

Sequestration application- *nulla bona* return was not served on the second respondent.- yet attached to papers-point dismissed

[1] This is an application for the provisional sequestration of the respondents joint estate. The respondents have also lodged a counter application for the setting aside of attachments made by the sheriff which are opposed by the applicant.

[2] The applicant is a bank and the respondents are married in community of property. The applicant bases its claim on the fact that the joint estate is factually insolvent, alternatively that the respondents have committed an act of insolvency and that there is reason to believe that it will be to the advantage of creditors if the joint estate is sequestrated.

[3] The application is being opposed by the respondents who have filed an answering affidavit which was responded to by way of a replying affidavit.

Points in limine

[4] At the commencement of these proceedings counsel for the respondent, Mr Cohen, raised points of law in *limine* which had not been raised in the Heads of Argument.

[5] Firstly, he submits that applicant's Security for payment of fees and charges issued by the Master of this Court, submitted as part of the sequestration application does not comply with the provisions of Section 9(3) of the Insolvency Act, 2 of 1936 ("The Act") in that it has become "stale". Secondly he submits that the *nulla bona* return upon which the applicant *inter alia* relies for the granting of the provisional order for sequestration of the joint estate is open to challenge as it has not been served on the second respondent.

First Point in Limine

[6] At the request of the Court counsel filed supplementary Heads of Argument in which they both refer to Mars: The Law of Insolvency in South Africa, Tenth Edition, Bertelman et al, at paragraph 5.4 on page 127 regarding the first point in *limine*. Paragraph 5.4 reads thus:

"*A creditor who commences sequestration proceedings against a debtor is bound to prosecute them at his own expense until a trustee is elected, and is guilty of a punishable offence if he allows himself to be induced by any valuable consideration to refrain from so doing. In view of this liability to proceed at his own expense, he must deposit with the Master security for the payment of all fees and charges necessary for the prosecution of all costs of administering the estate until the election of a trustee, or if no trustee is appointed, all fees and charges necessary for the discharge of the estate from sequestration. A certificate from the Master, given not more than 10 days before the date of the application, that he has done so must be attached to his application. Such certificate need not be attached to the application served up on the debtor but must be produced in court at the hearing of the application. The date of the application is the date of signature thereof; the relevant date is the date of the Notice of Motion, not the affidavit. The certificate of the Master may be dated after the application when it is lodged with the court. It has been held that failure to comply with Section 9(3) is a fatal defect and cannot be*

condoned, see further paragraph 5.5.4 below in respect of service of the application."

[7] It is common cause that the Security Bond which is dated 9 July 2020 and signed by applicant's attorney, Mr Hamman, was made available on the morning the application was heard whilst the notice of motion had been signed by the attorney on 29 May 2020.

[8] Evidently, the date of the notice of motion predates the date of the Security Bond by a measure of two months which means that the Security Bond was not furnished within ten days of the date of the application.

[9] The requirement of furnishing security is to discourage frivolous or vexatious proceedings against solvent persons and to safeguard such individuals against financial loss where such proceedings are nevertheless embarked upon. See *Arnawil Investments v Stamelman and Another* 1972(2) SA 13 (W) at 14.

[10] The issue of furnishing security in terms of Section 9(3) of the Act has been the subject of numerous court decisions. In *De Wet NO v Mandelie (Edms) Bpk* 1983(1) SA 544(T) at 546 (C-E). The following was said:

> "*It seems to be clear that the certificate need not be attached to the application when it is signed. Indeed, it need not exist. (Rennies Consolidated (Transvaal)(Pty) Ltd v Cooper 1975(1) SA 165(T); Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk; Mafeking Creamery Bpk v Van Jaarsveld 1980(2) SA 776(NC) at 780 F.) There is some controversy, however, as to when, thereafter, the certificate may be taken out. At the extreme end of the scale in Franks and Another v Hairdressers' Supplies (Pty) Ltd* **1934 CPD 92***, in which the court, dealing with S 113(1) of the 1926 Companies Act, dismissed a point in limine which was based on the security certificate having been filed after the presentation of the petition. Henochsberg (op cit at 610) cites this case with approval and goes on to say: "It is submitted that this is still the position, despite the requirement that the certificate is to be issued by the Master not more than ten days before the application, i.e, that the requirement, although intended to be adhered to, is directory, and not a condition precedent to the court's granting a winding up order, the condition precedent being the actual furnishing of the required security (the most satisfactory proof of which, however, would be by way of the Master's certificate even though the latter were furnished at the hearing of the application). It is not required to be lodged ten days before the application."*

[11] The above *dictum* fully addresses the point raised in limine in the present application. The condition precedent, namely, the master's certificate was furnished at the hearing after being obtained two months after the lodging of the application. In the circumstances I find that there had been proper compliance with the requirements of Section 9(3) and that the interpretation given to the section by counsel on behalf of the respondents is incorrect.

[12] The conclusion I come to is that the respondents' first point *in limine* is found wanting both in fact an in law and as such falls to be dismissed.

Second Point in Limine

[13] The second point in *limine* is that the *nulla bona* return was not served on the second respondent.

[14] Section 8(b) of the Act on which the applicant bases its application describes an act of insolvency in the following terms:

> "*If a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment."*

[15] Counsel for the respondents bases the second point in limine on the authority of Ratilal v Dos Santos 1995(4) SA 117(W) which the applicant disputes and submits should be distinguished from the facts of the present case.

[16] In Ratilal, the applicant who was relying on a *nulla bona* return, sought and was granted a provisional sequestration order against the respondent without the service of the application on the latter. This fact alone immediately positions the present case on a different pedestal from Ratilal. In *casu* both respondents oppose this application with the second respondent also having deposed to an opposing affidavit.

[17] The rationale behind the Ratilal decision is to be found at P119 H to 120C of that decision where the following was said: "*The problem that has risen in this matter is that a provisional order of sequestration has been granted without notice to an interested party. The practice that allows the grant of such an order without notice where a nulla bona return is relied upon arose before, and does not have regard to the statutory provisions which render it necessary to serve an application for sequestration of a joint estate on both spouses. The logic that appears to be behind the grant of a provisional sequestration order without service is the existence of satisfactory proof in the form of a return of service by a deputy sheriff, that the respondent, when served with a writ of execution, has already intimated that he has no assets with which to satisfy the judgment. In cases where there are two respondents and the return of service reflects that the writ has been served on one of them only, it does not seem to me to be appropriate that a provisional sequestration order which may affect the rights of the other respondent should automatically be granted without notice."*

[18] On a proper reading of the Ratilal judgment, so the applicant submits, nothing prohibits this court from granting a provisional order for sequestration where the application was served on both parties and where the nature and content of the application came to both spouses' attention before the granting of a provisional order.

[19] In this application this court has had regard to the following facts: Judgment was obtained against the first respondent based on a deed of suretyship executed by her in the applicant's favour on 2 July 2013 and as part of the Deed of Surety, the first respondent completed a "Marital Status Declaration" stating that she is married to the second respondent in community of property.

[20] Further, the second respondent also completed a "Marital Status Declaration" and he cannot be said to have been unaware that the first respondent was binding herself and the joint estate as surety and co-principal debtor in favour of the applicant.

[21] Summons was served on the first respondent on 4 November 2015 and the matter was defended. On 5 September 2019 judgment was granted in favour of the applicant against the first respondent.

[22] The judgment having gone unsatisfied, the applicant caused a writ of execution to be issued against immovable property on 26 September 2019, and the said warrant was served on the first respondent on 2 October 2019.

[23] The first respondent was unable to point out assets to the sheriff (movable or immovable) of sufficient value to satisfy the judgment debt as a result of which the sheriff delivered a *nulla bona* return, the accuracy of which the second respondent has not taken issue with.

[24] It is not disputed that the second respondent received service of the writ of Execution as well as the *nulla bona* return through the service of the Application for Sequestration to which those documents were attached. The second respondent does not take issue with the validity of the judgment, the nature and amount of the judgment debt, the content of the writ of execution or the accuracy of the *nulla bona* return of service. Absent the contestation of the validity of these documents, it remains an enigma what the purpose of another service of the *nulla bona* on the second respondent would achieve.

[25] Counsel for the applicant, Ms Schoeman, submits, and I accept that the respondents are not only being overly technical but also engaging in stratagems and shenanigans to delay an inevitable sequestration day.

[26] In light of all the above, I come to the conclusion that the second point in limine is not sustainable and falls to be dismissed.

The Respondents' joint estate is placed under provisional sequestration in the hands of the Master of the High Court returnable on 31 May 2021 to the unopposed motion court roll

Baker N.O and Others v Investec Bank Limited and Another (14748/16) [2021] ZAGPPHC 298 (20 May 2021)

Impeahable transactions-action brought by the creditors of Bluecore in the stead of the liquidators after the liquidators were indemnified as envisaged under s 32(1)(b) of the Insolvency Ac ("the Insolvency Act").Action dismissed!

[1] The plaintiffs have instituted an action against the defendants in which they seek relief in the following terms:

"1.1 As against the First Defendant:

1.1.1 An order that the disposition in terms of which the insolvent paid an amount of R 60 million to the First Defendant to be set aside and that the First Defendant be ordered to pay to the First to Third Plaintiffs the sum of 60 million.

1.2 As against the Second Defendant:

1.2.1 An order that the Second Defendant pay the amounts appearing in column 4 of annexure "C" to the lenders appearing in column 1 of annexure 'C";

1.3 Interest on the amounts claimed at 9% per annum against the First and Second Defendants,

1.4 Costs against the First and Second Defendants.

1.5 Further and/or alternative relief".

[2] The first to fourth plaintiffs are the joint liquidators of Bluecore Investments (Pty) Ltd (in liquidation) ("Bluecore"). On 1 December 2009 Bluecore was placed under provisional liquidation and was finally wound-up on 16 March 2010.

[3] This action is brought by the creditors of Bluecore in the stead of the liquidators after the liquidators were indemnified as envisaged under s 32(1)(b) of the Insolvency Act**[1]** ("the Insolvency Act").

[4] At a pre-trial meeting held on 23 May 2019, the parties agreed that there should be a separation of issues in terms of Uniform rule 33(4) and that the issue of merits be postponed *sine die* pending a determination of the special plea of prescription raised by the defendants.

[5] Bluecore had intentions of developing a golf and eco estate to be known as 'The Hills' ("the development"). The land earmarked for this development is situated at Portions 72 and 73, portions of Portion 1 of the farm Rietfontein, Gauteng Province ("the development land").

The issue to be determined is when prescription began to run.

[25] It is the plaintiffs' contention that their claims have not prescribed in that the debt only became due when summons was issued. It was submitted that the lenders only became aware of the facts giving rise to their claim during November 2013 and it is at that stage that prescription began to run. It was further submitted that even though the lenders were notified of the disposition on 13 August 2006, it is unreasonable to have expected the lenders at that stage to have examined their loan and sale agreements and to make enquiries about the payment.

[26] The first defendant correctly contends, contrary to the plaintiffs' view, that the liquidators are the actual 'plaintiffs'**[9]**. In *Reynolds and Others NNO v Standard Bank of South Africa***[10]** the court stated that:

> "[13] In the present case, and because of the provisions of s 32(1) and 32(3) of the Insolvency Act, it is correct to describe the plaintiffs as merely 'nominal plaintiffs'. They are the plaintiffs because they are the only parties entitled to embark on the litigation concerned. The fact that a creditor is given to fund and direct such litigation because of the provisions of s 32(1)(b), when the plaintiffs are not prepared to do so, does not detract from the fact that it is the plaintiffs to whom payment will have to be made if the litigation is successful, and who will be liable for costs if it fails – hence the requirement of an indemnity as stated in s 32(1(b)".

[27] On behalf of the first defendant it was submitted that since the plaintiffs were appointed as liquidators on 29 June 2010, they should have acquired knowledge of the disposition during 2010. Since summons was served on the first defendant on 3 March 2016, it is the first defendant's contention that the plaintiffs' claim prescribed three years after the liquidators were appointed.

[28] On behalf of the second defendant it was submitted that the plaintiffs' claim has prescribed since the plaintiffs had knowledge of the dispositions. According to the second defendant, since the lenders were informed by the first defendant on 13 August 2006 that it was paying over the capital amount to Bluecore on the incorrect assumption that the specified suspensive conditions have been fulfilled, prescription began to run from the

date the lenders acquired knowledge of the disposition. Since summons was served on the second defendant on 23 February 2016, it is the second defendant's contention that the plaintiffs' claim prescribed on 12 October 2009.

[29] In the alternative, it was submitted on behalf of the second defendant that the lenders were aware that Bluecore was wound-up on 16 March 2010, the plaintiff failed to act reasonably by not inquiring about the facts surrounding the disposition.

[30] It is common cause that Bluecore was finally wound-up on 16 March 2010 and that the liquidators were appointed on 29 June 2010. Following the *dictum* in the *Kotze* matter (*supra*), the plaintiffs acquired the right to institute action to set aside the disposition without value on 29 June 2010. Therefore, the plaintiffs' claim prescribed three years from that date as envisaged in terms of s 10(1) read with s 11(d) of the Act. In view of the fact that summons was only served on the first and second defendants on 3 March 2016 and 23 February 2016, respectively, the three-year prescription period had by the time service of the summons was effected, expired. Further, in view of the fact that Bluecore was finally wound-up on 16 March 2010, and as correctly pointed out by counsel for the second defendant, the lenders would ordinarily have been informed about Bluecore's liquidation. Taking into account that the loan agreement provides that in the event of the liquidation of Bluecore the capital amounts loaned to Bluecore should be repaid to the lenders, by exercising reasonable care, the lenders would have acquired knowledge of the facts surrounding the disposition and could have acted upon it.

[31] I am satisfied that the defendants have shown sufficient cause why their special plea of prescription should be upheld and for the plaintiffs' action be dismissed.

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

1. The first and second defendants' special plea of prescription is upheld.

2. The plaintiff's claim against the defendants is dismissed with costs, including costs of Senior Counsel.

KNOOP NO AND ANOTHER v GUPTA AND ANOTHER 2021 (3) SA 88 (SCA)

Business rescue — Business rescue practitioner — Removal — Grounds — Court's discretion — General principles — Proof of grounds — Implications of practitioner being officer of court and subject to directors' duties — Companies Act 71 of 2008, ss 139(2) and 140(3).

The directors of a pair of companies (Islandsite and Confident Concept) had placed the companies in business rescue and appointed appellants (Knoop and Klopper) as business rescue practitioners (see [1]). Later a shareholder in both companies (Mrs Gupta, first respondent) applied for their removal on grounds that their staff were incompetent, they ignored and undermined the business rescue plans, they ignored offers for assets and insisted on sales by auction rather than private agreement, and they had breached the Value-Added Tax Act 89 of 1991 (see [15] and [16]). She alleged further that their conduct was in bad faith, involved failure to perform their duties and an insufficiency of care, that their interests were conflicted, that they lacked independence and that their conduct fell short of that of an officer of the court or director of a company (see [15], [30] and [34]).
The High Court upheld the application, ordered the practitioners removed, and later granted them leave to appeal to the Supreme Court of Appeal (see [2]).
In upholding the appeal, the SCA considered the following:

- The discretion of a court to remove a business rescue practitioner when one of the grounds in s 139(2) of the Companies Act 71 of 2008 is established (see [17]);
- general principles applying to removal (see [18]);
- proof of grounds of removal (see [18]);
- the grounds of incompetence or failure to perform duties (s 139(2)*(e)*); failure to exercise proper care (ss *(b)*); engagement in illegal acts (ss *(c)*); and conflict of interest or lack of independence (ss *(e)*) (see [20] – [24] and [142]);
- the implications of a business rescue practitioner being an officer of the court (s 140(3)*(a)*) and subject to the duties of a director (s 140(3)*(b)*) (see [30], [32] – [34] and [37]);
- that the facts failed to support the competence, business rescue plan, competitive offer or VAT complaints (see [40] – [41], [55], [78], [93], [100] and [108] – [109]);
- that the High Court had, by relying on irrelevant considerations and issues not raised in the papers, erred in failing to examine whether the evidence supported Mrs Gupta's case (see [13], [112], [114], [117], [119], [139] and [143]).

Appeal upheld and the High Court's order set aside and replaced with an order dismissing Mrs Gupta's application (see [146]).

PIETERS NO v ABSA BANK LTD 2021 (3) SA 162 (SCA)

Winding-up — Dissolution — Date of dissolution — When Registrar recording dissolution in Companies Register, not date of publication of notice of dissolution in Government Gazette — Companies Act 61 of 1973, s 419.

Winding-up — Liquidator — Completion of duties — Master's certificates in terms of ss 419(1) and 385 of Companies Act — Effect — Whether Master having power to

reinstate liquidator subsequent to issuing of certificates — Companies Act 61 of 1973, ss 385 and 419.

The underlying issue to be resolved in the present matter was when a company was considered to be dissolved under the Companies Act 61 of 1973, which in turn called for a consideration of provisions in the Act dealing with dissolution: namely s 419, and in particular ss (2), which provides that the'Registrar shall record the dissolution of the company and shall publish notice thereof in the prescribed manner', and ss (3) that '(t)he date of dissolution of the company shall be the date of recording referred to in subsection (2)'.

The relevant background facts were the following:
The appellant, having completed her duties as liquidator of the company Cell F, applied, in terms of s 385 of the Companies Act 61 of 1973, to the Master of the High Court for a certificate confirming that fact. The Master issued a certificate, in which it made such a confirmation, and in addition stated that the bond of security the appellant had furnished could be reduced to nil. The Master on the same day issued to the Registrar of Close Corporations and Companies a certificate in terms of s 419(1) of the Companies Act, certifying that the company Cell F had been completely wound up. Nearly five years later the appellant wrote to the Master of the High Court asking him to 're-issue' her certificate of appointment to enable her to pursue recovery of a potential asset of Cell F that had come to her attention. The Master complied, issuing a certificate recording that the appellant had been 're-instated' as liquidator. The appellant subsequently launched proceedings in the court a quo against the respondent, Absa Bank Ltd (Absa), claiming substantial damages. Absa successfully raised a special plea disputing the appellant's locus standi. The appellant appealed to the Supreme Court of Appeal.

The basis upon which the respondent claimed that the appellant had no locus standi to pursue its claim against it in the capacity as liquidator was that both the liquidator and the Master had fully and finally discharged their respective offices, Cell F having been finally wound up on 14 August 2003 when the Master certified in terms of s 419(1) of the Act that it had been 'completely wound up'. It was therefore not open to the appellant to request that her certificate of appointment be reissued, or to the Master to grant the request and 're-instate' her in that office. The crux of the appellant's response was that the company had never in fact been dissolved in terms of s 419(2) and (3) of the Act. The basis of this claim was seemingly that the Registrar had not published a notice of dissolution in the *Government Gazette*. For the appellant, the dissolution of the company was a consequence of publication in the *Gazette* and that it was only after publication that dissolution was complete.

Consequently, the appellant argued, the company remained in existence and in liquidation and that it was therefore permissible for the Master to reinstate her, thus clothing her with locus standing to pursue the present claim.

The SCA criticised the appellant's conception of dissolution under the Act. It stressed that the *recording* by the Registrar of the dissolution and *publication* of notice of the dissolution were two different acts. It held that s 419(3) reflected a clear legislative choice that it would be *the former* and not the latter date that would determine when the company was dissolved. Publication was merely a public intimation of an existing

fact, namely that the company has been dissolved. (See [12].) Accordingly, the absence of publication in the *Government Gazette* was irrelevant to the question whether or not dissolution had taken place (see [16]).

The SCA held that the appellant had failed to discharge the onus she bore of establishing that her appointment was legally effective giving her locus standi to bring the present claim, in that she had not proven that the Registrar had not recorded the dissolution of Cell F (see [18], [20] and [21]).

Even though the SCA held that the appeal could be dismissed on the above ground, it went on to consider whether, were Cell F not dissolved, the appointment would be valid. It held that it would not be. In its view, the issue by the Master of a certificate under s 385, permitting the liquidator to cause the bond of security to be cancelled, in conjunction with the issue of a certificate under s 419(1) that the company had been completely wound up, brought the winding-up process to an end and released the liquidator from office. Assuming in favour of the appellant that the company had not been dissolved and remained a company in liquidation, it was nonetheless a company in respect of which the liquidator's appointment had been terminated. If it transpired that there were further assets and this occurred between the completion of the winding-up and the company's dissolution, that required, at the very least, a fresh appointment of a liquidator, which could only be made in terms of s 377(1) of the Companies Act. That route was not followed in the present case. (See [25].) The SCA accordingly dismissed the appeal (see [28]).

Nyhonyha and others v Venter NO and others [2021] 2 All SA 507 (GJ)

Insolvency – Provisional winding-up order – Application to set aside on ground that company was factually solvent and that it had experienced a temporary liquidity difficulty which resulted in its inability to timeously satisfy the claim of the creditor which had applied for its liquidation – Companies Act 61 of 1973, section 354 gives a court wide powers to stay or set aside a winding up at any time after commencement thereof – Interest of creditors a weighty factor to be considered in exercise of court's discretion – Winding up order set aside on basis that where all creditors could be paid, there was no advantage to keeping company wound up.

In September 2020, the court placed a company ("Regiments") under final winding-up.

The applicants applied for the winding-up order to be set aside. The applicants' case was that Regiments was factually solvent and that it had experienced a temporary liquidity difficulty which resulted in its inability to timeously satisfy the claim of the creditor which had applied for its liquidation. It was alleged that as soon as the winding-up was set aside, it would be able to release sufficient funds to meet the claim of all its creditors in the amount of 100 cents in the rand. According to the applicants, Regiments had various assets residing in its subsidiary companies which could be liquidated to meet all its liabilities. Some of the subsidiaries were the sixth to eleventh applicants. The sixth applicant ("Coral") was the most important of the subsidiaries.

Regiments had concluded a restructuring or unbundling transaction with the sixth to eighth applicants, the key element of which involved liquidating the assets held in Coral. Coral held shares in an entity ("Capitec") which were of substantial value. It was intended that those will be sold and the proceeds paid to Regiments and two other stakeholders. In consequence of the unbundling transaction, Regiments would, according to the applicants, be able to meet all its debts.

Held – Section 354 of the Companies Act 61 of 1973 allows a court to stay or set aside a winding up at any time after commencement thereof. The powers conferred on the court are wide. It is bound to scrutinise the facts very carefully and to exercise its discretion in a manner that at the very least does not disadvantage any creditor. The interests of the creditors weigh heavily with the court.

In casu, it was undeniable that if all the creditors could be paid then there was no advantage to keeping Regiments wound up. The winding-up order was accordingly set aside.

Arqomanzi Proprietary Limited v Vantage Goldfields and others 549/2021 Mbombela case 549/2021

Business rescue plan-unilaterally amended by business rescue practitioners-cannot be done

A rule nisi that was by agreement between the applicant, the business rescue practitioners of Vantage Goldfields Proprietary Ltd (Vantage), Barbrook Mines Proprietary Limited (Barbrook) and (Maronjwaan Imperial Mining Company Proprietary Limited (Maronjwaan) and other respondents issued on 23 February 2021 by Greyling-Coetzer in terms of which the rescue practitioners were interdicted from further unilaterally implementing the amended rescue plans pending finalization of the dispute between the parties, was laid before this court on 4 May 2021 being the return date of the rule nisi aforesaid. On the latter date, the rule nisi was extended to Thursday 6 May 2021 for the parties to comply with certain directives issued by the court.

[2] At the heart of the dispute the question is whether as a general rule the business rescue practitioners of the companies in business rescue proceedings can unilaterally make substantial amendments to the business rescue plans after they have been adopted by the creditors of the entities under business rescue? The other question of importance is whether the fourth and fifth respondents (the business rescue practitioners) could disregard an order made by Reclose AJ which directed them to publish amendments to the adopted business rescue plans and to allow the creditors to vote on those amendments that might be so proposed?

At the meeting convened in terms of section 151, the practitioner (referring to business rescue practitioner), must introduce the proposed business rescue plan for consideration by the creditors and if applicable by the shareholder1. At the meeting convened in terms of section 151, the practitioner must call for vote for preliminary approval of the proposed plan as amended, if applicable unless the meeting has first been adjourned in accordance with paragraph (d)(ii)2. In a vote called in terms of

subsection (1)(e), the proposed business rescue plan will be approved on preliminary basis if - (a) it was supported by the holders of more than 75 percentage of the creditors' voting interests that were voted and the votes in support of the proposed plan included at least 50% of the independent creditors interest if any, that were voted.

The practitioner must within 10 business days after publishing a business rescue plan in terms of section 150, convene and preside over a meeting of creditors and any other holder of voting, interest, called for the purpose of considering a plan4. The practitioner after consulting the creditors, other affected persons and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 1515. The business rescue plan must contain all the information reasonably required to facilitate affected person in deciding whether or not to accept or reject the plan and must be divided into three parts6.

[49] Consequently an order is hereby made as follows:
49.1 It is hereby declared that the business rescue practitioners (fourth and fifth respondents) cannot unilaterally amend the previously adopted business rescue plans of the first, second and third respondents in business rescue.
49.2 It is hereby declared that the business rescue practitioners in this case cannot disregard an order which was granted by Roelofse AJ on 11 November 2019 which order is quoted in paragraph 6 of this judgment.
49.3 The rule nisi granted by Greyling-Coetzer AJ on 26 February 2021 and quoted in part in paragraph [19] of this judgement is hereby confirmed and granted as a final relief.
49.4 Should there be any other offers including that of the sixth and tenth respondents and that of the applicant, such offers shall be subjected to compliance with the relevant legislative frame-work for proper adoption by the creditors of the entities under business rescue and any such process along the same basis as contemplated in Roelofse AJ's judgment, shall be completed by not later 1 July 2021.
49.5 49.5 Should it not be possible by 1 July 2021 to complete the process in terms of the applicable legislative frame-work for the adoption of any proposed amendment to the adopted plans and to start with process of implementation thereof, the business rescue practitioners and any other affected person shall be entitled to approach the court by not later than 1 July 2021 for an appropriate relief.
49.6 The respondents, who opposed the application are hereby ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved. Should it not be possible by 1 July 2021 to complete the process in terms of the applicable

Agri Oil Mills (Pty) Ltd v Van Tonder and others Land and Agricultural Bank Intervening Party KZN PMB Case 3883/2020P on 13 May 2021

Business rescue converted to liquidation –date of commencement of the liquidation proceedings-section 348-date of the issue of the application- 15 May 2021-more than one application

Business rescue converted to liquidation-application brought by Land bank in terms of section 130(1) (a)

BRP's continued notwithstanding launch of application. Plans were not approved. Non comploince with section 148 did not help Land Bank.

Notice of termination not filed section 132 (2) (b) Still conflicting cases!Court says it ends when when plan is rejected and no actions taken.

Syme and others v Southern Sky Hotel and Leisure (Pty) Ltd in re: intervention application Southern Sky Food Enterprise (Pty) Ltd in Vision Tactical (Pty) Ltd. Case 7535/2020 Limpopo 3 June 2021

Business rescue-whilst company already liquidated- nothing can come from rescue-no prospects.

No prospects of success, even plan attached not proper, "The company is not capable of being rescued. There was a previous attempt to embark upon business rescue in 2016 but with no sucees. It simply spawned extensive litigation at the instance of Ms. Rinderknecht and frustrated creditors. I see no prospect of the company being rescued."

De Wet and Another v Khammissa and Others (358/2020) [2021] ZASCA 70 (4 June 2021)

Liquidators appointment-Master refusing to appoint liquidators and later appointing them – Master *functus officio* and second decision a nullity.

ORDER

On appeal from: Gauteng High Court, Pretoria (Siwendu J sitting as court of first instance): judgment reported *sub nom Khammissa and Others v Master of the High Court, Gauteng and Others* **2021 (1) SA 421** (GJ).

The appeal is dismissed with costs, including costs of two counsel.

JUDGMENT

Makgoka JA (Saldulker and Mbatha JJA and Gorven and Goosen AJJA concurring):

[1] This appeal concerns two mutually exclusive decisions made by the Master of the High Court, Gauteng Division, Johannesburg (the Master). The Master is appointed under **s 2(1)***(a)*(ii) of the **Administration of Estates Act 66 of 1965**. In **s 1** of that Act the term 'Master' is defined as meaning a Deputy Master or Assistant

Master appointed under **s 2** and is subject to the control, direction and supervision of the Chief Master.

[2] On 31 August 2017 the Master made a decision not to appoint the appellants as additional joint trustees of Duro Pressing (Pty) Ltd (in liquidation) (Duro), (the first decision). On 25 October 2017 the Master made a decision to appoint the appellants as additional joint trustees of Duro (the second decision). The two decisions were made against the following factual backdrop. Duro was voluntarily wound-up by special resolution on 27 February 2014. The winding - up was converted to a compulsory one by the court on 25 July 2014.

[3] The respondents and one CF De Wet were appointed by the Master as Duro's joint final liquidators on 8 April 2014. CF de Wet died on 23 May 2017. Acting in terms of s 377 of the Companies Act 61 of 1973 (the Companies Act), the Master convened a creditors' meeting on 29 August 2017 for the purpose of nominating a liquidator in the place of CF De Wet. The meeting was chaired by the Assistant Deputy Master, Mr Reuben Maphaha, during which the appellants were nominated for appointment as additional joint liquidators of Duro. The first appellant, Gert Steyn de Wet, is CF de Wet's brother.

[4] Pursuant to the creditors' meeting, on 31 August 2017, the Master, per Ms Pamela Dube, also an Assistant Deputy Master, conveyed the first decision in a letter to the appellants, and accordingly issued a new certificate of appointment reflecting the removal of CF de Wet as a liquidator of Duro, and the respondents as the only joint liquidators. In the same letter, the Master informed the appellants of their right in terms of s 371(1) of the Companies Act, to request the Master in writing to submit his reasons to the Minister of Justice for the first decision.**[1]** The appellants did not exercise this right. Instead, the Master received a letter from attorneys on behalf of undisclosed creditors seeking reasons for the first decision, and after Ms Dube had done so, they requested the Master to reconsider it. On 25 October 2017, the Master, represented by Mr Maphaha, made the second decision and accordingly issued an amended certificate of appointment, evenly dated, reflecting the appellants' appointment as co-liquidators with the respondents.

[5] On 20 December 2017 the respondents launched an application in the court a quo seeking to review and set aside the second decision, and declaring the first decision to be the valid one, together with ancillary relief. The application was brought in terms of s 151 of the Insolvency Act 24 of 1936 (the **Insolvency Act), alternative**ly the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The grounds of review were that the second decision was: (a) ultra vires; (b) procedurally unfair; (c) taken arbitrarily or capriciously; and (d) not rationally connected to the information before the Master. The Master did not oppose the application, and filed a notice to abide the decision of the court a quo. Accordingly, the Master took no part in this appeal. The appellants opposed the application but did not deliver an answering affidavit. Instead, they filed a notice in terms of rule 6(5)(*d*)(iii) of the Uniform Rules of Court, in which they raised the following three questions of law:

‘1. That the applicants [the respondents] do not have locus standi to seek the relief to the main application; and

2. That the relevant provisions of **section 151** of the **Insolvency Act of 1936**, and the provisions of the **Promotion of Administrative Justice Act of 2000** do not apply to the relief sought in the current application;

3. That the applicants [the respondents] have disregarded the provisions of section 371 of the Companies Act of 1973, which failure is destructive of the relief sought in the current application.’

[6] The thrust of the appellants’ case was this: **s 151** of the **Insolvency Act finds** no application in the matter and that **s 371** provides the only means of obtaining redress in respect of the Master’s appointment of liquidators. Even if **s 151** applied, it was not available to the respondents as they were not ‘aggrieved persons’ for purposes of that section. Furthermore, PAJA was not applicable since the respondents had failed to exhaust internal remedies by not appealing to the Minister in terms of **s 371.** Even in the event of PAJA being applicable, the respondents had failed to establish the requisite locus standi.

[7] The application came before Siwendu J. The learned Judge recorded that ‘whether such a decision is reviewable under PAJA was raised but not pursued’. She proceeded to identify the issues for determination as follows (at para14):

‘The contested issues expose two fundamental legal considerations. The first is, who can legitimately challenge *an appointment of a liquidator*? *In this case, can the applicants challenge the appointment of another liquidator*? The second is, what is the correct gateway to relief when there is a *challenge to an appointment of a liquidator*? There is limited and conflicting authority on these issues.’ (Emphasis added.)

As I demonstrate later, the court a quo, with respect, misconstrued the basis on which the review application fell to be determined. As a result, it embarked on an unnecessary survey of **ss 371** and **151**.

[8] To determine the respondents’ locus standi, the court a quo considered **s 371** and the related case law. As mentioned earlier, **s 371** entitles ‘any person aggrieved’ by the appointment of a liquidator or the refusal thereof, to request the Master in writing to submit his reasons for such appointment or refusal to the Minister of Justice. The court a quo spent considerable effort seeking to determine whether the respondents qualified as ‘aggrieved persons’.

[9] It considered three decisions of provincial divisions: *Janse Van Rensburg v The Master* **2004 (5) SA 173** (T); *Geduldt v The Master and Others* **2005 (4) SA 460** (C) and *Patel v The Master of the High Court* 2014 JDR 0346 (WCC). Those decisions are not unanimous on who qualified as an ‘aggrieved person’ to clothe them with the necessary locus standi in terms of **s 371.** The court preferred the reasoning in *Geduldt* and *Patel* and concluded that the appellants qualified as

'aggrieved persons' as envisaged in **s 371.** The court also concluded that, in addition to **s 371**, the respondents were entitled to rely on **s 151** to challenge the Master's decision.

[10] Having disposed of the issue of locus standi in the respondents' favour, the court concluded that the Master was *functus officio* and 'not empowered to issue a second decision once the decision not to appoint the second and third respondent was made'. Accordingly, the court a quo issued an order in terms of which: the second decision was reviewed and set aside; the Master's certificate of appointment in respect of the second decision was revoked; and the appellants were ordered to pay the costs of the application, including costs of two counsel.

[11] Aggrieved by that order, the appellants appeal to this Court, with the leave of the court a quo. In this Court, the appellants persisted with the gravamen of their case asserted in the court a quo, summarised in para 6 above. As already stated, the court a quo, with respect, failed to properly identify the issue for determination. The respondents' challenge, properly construed, was not about the merit of the appointment of the appellants as joint liquidators, as the court a quo consistently mentioned in its judgment. It is so that the decision under review has its genesis in that appointment. However, the thrust of the respondents' challenge was that the Master had become *functus officio* once she had made the first decision, and thus had no power to revoke it and replace it with second decision.

[12] Viewed in that light, the application quintessentially concerned administrative law, as opposed to insolvency or company law. The decision of the Master directly affected the respondents and they indubitably had locus standi at common law. They did not need either s 371 of the Companies Act or **s 151** of the **Insolvency Act to** establish their locus standi. If anything, it is the appellants who would have had to rely on **s 371** had they sought to challenge the Master's first decision (not to appoint them), a decision they clearly were aggrieved by.

[13] Once the conceptual issue concerning the nature of the appellants' true complaint is appreciated, it follows that the court a quo's excursion on **s 371** and the related case law, was irrelevant. This applies with equal force to the court a quo's interpretation of **s 151**, on which the court a quo also expended much effort. As a result, I do not express any view as to the correctness of the court a quo's interpretation of these sections, nor of any of the decisions referred to in its judgment. To be clear, that should not be considered as an endorsement or rejection of the court a quo's conclusions.

[14] This case demonstrates the importance of a court's central role in the identification of issues. It is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That task should never be

left solely to the parties or their legal representatives. Unfortunately, this is what happened in this case. The court a quo was apparently led astray by the arguments contained in the appellants' notice in terms of **rule 6(5)(***d*)(ii), which it accepted uncritically.

[15] Back to the merits of the appeal. In this Court, counsel for the appellants fairly accepted the correctness of the views expressed in paras 11 and 12 above, and that the case turns on the legality of the second decision. I now turn to that decision. The respondents contend that the Master became *functus officio* after making the first decision, and that she was not empowered to revoke it and replace it with the second decision. Broadly stated, *functus officio* is a doctrine in terms of which decisions of officials are deemed to be final and binding once they are made. Thus, the question as to whether the Master was *functus officio*, calls for a consideration whether the first decision was final. Hoexter,**[2]** explains that finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it, ie it must have passed into the public domain in some manner.**[3]**

[16] In the present case, on 31 August 2017 the Master:

(a) communicated to the appellants her first decision;

(b) issued a certificate of appointment reflecting the removal of CF de Wet as a liquidator of Duro, and reflecting the respondents as Duro's only joint liquidators;

(c) advised the appellants of their right to request her to furnish the reasons for her decision, to the Master.

[17] In my view, these constituted overt acts in terms of which the Master's decision passed into the public domain. In the absence of a statutory provision to the contrary, the Master had no power to revoke the first decision. Neither the Companies Act nor the **Insolvency Act confers** such power on the Master. The requirements for *functus officio* were thus met, and finality reached on 31 August 2017. The first decision became final and irrevocable. It follows ineluctably that the second decision was invalid.

[18] The appeal must fail and it is dismissed with costs, including costs of two counsel.

END FOR NOW